

Federal Court



Cour fédérale

Date: 20121016

Docket: T-1619-11

Citation: 2012 FC 1047

Ottawa, Ontario, October 16, 2012

PRESENT: THE CHIEF JUSTICE

BETWEEN:

AGIM UKAJ

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Mr. Agim Ukaj, was with his spouse in the departure area at the Vancouver International Airport when he was approached by a Canada Border Services Agency (CBSA) officer conducting currency export checks. After identifying himself, the officer asked if either Mr. Ukaj or his spouse was carrying money or monetary instruments amounting to \$10,000 or more. They both answered “no.” When the officer then asked how much money they were carrying, they each replied that it was “less than \$10,000.”

[2] A "verification" of Mr. Ukaj produced currency totaling less than \$10,000. However, a verification of his spouse produced US\$14,100, which she and Mr. Ukaj both stated belonged to him. After interviewing each of them, the officer determined that he had reasonable grounds to believe that Mr. Ukaj and his spouse had failed to report the currency, as required by section 12 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17* (the "Act"). In addition, he determined that he had reasonable grounds to suspect that the money was proceeds of crime. He therefore seized the money, pursuant to section 18 of the Act.

[3] Mr. Ukaj subsequently wrote to the CBSA to request a ministerial review of the seizure, pursuant to section 25 of the Act. In support of his request, he attached two affidavits, sworn by himself and a childhood friend, respectively, which purported to explain the sources of the seized funds. Ultimately, a delegate of the Minister exercised her discretion to confirm the forfeiture of the seized funds.

[4] Mr. Ukaj submits that the Minister's delegate erred by:

- i. unreasonably exercising her discretion to confirm the forfeiture of the funds; and
- ii. failing to adequately explain why the affidavit evidence and supporting material were not considered to be sufficient to demonstrate a legitimate origin of the money.

[5] I disagree. For the reasons that follow, this application for judicial review is dismissed.

Standard of Review

[6] The standard of review applicable to first issue raised by Mr. Ukaj, concerning the exercise of discretion by the Minister's delegate, is reasonableness (*Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, at para 51; *Kang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 798, at para 24 [*Kang*]; *Admasu v Canada (Minister of Citizenship and Immigration)*, 2012 FC 451, at para 9).

[7] Reasonableness is also the standard of review applicable to the second issue raised by Mr. Ukaj, concerning the adequacy of the reasons given by the Minister's delegate (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, at paras 14-15 [*Newfoundland Nurses*]).

Analysis

A. The decision to confirm the forfeiture of Mr. Ukaj's money

[8] Mr. Ukaj submits that it was unreasonable for the Minister's delegate to fail to exercise her discretion in his favour, given the sworn affidavit evidence from his childhood friend, Mr. Mustafa, which he claims demonstrated a legitimate origin for \$10,000 of the seized money. I disagree.

[9] The affidavit evidence from Mr. Mustafa was contradicted by other evidence relied upon by the Minister's delegate in reaching her decision, including information that was provided by Mr. Ukaj himself. That other evidence included the lack of documentary evidence to establish a legitimate origin of the currency and the conflicting information that had been provided regarding the source and ownership of the money.

[10] The Minister's delegate explicitly noted that the latter information included the reasons provided by the seizing officer to establish reasonable grounds to suspect that the money was the proceeds of crime. As was explained in an initial letter that was sent to Mr. Ukaj by an Adjudicator in the Recourse Directorate of the CBSA, those reasons included:

- i. the failure to report the money as required by the Act;
- ii. the absence of an apparent reason for failing to report the money prior to entering the departure area, despite being given the opportunity to do so at the gate prior to passing into the secure area;
- iii. one of the bundles of money, totaling US\$5,000, was concealed in the bottom of the purse of Mr. Ukaj's spouse;
- iv. Mr. Ukaj changed his story regarding the origin of the money numerous times;
- v. the money in the couple's possession plus the cost of their plane tickets exceeded their annual income;
- vi. the monthly expenses that they acknowledged having exceeded their monthly income;
- vii. Mr. Ukaj was unable to provide details regarding the "side jobs" that he, at one point, identified as being the source of the funds;
- viii. Mr. Ukaj was unable to provide details regarding when and where he exchanged Canadian currency into US currency;
- ix. Mr. Ukaj was unable to explain the reasons for purchasing money orders in excess of one month's income (the receipts for such money orders were in his possession at the airport); and

- x. Mr. Ukaj could not explain how he saved over \$14,000 in less than one year when he was only able to save \$10,000 over many years, prior to coming to Canada from Italy.

[11] In her initial letter to Mr. Ukaj, the Adjudicator explicitly noted the contradictions between the affidavit evidence provided by Mr. Mustafa and the initial statements that Mr. Ukaj made at the airport regarding the source of the currency. She then observed that, in the absence of evidence to the contrary, it appeared that the seizure had been lawful. That said, she enclosed a copy of the seizing officer's report and invited him to provide any additional information or documentation that he believed might be of assistance to the Minister in making his decision. Mr. Ukaj did not avail himself of that opportunity.

[12] In a second letter to Mr. Ukaj, the Adjudicator explicitly stated that "a withdrawal from a bank account does not constitute proof of legitimate source of the currency." She then invited Mr. Ukaj once again to provide any additional information or documentation that he believed might be of assistance to the Minister in making his decision. Mr. Ukaj did not avail himself of that second opportunity to provide additional information.

[13] In her decision to confirm the forfeiture of the money, the Minister's delegate explained why the documentation that Mr. Ukaj had provided was not sufficient to demonstrate a legitimate origin of the money. In brief, she noted that while the bank statements provided by Mr. Mustafa demonstrated withdrawals for varying amounts over the course of 10 months prior to the seizure, they did not demonstrate a direct link between the seized currency and a legitimate origin. She also

explained that the condominium sales agreement contract which was provided by Mr. Mustafa did not constitute evidence of a legitimate source of the currency. In addition, she noted that Mr. Ukaj had failed to provide additional evidence, after being informed that the initial evidence he had provided was not sufficient to establish a legitimate origin for the seized money.

[14] Given the foregoing, it was reasonably open to the Minister's delegate to confirm the forfeiture of the seized money.

[15] The burden was on Mr. Ukaj to persuade the Minister to exercise his discretion to grant relief from forfeiture by satisfying him that the seized funds were not proceeds of crime. For the reasons set forth above, the Minister's delegate concluded that Mr. Ukaj had not met that burden. In my view, that decision was well within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9, at para 47 [*Dunsmuir*]).

[16] In addition to being contradicted by Mr. Ukaj's initial statements regarding the origin of the seized money, the affidavit evidence provided by Mr. Mustafa did not in fact establish a link between the money and the withdrawals identified in the bank statements that he provided. Indeed, I agree that the link which Mr. Mustafa asserted was especially weak, because no information was provided to explain when, how or why he gave the money to Mr. Ukaj, or to explain when the money was converted to US currency. It was therefore not unreasonable for the Minister's delegate to conclude that Mr. Mustafa's bare assertions, banking statements, and condominium sales contract were insufficient to demonstrate a legitimate source for the seized money (*Kang*, above, at 40;

Tourki v Canada (Minister of Public Safety and Emergency Preparedness), 2007 FC 746, at para 33).

B. *The adequacy of the reasons given by the Minister's delegate*

[17] Mr. Ukaj submitted that the Minister's delegate erred by discounting Mr. Mustafa's sworn affidavit evidence without articulating a reason. He further asserted that the Minister's delegate failed to mention or consider that affidavit or the other affidavit evidence provided by Mr. Ukaj. I disagree.

[18] The adequacy of reasons is not "a stand-alone basis for quashing a decision. Rather, reasons must be read together with the outcome in determining whether a decision falls within a range of acceptable outcomes (*Newfoundland Nurses*, above, at para 14).

[19] In articulating a decision, a decision-maker is not required to make an explicit finding on each constituent element that led to the final conclusion. Instead, the reasons given simply need to allow a reviewing court to understand why the decision was made and permit it to determine whether the conclusion is within the range of acceptable outcomes (*Newfoundland Nurses*, above, at para 16). I am satisfied that the reasons given by the Minister's delegate more than meet this test.

[20] As to the affidavit evidence in question the Minister's delegate stated, at the outset of her decision, that she had fully considered the documentation that Mr. Ukaj had provided. At page two of her decision, she then specifically referred to the "[t]wo affidavits, bank statements and the contract" that Mr. Ukaj had submitted. In addition, the Case Synopsis, which the Minister's delegate

signed, described the affidavit evidence of both Mr. Ukaj and Mr. Mustafa in detail (*Yusufov v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 453, at para 29).

[21] More generally, the decision of the Minister's delegate was very clear about why she had made her decision. After summarizing what had happened at the airport and referring to the two affidavits and supporting documentation that Mr. Ukaj had provided, her decision explicitly stated that it had been determined that the documentation provided was insufficient to demonstrate a legitimate origin of the currency. The decision then explained that bank statements do not demonstrate a direct link between seized currency and a legitimate origin. In addition, it noted that Mr. Ukaj had been informed of these findings and invited to provide further documentary evidence to establish the source of the seized funds, but failed to do so. Finally, the basis for the decision not to grant discretion to return the seized funds was summarized as being attributable to: (i) the lack of documentary evidence of the legitimate origin of the currency, and (ii) the conflicting information given about the source and ownership of the currency, including information set forth in the reasons provided by the seizing officer to establish reasonable grounds to suspect that the currency was the proceeds of crime.

[22] Given the foregoing, I am satisfied that the reasons provided by the Minister's delegate were more than sufficient to allow the Court to understand why the decision was made and to determine whether the conclusion is within the range of acceptable outcomes. Based on my review of those reasons, I am satisfied that the conclusion reached by the Minister's delegate was well within that range.

C. *The decision of the CBSA officer to seize the currency*

[23] During the oral hearing before the Court, counsel for Mr. Ukaj argued that the decision by the CBSA officer at the Vancouver International Airport to seize the money from Mr. Ukaj was unreasonable.

[24] Given that this submission was not made in Mr. Ukaj's Application for Judicial Review or at any other time prior to the hearing, it cannot be entertained by the Court (*Republic of Cyprus (Commerce and Industry) v International Cheese Council of Canada*, 2011 FCA 201, at para 15; *Vézina v Canada (National Defence, Chief of the Defence Staff)*, 2012 FC 625, at para 21). Moreover, it is now well established that, unless the Court orders otherwise, or the decisions at issue form part of a continuous course of conduct by a single decision-maker, only one administrative decision can be the subject of an application for judicial review. (*Human Rights Institute of Canada v. Goldie*, [2000] 1 FC 475, at para 5; *Servier Canada Inc v Canada (Minister of Health)*, 2007 FC 196, at para 17).

[25] In any event, I am satisfied that that it was not unreasonable for the officer to seize the funds. Subsection 18(1) of the Act permits an officer to seize currency or monetary instruments when he or she believes on reasonable grounds that subsection 12(1) has been contravened. Subsection 12(1) establishes a requirement to report, 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. That amount is \$10,000.

[26] In my view, when someone has failed to take the opportunity to report currency or monetary instruments having a value in excess of that prescribed amount prior to passing into the departure area of an airport, and has not provided a reasonable explanation for failing to report the currency in accordance with the law, it is not unreasonable to conclude that the test set forth in subsection 18(1) has been met. This is particularly so where the person in possession of the money has told an officer that he or she is not carrying cash or monetary instruments with a value of \$10,000 or greater.

[27] I am also satisfied that it was not unreasonable for the seizing officer to conclude, for the various reasons identified in his report, that there were reasonable grounds to suspect that Mr. Ukaj's money was proceeds of crime, as contemplated by subsection 18(2) of the Act. For the reasons he identified, his conclusion was well within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

Conclusion

[28] For the foregoing reasons, this application is dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUGES THAT this application is dismissed with
costs.

“Paul S. Crampton”

Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1619-11

STYLE OF CAUSE: AGIM UKAJ v THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: August 28, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** CRAMPTON CJ.

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