Federal Court  Cour fédérale

Date: 20221108

Docket: T-1337-21

Citation: 2022 FC 1516

Toronto, Ontario, November 8, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

NICHOLAS EVANS

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a May 27, 2021 decision [Decision] of a delegate of the Minister of Public Safety and Emergency Preparedness [Minister] confirming the determination by an officer [Officer] of the Canada Border Services Agency [CBSA] to hold currency seized as forfeit pursuant to section 29 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* SC 2000, c 17 [Act].

[2] As discussed further below, based on the evidence that was before the decision-maker, I find the Decision to be reasonable and that the application should be dismissed.

I. Background

(1) Legislative Scheme

[3] Pursuant to subsection 12(1) of the Act, a person must report to an officer the exportation of currency of a value equal to or greater than the prescribed amount, which is set in the *Cross-border Currency and Monetary Instruments Reporting Regulations* SOR/2002-412 to be $10,000 CAD.

[4] Where an officer believes on reasonable grounds that subsection 12(1) has been contravened, the officer may seize the currency as forfeit under subsection 18(1) of the Act.

[5] Subsection 18(2) of the Act sets out the conditions of return of seized currency:

Return of seized currency or monetary instruments	**Mainlevée**
(2) The officer shall, on payment of a penalty in the prescribed amount, return the seized currency or monetary instruments to the individual from whom they were seized or to the lawful owner 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 funds for use in the financing of terrorist activities.	(2) Sur réception du paiement de la pénalité réglementaire, l'agent restitue au saisi ou au propriétaire légitime les espèces ou effets saisis sauf s'il soupçonne, pour des motifs raisonnables, qu'il s'agit de produits de la criminalité au sens du paragraphe 462.3(1) du *Code criminel* ou de fonds destinés au financement des activités terroristes.

[6] Under section 25 of the Act, a person from whom currency is seized can request a review of that determination by the Minister. Pursuant to subsection 27(1) of the Act, the Minister shall determine whether subsection 12(1) was contravened. If the Minister does find that subsection 12(1) was contravened then the Minister may, amongst other things, confirm that the currency is forfeited pursuant to paragraph 29(1)(c).

(2) Facts Relevant to Applicant

[7] On February 1, 2021, the Applicant, Nicholas Evans, was approached for questioning while boarding a flight to Guyana at Toronto Pearson International Airport. During questioning, the Applicant revealed that he was in possession of $38,500 CAD as well as additional money in his wallet and a number of envelopes totalling $661 CAD, $179 USD, 15,000 Guyana dollars, and 105 Trinidad and Tobago dollars, none of which had been reported to customs before departure.

[8] The Officer seized the $38,500 CAD on the basis that the Applicant failed to report it as required under subsection 12(1) of the Act. The Officer questioned the Applicant about the origin of the money. On the basis of the answers given, the Officer determined that the Applicant had not demonstrated a clear legitimate source of the money. The Officer maintained the currency as forfeit pursuant to subsection 18(2) of the Act.

[9] On February 2, 2021, the Applicant requested a review of the Officer's enforcement action from the Minister. The Applicant claimed that he had misunderstood his reporting obligations and thought he could report the currency on a form given on the plane. He indicated

that he had worked in construction running his own business for 15 years and taken payments from clients in cash, cheque, and by e-transfer and that around August 2020, he received a $14,180 insurance payout for a stolen work truck. The Applicant also provided bank statements from his chequing account.

[10] On February 19, 2021, a Notice of Circumstances of Seizure [NCS] was sent to the Applicant, requesting the Applicant to "provide documentary evidence demonstrating the legitimate origin of the entirety of the seized currency". The letter indicated that an explanation must be provided and detailed with sufficient proof to establish there are no other explanations for the currency possible. The NCS included examples of the type of documentary evidence to provide. The NCS acknowledged that some bank documents had already been provided by the Applicant, but noted there was no indication on the bank statements as to whether the account belonged to the Applicant and the statements did not indicate which deposits and/or withdrawals were associated with the total amount of the seized currency.

[11] In response to the NCS, the Applicant submitted a void cheque for his bank account, a copy of the insurance cheque for the stolen work vehicle, and three Benjamin Moore invoices, totalling $800, relating to supplies he asserted were used for previous work projects.

[12] On March 4, 2021, the Applicant submitted additional bank statements for an account at a different bank.

[13] On May 27, 2021, the Minister issued the Decision, maintaining the enforcement action for failure to report the currency and confirming, under section 29 of the Act, that the seized currency should be held as forfeit.

[14] The Minister concluded that the Applicant's evidence did not demonstrate a link with the seized currency or its legitimate origin. The Decision noted that although the Applicant asserted that part of the seized currency came from the revenue from his construction business, he did not provide any documentation confirming the existence of the business nor any evidence of its legitimate operation. The bank information did not indicate the sources of the many e-transfer deposits. Further, while the Applicant identified a September 19, 2020 deposit that corresponded to the insurance payment from the stolen truck, the Applicant did not identify a subsequent withdrawal that could link the insurance payout to the seized currency. Based on the lack of evidence demonstrating a legitimate origin of the money, the Minister determined that the seized currency would be held as forfeit under section 29 of the Act.

II. Issues and Standard of Review

[15] The following issues are raised by the Applicant:

A. Was the Decision reasonable?

B. Has there been a breach of procedural fairness?

[16] The Respondent also initially raised two preliminary issues regarding the scope of judicial review and whether the Court should admit the affidavit evidence adduced by the Applicant on the judicial review as it included information that was not before the decision-maker.

[17] The Federal Court of Appeal has held that the determinations made by the Minister under section 27 (the contravention of the reporting requirement) and section 29 (the forfeiture of the currency) of the Act are discrete decisions which are subject to distinct review mechanisms: *Tourki v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FCA 186 [*Tourki*] at paras 16-18.

[18] Under subsection 30(1) of the Act, a person may appeal a decision involving the failure to report by way of an action in the Federal Court. Conversely, a person may challenge the terms and conditions of the forfeiture of currency under section 29 of the Act through an application for judicial review under subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7.

[19] At the hearing of the application, the Applicant conceded that the only Decision before the Court on this judicial review is the Minister's decision under section 29 of the Act, confirming the forfeiture of the currency. Thus, the only preliminary issue that remains is the admissibility of the new evidence filed by the Applicant.

[20] The parties agree that the applicable standard of review for the Minister's decision under section 29 is reasonableness. None of the situations that rebut the presumption of reasonableness review for administrative decisions are present here: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17.

[21] In exercising the reasonableness standard, the Court must determine whether the Decision is "based on an internally coherent and rational chain of analysis" that is "justified in relation to

the facts and law that constrain the decision maker": *Vavilov* at paras 83, 85-86; *Canada Post Corp* v *Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at paras 2, 31. A reasonable decision bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at para 99.

[22] The standard of review for procedural fairness is best described as correctness, although strictly speaking no standard of review applies: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CP Rail*] at paras 54-55. A court assessing procedural fairness must determine whether the procedure followed was fair and just having regard to all of the circumstances, with a sharp focus on the nature of the substantive rights involved and the consequences for the individual: *CP Rail* at para 54. The question is whether the applicant knew the case they had to meet and had a full and fair chance to respond: *CP Rail* at para 56.

III. Analysis

(1) The Applicant's new evidence

[23] In its evidence on the application, the Applicant submitted new information, including documentation relating to an asserted Ontario Student Assistance Program loan and additional bank documents. It is not disputed that this information was not submitted to the Minister. As such, it could not have been considered for the purposes of the Decision.

[24] The role of the Court on a judicial review is not to conduct a merits-based analysis *de novo*, but to determine instead whether the decision under review was reasonable. It is trite law that absent limited exceptions, it is only the evidentiary record that was before the administrative

decision-maker that is admissible on judicial review: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh*] at paras 86, 98; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 18-19. The recognized exceptions include: 1) general, non-argumentative background information that may assist the court in understanding the record before it, but does not go to the merits of the dispute; 2) documentation establishing a complete absence of evidence on which a finding is made; and 3) evidence relevant to an issue of natural justice, procedural fairness, improper purpose, or fraud that could not have been placed before the decision-maker and does not interfere with the role of the administrative decision-maker: *Tsleil-Waututh* at para 98; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 20-25.

[25] It is clear that the evidence in this case does not fit into one of the recognized exceptions. Rather, like the case of *Sandidi v Minister of Public Safety and Emergency Preparedness*, 2020 FC 995 [*Sandidi*] at paragraph 41, the Applicant is seeking to fill what he believes to be the gaps in his evidence after having read the Decision for which judicial review is sought. The Act does not provide for the Applicant to improve or supplement his evidence after the Decision is made. The review of the Officer's determinations was made by the Minister. The Minister cannot be faulted for evidence that was not before him and it is not the role of the Court to consider new evidence in the process of determining whether the Decision was reasonable.

[26] Similarly, like in *Sandidi*, the Applicant here cannot properly claim procedural unfairness as a means to justify his new evidence. The Applicant was provided with multiple opportunities to submit documentation in support of the legitimacy of the currency. The NCS detailed the type

of documentation expected and indicated where the evidence that had already been provided was lacking. The Minister accepted and considered the documentation provided before the NCS was issued and after the NCS was issued. There is no breach of procedural fairness associated with the request, receipt and consideration of evidence.

[27] The new evidence submitted is not properly before the Court and shall not be considered.

(2) Was the Decision reasonable?

[28] The Applicant asserts that the Decision was unreasonable as it does not fairly consider the evidence that was submitted by the Applicant (and was before the Minister), placing the onus of proof too high. The Applicant queries what further evidence it could have provided to satisfy the Minister that the currency was legitimate. He further questions why the Applicant was not entitled to pay a penalty in resolution of the matter instead of maintaining the currency in forfeit. He contends that there is no evidence that the currency arises from proceeds of crime and that the Applicant has not been charged with the offence of laundering proceeds of crime under subsection 462.31(1) of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

[29] As noted by the Respondent, the Minister's discretion under section 29 is limited. It does not include a review of the Officer's enforcement. Rather, the only question for determination is whether the evidence submitted regarding the forfeited currency satisfactorily shows that it does

not represent proceeds of crime: *Bouloud v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 41 at para 3. As summarized in *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 [*Sellathurai*] at paragraph 36:

> [36] ....the effect of the customs officer's conclusion that he or she had reasonable grounds to suspect that the seized currency was proceeds of crime is spent once the breach of section 12 is confirmed by the Minister. The forfeiture is complete and the currency is property of the Crown. The only question remaining for determination under section 29 is whether the Minister will exercise his discretion to grant relief from forfeiture, either by returning the funds themselves or by returning the statutory penalty paid to secure the release of the funds.

[30] The onus falls squarely on the Applicant to establish that the source of the currency is legitimate: *Sandidi* at para 63. Contrary to the argument of the Applicant, the issue is not whether the Minister can show reasonable grounds to suspect that the seized funds are proceeds of crime: *Sellathurai* at para 50. There is no such onus on the Minister.

[31] Further, subsection 462.3(1) of the *Criminal Code* does not pertain to section 29 of the Act. The forfeiture procedure is not penal in nature; rather, it is a civil collection mechanism: *Tourki* at para 43. It is not necessary that the Applicant be charged or convicted with a criminal offense, nor is the CBSA or Minister required to establish an illegitimate source of the currency beyond a reasonable doubt.

[32] In this case, the Minister was not satisfied that the Applicant had established that the source of the currency that was forfeited came from a legitimate source. While the Applicant's bank statement showed money flowing in and out of the Applicant's account, there was no direct link to the $38,500 forfeited nor, with few exceptions, was there an indication of the source of

the funds in the account. The $14,180 insurance payment was shown as a deposit; however, it was not subsequently shown as a withdrawal. Nor did it account for the $38,500 found on the Applicant. There was no link between this money or any other deposits in the account to the forfeited currency.

[33] The Applicant further claimed that part of the seized currency came from the revenue from his construction business. However, the only evidence provided to the Minister was three Benjamin Moore invoices for paint, totalling $800 that the Applicant asserted was used on his construction jobs. I agree that this evidence is insufficient. As noted in the Decision, the Applicant did not provide any documentation to the Minister confirming the existence of the business or of its legitimate operation. Nor could it be assumed that any income made from business was linked to the $38,500 forfeited.

[34] As noted by the Federal Court of Appeal in *Docherty v Minister of Public Safety and Emergency Preparedness*, 2013 FCA 89 at paragraph 19, and referenced by the Minister's delegate in the Decision:

> [19] Individuals are free to arrange their affairs so as to leave the smallest possible financial footprint consistent with their obligations under federal and provincial tax laws. The disadvantage of doing so is that when a question arises as to the source of large amounts of cash found in their possession, they have very few means of establishing the legitimacy of those funds. In the context of the issues sought to be addressed by the Act – money laundering and the financing of terrorism – the government is entitled to ask for a reasonable explanation of the source of currency in excess of the prescribed limit found on persons leaving Canada.

[35] On the basis of the evidence before him, the Minister reasonably concluded that the Applicant's evidence did not establish a link between the income in the Applicant's bank or that received from insurance and the seized currency. Nor did the evidence otherwise establish the legitimate origin of the currency.

[36] The Applicant argues that the Minister approached the appeal with a closed mind. However, the Decision does not establish that the Minister failed to consider the evidence before him. While the Applicant asserts that the Applicant had an innocent misunderstanding as to his reporting obligations, this is not relevant to the Decision or to the source and legitimacy of the currency.

[37] Further, I am also unpersuaded by the Applicant's argument that the reasons are inadequate. The Decision noted the onus that was on the Applicant, summarized and considered the Applicant's evidence, and indicated why the Minister considered the evidence to be insufficient. While the Applicant may not agree with the findings made, that does not render the Decision unreasonable.

[38] In my view, the Decision was transparent, intelligible, and provided justification for its findings. There is no reviewable error.

(3) Has there been a breach of procedural fairness?

[39] The Applicant's additional argument that the Minister did not provide him with a full and fair opportunity to explain the source of the money and respond to the Minister's concerns is also not compelling.

[40] The Applicant was informed through the NCS of what evidence he needed to produce and of the deficiencies in the evidence that had been produced to that date and was provided an opportunity to respond by submitting further documents to be considered by the Minister. The Applicant took advantage of these opportunities and the Minister considered the totality of the documentation provided.

[41] The Applicant does not specify in what sense he was denied an opportunity to explain the source of the money or respond to the Minister's concerns. The main dispute appears to be a disagreement with the outcome.

[42] In my view, the Applicant knew the case he had to meet and had an opportunity to respond. The NCS informed the Applicant that the onus would be on him to demonstrate the legitimate origin of the currency at appeal. That the Applicant was not able to meet this onus does not mean that the Decision was procedurally unfair.

IV. Conclusion

[43] For all of these reasons, the application is dismissed.

[44] The Respondent requested costs in the amount of $2,500. The Applicant submitted that no costs should be awarded. In my view, costs should follow the outcome. However, I will exercise my discretion and set the award of costs at $1,500, which I consider appropriate.

JUDGMENT IN T-1337-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The Respondent is awarded costs in the amount of $1,500.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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