

Federal Court



Cour fédérale

Date: 20141015

Docket: T-87-14

Citation: 2014 FC 980

Ottawa, Ontario, October 15, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ABDULAZIZ ISSA

Applicant

And

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

[1] Abdulaziz Issa seeks judicial review of a Minister's Delegate's decision confirming that the sum of \$11,106.70 seized by Canadian Border Services Agency officers at the Vancouver airport under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* would be held as forfeit.

[2] Mr. Issa asserts that the Minister's Delegate imposed a burden on him to establish the source of the funds in issue that was impossible to satisfy. The Minister's Delegate further erred,

Mr. Issa says, by refusing to return any of the disputed funds to him unless he could prove the source of all of the funds in question. Finally, Mr. Issa says that the Minister's Delegate's decision was unreasonable.

[3] I have not been persuaded that the Minister's Delegate erred as alleged. Consequently, the application for judicial review will be dismissed.

I. Background

[4] On January 25, 2012, Mr. Issa was at the Vancouver International Airport, preparing to board a flight to Kenya, via Amsterdam. A CBSA agent asked him whether he was traveling with currency equal to or greater than \$10,000 Canadian. Mr. Issa stated that he had \$9,000 in his possession. He confirmed that some of this money was his, and that some belonged to other people.

[5] An officer then escorted Mr. Issa to a CBSA office, whereupon Mr. Issa produced currency amounting to \$11,106.70 in Canadian funds. Mr. Issa stated that he had not reported having more than \$10,000 as he had misunderstood the question, and had only reported the money that belonged to him.

[6] The CBSA officer asked Mr. Issa why he needed so much money, given his claim that he was just going on vacation. Mr. Issa explained that he needed \$5,000 for expenses and \$1,500 for rent during his trip.

[7] When CBSA officers examined Mr. Issa's luggage, they found a baggie containing 39.36 grams of a green leafy substance, which Mr. Issa subsequently identified as khat. I do not

understand there to now be any dispute about the identity of the substance found on Mr. Issa, or that khat is an illegal drug in Canada.

[8] A search of CBSA databases revealed that Mr. Issa had been the subject of a customs enforcement action in March of 2011 involving the importation of approximately 20 kilograms of khat. While not now denying that this was so, at the time that he was questioned by CBSA officials, Mr. Issa professed to not know what this record referred to.

[9] When asked a CBSA officer asked Mr. Issa where the money he was carrying had come from, he stated that he had withdrawn \$6,000 from the TD Bank and that \$4,500 had been obtained from the VBCE Currency Exchange. He did not explain the source of the \$4,500, but said that the \$6,000 was business income from his work as a taxi driver.

[10] Following further discussion with Mr. Issa, CBSA officials seized \$11,050 of the money in Mr. Issa's possession under subsection 18(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17. The equivalent of just over \$60 in various currencies was returned to him "to cover local expenses".

[11] The grounds cited by the CBSA for the seizure were that:

- Subject was in possession of currency total[ing] more than \$10,000 CAD that was not reported, despite multiple opportunities to do so.
- Clear and visible signage is posted at every entrance of the International Departures area, explaining the CBSA reporting requirements when travelling with currency over \$10,000 CAD or more.
- Subject travelling across an international border with large amount of currency.

- Bulk smuggling is a common form of money laundering and distances money from illicit source.
- Subject travelling beyond his means for his stated income, living situation, and debt.
- Currency not wrapped to banking standards and was in \$100 bills which have been suggested as being a preferred currency for smuggling to foreign jurisdictions.
- Officer explained that the currency seizure is a civil penalty and that the claimant was being questioned to determine the legitimacy of the currency, claimant was uncooperative, answered reluctantly or was evasive.
- Claimant made false or contradictory statements during questioning, for instance not carrying currency above the threshold, imported khat previously because he did not know it was prohibited...[t]old the seizing officer he lived with his wife and 7 children, yet told the assisting officer he did not live with his family.
- Concurrent to the non-report of the currency, claimant was arrested for exporting narcotics out of Canada.
- Previous CBSA enforcement history for importation of commercial quantities of narcotics.
- Travelling to a drug source country and showed no emotion when he was told that his currency was being seized as proceeds of crime without terms of release.

[12] Mr. Issa then sought an administrative review of the officer's decision. A lengthy exchange of correspondence then ensued between Mr. Issa and CBSA officials, as Mr. Issa endeavoured to establish that the source of the seized funds was indeed legitimate. The individuals whose money Ms. Issa was purportedly transporting also sent correspondence to the CBSA, explaining where their money had come from.

[13] On September 26, 2013, a Minister's Delegate rendered a decision under section 27 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, confirming that

Mr. Issa had contravened the reporting requirements of the legislation. Mr. Issa has not challenged that decision.

[14] Included with the section 27 decision was a second decision, this one under section 29 of the Act. In this second decision, the Minister's Delegate confirmed that the monies seized on January 25, 2012 would be held as forfeit, as Mr. Issa had been unable to establish the legitimate origins of the currency seized. It is this decision that is the subject of this application for judicial review.

II. The Minister's Delegate's Decision

[15] Based upon the documents provided to the CBSA by, or on behalf of Mr. Issa, the Minister's Delegate was not satisfied that the seized currency had a legitimate and lawful origin. In particular, the Minister's Delegate found that banking records provided by Mr. Issa and his friends demonstrated that money had been deposited into, and then withdrawn from financial institutions. These records did not, however, demonstrate the original source of the funds.

[16] The Minister's Delegate acknowledged that Mr. Issa and his friends worked as taxi drivers in what is essentially a cash business, and that this would make it difficult for them to establish the lawful origin of the funds that were found in Mr. Issa's possession. It was, however, made clear to Mr. Issa during the review process that additional evidence as to the source of the funds would be required. Although he was afforded an opportunity to provide such evidence, Mr. Issa failed to do so.

[17] Given that the legitimate origin of the seized funds had not been established, the Minister's Delegate declined to exercise the discretion conferred on him by section 29 of the Act, and the forfeiture of the funds was maintained.

III. Issues

[18] Mr. Issa asserts in his memorandum of fact and law that the Minister's Delegate erred by imposing a burden on him to establish the source of the funds that was impossible to satisfy. This argument was recast somewhat at the hearing, with counsel submitting that the issue was "whether the Minister's Delegate should have been convinced by Mr. Issa's story". The arguments advanced by Mr. Issa were thus really addressed to the reasonableness of the Minister's Delegate's decision and will be considered in that context.

[19] The second issue raised by Mr. Issa is whether the Minister's Delegate erred in refusing to return a portion of the seized funds to him.

IV. The New Evidence

[20] Mr. Issa's affidavit identifies sources of income that he had not previously identified, and provides a further explanation as to why Mr. Issa was confused about the amount of money that he was carrying. Counsel for Mr. Issa conceded at the hearing that this information cannot properly be considered in an application for judicial review, as it was not before the Minister's Delegate when he made the decision under review. I have accordingly disregarded it.

V. Was the Minister's Delegate's Decision Reasonable?

[21] In order to put the Minister's Delegate's decision into context, it is first necessary to have an understanding of the legislative scheme of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, and the relevant jurisprudence.

[22] As the Federal Court of Appeal observed in *Sellathurai v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FCA 255, at para. 34, [2009] 2 F.C.R. 576, the Minister's discretion under section 29 of the Act is only engaged once he has concluded that there has been a failure to report under section 12 of the Act.

[23] Given that Mr. Issa does not dispute that he failed to report that he was carrying more than \$10,000 on January 25, 2012, "the starting point for the exercise of the Minister's discretion is that the forfeited currency ... is, for all legal purposes, property of the Crown": *Sellathurai*, above at para. 34. It is not the role of the Minister or Minister's Delegate in a section 29 decision to reassess the customs officer's contravention decision: *Sellathurai*, above at para. 43. The only issue to be determined under section 29 of the Act "is whether the Minister will exercise his discretion to grant relief from forfeiture": *Sellathurai*, above at para. 36.

[24] The onus is on an applicant under section 29 of the Act to demonstrate that the seized currency is *not* the proceeds of crime. As the Federal Court of Appeal observed in *Sellathurai*, one obvious way to do this is to show that the seized funds came from a legitimate source. If an applicant is unable to show that the funds came from a legitimate source, the Minister is entitled to decline to exercise his discretion to grant relief from forfeiture: *Sellathurai*, above at para. 50.

[25] As concerns the standard of proof that an applicant must meet to obtain section 29 relief, the Federal Court of Appeal held in *Sellathurai* that it was “neither necessary nor useful to attempt to define in advance the nature and kind of proof which the applicant must put before the Minister”: at para. 51. The question is whether the Minister’s conclusion as to the legitimacy of the source of the funds in question is reasonable, in light of the evidence in the record.

[26] In deciding whether the decision under review was reasonable, it is sufficient if the reasons offered by the Minister’s Delegate are transparent, intelligible and justified, and that the result reached “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190.

[27] Similarly, it is not for this Court to reweigh the evidence. Rather, under a reasonableness review, the Court’s role is limited to making findings of irrationality or arbitrariness: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2014 FCA 113 at para. 99, 372 D.L.R. (4th) 539.

[28] Keeping the relevant legal principles in mind, I am satisfied that the decision of the Minister’s Delegate in this case was indeed reasonable.

[29] As was the case in *Sellathurai*, the evidence Mr. Issa provided in support of his application for section 29 relief was essentially unverifiable. He provided a letter confirming his employment as a taxi driver as well as banking statements for a couple of months preceding his scheduled departure. While these statements confirmed that Mr. Issa had money in his

possession at certain times, it did not demonstrate the source of the funds that were seized by the CBSA.

[30] Employment letters and banking statements provided by the individuals whose money was in Mr. Issa's possession at the time of the seizure also did not provide an identifiable link between the individuals' employment and the monies seized.

[31] Mr. Issa argues that taxi drivers work in a cash business, and that he and his friends did not have books and records to demonstrate the source of their funds. However, as the Minister has pointed out, taxpayers are required to keep books and records of their earnings in order to comply with their obligations under the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1.

[32] A CBSA adjudicator repeatedly told Mr. Issa that the information he had provided to the CBSA was insufficient to demonstrate that the monies seized on January 25, 2012 came from a legitimate source. The adjudicator explained why this was so, and Mr. Issa was afforded additional time to provide additional documentation. He failed to do so, and the Minister's Delegate concluded that he had not met his onus under section 29 of the Act. That conclusion was one that was reasonably open to the Minister's Delegate on the record before him.

VI. Did the Minister's Delegate Err in Refusing to Return a Portion of the Seized Funds to Mr. Issa?

[33] Mr. Issa also contends that the CBSA adjudicator who prepared a case synopsis for the Minister's Delegate found that Mr. Issa's brother had provided payroll cheque stubs and banking records that substantiated the source of \$500 of the monies in issue. Given this finding, Mr. Issa submits that the Minister's Delegate should have authorized a partial return of the seized currency to this extent.

[34] As the parties have noted, there is some divergence in the jurisprudence of this Court as to whether section 29 of the Act permits partial relief from forfeiture where it can be established that a portion of the seized funds were not the proceeds of crime. In *Da Huang v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 729, [2013] 435 F.T.R. 243, this Court held that it did. However, a contrary finding was made in *Admasu v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 451, [2012] 408 F.T.R. 143, *Dhamo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 443 at paras. 16 and 33, [2013] F.C.J. No. 496, *Mohammad v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 148, 427 F.T.R. 185 and *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 600, [2013] 433 F.T.R. 273.

[35] I do not, however, need to decide this question in this case as the Minister's Delegate reasonably found as a fact that Mr. Issa had *not* established that any portion of the seized funds were not the proceeds of crime

[36] The CBSA adjudicator who prepared the case synopsis for the Minister's Delegate did *not* find that the \$500 was not the proceeds of crime. She simply stated that "it is feasible that the currency provided by [Mr. Issa's brother] could be sourced from his employer earnings".

[37] More importantly, the Minister's Delegate observed that none of the documents provided by, or on behalf of Mr. Issa established where any of the money originated, or that any of the money, including the \$500 allegedly provided by Mr. Issa's brother, was not the proceeds of crime. This conclusion was reasonably open to the Minister's Delegate on the record before him, and Mr. Issa has not established the existence of a reviewable error in this regard.

VII. Conclusion

[38] For these reasons, Mr. Issa's application for judicial review is dismissed with costs to the Minister fixed in the amount of \$1,500.00.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed, with costs to the Minister in the amount of \$1,500.00.

“Anne L. Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-87-14

STYLE OF CAUSE: ABDULAZIZ ISSA v MINISTER OF PUBLIC SAFETY
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