Date: 20080110

Docket: T-685-06

Citation: 2008 FC 31

Ottawa, Ontario, January 10, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

AHMAD QASEM

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In 2003, Mr. Ahmad Qasem presented himself at Pearson International Airport to board a flight for Amsterdam with a final destination of Amman, Jordan. In the jetway, just as he was about to board the plane, he was stopped by an inspector who was assisted by a dog trained to detect currency. A customs officer asked Mr. Qasem a series of questions and, in due course, it came to light that Mr. Qasem had over $100,000 in cash in his pockets and carry-on bag. Mr. Qasem had not reported the fact that he was taking a large amount of currency out of Canada, as he was obliged to do under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, s. 12(1) (see attached Annex for relevant statutory provisions). As a result, his money was seized on suspicion that it represented the proceeds of crime. Mr. Qasem asked the Minister of National

Revenue to review that decision. The Minister's delegate confirmed that the money should be forfeited. Mr. Qasem argues that the delegate erred and asks me to overturn his decision.

[2] I agree that the delegate erred and must, therefore, allow this application for judicial review.

I. Issues

1. Did the delegate err in imposing a burden and standard of proof on Mr. Qasem that was too high?

2. Was the delegate's decision reasonable?

[3] In light of my conclusion on the first issue, I decline to address the second.

II. Analysis

Did the delegate err in imposing a burden and standard of proof on Mr. Qasem that was too high?

1. Factual Background

[4] The customs officer asked Mr. Qasem if he could speak English. He said, "Not so good". The officer then asked him if he had more that $10,000 with him. The officer showed Mr. Qasem

some money to help him understand what was being asked. Mr. Qasem replied that he had $5,000. The officer asked to see it. Mr. Qasem produced from his front trouser pocket a bundle of bills that the officer believed to contain more than $5,000. The officer took Mr. Qasem to another location in the airport where the bundle was counted. It contained $10,000. Mr. Qasem was then asked if he had any more money on him. He said no. The officer asked him to empty another pocket. Mr. Qasem produced another bundle of bills containing $10,000. The officer asked him if he had any more. He said no. The officer asked Mr. Qasem to empty his shirt pocket, which yielded another wad of bills containing a mixture of Canadian and United States currency. The officer then examined Mr. Qasem's carry-on bag, which he found to contain nine bundles of money held together with elastic bands. Mr. Qasem was escorted to a search room where the money could be counted. An Arabic-speaking officer was asked to join them to help interpret.

[5] When all the money was counted, it added up to $100,200.00.

[6] At Mr. Qasem's request, the officer contacted Mr. Qasem's son, who explained that the money was intended to be used to buy land on the West Bank (not Jordan). It was necessary to carry cash because there were no banks in the area. Cash transactions are commonplace there.

[7] Because Mr. Qasem had failed to comply with s. 12(1) of the Act by not declaring that he was carrying such a large amount of cash, and because the officer suspected that it represented the proceeds of crime, the money was seized and forfeited under subsections 18(1) and (2) of the Act.

[8] In his written report, the officer noted the following circumstances justifying his decision:

- a large amount of money was involved;
- Mr. Qasem initially denied possessing it;
- the money did not belong to Mr. Qasem;
- Mr. Qasem had no personal income;
- Mr. Qasem had no documents to confirm that the funds were legitimately acquired or what their purpose was;
- Mr. Qasem had no travel documents confirming that his final destination was the West Bank;
- the bills were secured by elastic bands, which is consistent with money laundering practices;
- Mr. Qasem possessed bank deposits for the Islamic International Arab Bank;
- Mr. Qasem possessed multiple sets of identification;
- Mr. Qasem's two passports (one Canadian, one Palestinian) had different birth dates and spellings of his name.

[9] Mr. Qasem asked to have the officer's decision reviewed by the Minister. He was invited to submit further evidence and did so. Mr. Qasem's son explained that $98,000 came from the repayment of a loan that he had made to the family business. He produced statements showing transactions on the company account that he said were for the purpose of the loan repayment. He

was asked for additional corroborating documents but was only able to produce a copy of the loan agreement.

[10] Customs officials also supplied further evidence for the Minister's delegate to consider. In particular, officials described money launderers' techniques for bundling money as compared to the practices of legitimate financial institutions. Further, they questioned whether one could use Canadian dollars to purchase property in a foreign country.

[11] The Minister's delegate confirmed that Mr. Qasem had violated s. 12 (1) of the Act by failing to declare that he was carrying more than $10,000 in cash. Accordingly, the money he was carrying was lawfully subject to seizure under s. 18(1) of the Act. The delegate went on to explain that the money would continue to be forfeited as suspected proceeds of crime because:

- the amount ($100,200.00) was a very large sum to be transporting to another country, considering the risks of theft and loss; and
- Mr. Qasem had provided insufficient evidence to confirm his assertion that the money represented proceeds from the sale of a business.

[12] The delegate also had before him the opinion of an adjudicator, who had reviewed all of the evidence and advanced a recommended outcome on the review. The adjudicator's reasons are considered to form part of the delegate's decision (*Dag* v. *Canada (Minister of Public Safety and*

Emergency Preparedness), 2007 FC 427, [2007] F.C.J. 591 (F.C.) (QL)). The following passage formed a key part of the adjudicator's analysis:

> Where there is a failure to report, the claimant must establish by reliable proof that the reasons for suspicion are groundless, namely that the suspicion of proceeds of crime is without reason. It is my opinion that the claimant has not provided in sufficient detail and with enough credible, reliable and independent evidence to establish that *no other reasonable explanation is possible.* (emphasis added)

[13] The delegate authorized the return of $5,000.00 to Mr. Qasem, as he had initially told the officer that this was the amount he was carrying. The rest was forfeited.

2. Burden and Standard of Proof

[14] The Minister's delegate must determine whether the evidence discloses reasonable grounds to suspect that the funds in issue represent the proceeds of crime: *Sellathurai* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 208, [2007] F.C.J. 280 (F.C.) (QL). In effect, then, the delegate must determine whether there is reliable and objective evidence to support that suspicion.

[15] Mr. Qasem argues that the delegate imposed on him a burden and standard of proof that, in effect, is impossible to meet and unwarranted by the governing legislation. The leading case on this issue is *Sellathurai*, above. There, Justice Sandra Simpson stated:

> With regard to the burden of proof on an applicant who wishes to dispel a suspicion based on reasonable grounds, it is my view that such an applicant must adduce evidence which proves beyond a reasonable doubt that there are no reasonable grounds for suspicion. Only in such circumstances will the evidence be sufficient to displace a reasonable suspicion.
>
> I have reached this conclusion because, if a Minister's Delegate were only satisfied on the balance of probabilities that there were no reasonable grounds for suspicion, it would still be open to him to suspect that forfeited currency was proceeds of crime. The civil standard of proof does not free the mind from all reasonable doubt and, if reasonable doubt exists, suspicion survives. (At para. 72-73).

[16] This approach has been followed in numerous other decisions of the Federal Court: *Ondre* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 454, [2007] F.C.J. No. 616 (F.C.) (QL); *Hamam* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 691, [2007] F.C.J. No. 940 (F.C. (QL); *Yusufov* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 453, [2007] F.C.J. No. 615 (F.C.) (QL); *Majeed* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1082, [2007] F.C.J. No. 1394 (F.C.) (QL).

[17] I accept the logic and symmetry of Justice Simpson's approach – a reasonable suspicion that funds represent the proceeds of crime can be displaced only by evidence that is sufficiently cogent to put the legitimate source of the funds beyond reasonable doubt. However, I have concerns about the application of this approach in practice, both in general terms and in the case before me.

[18] First, I believe it would be wrong to insist that there is a *legal* burden of proof on the person whose funds were seized to produce evidence beyond a reasonable doubt that the funds were not

generated from criminal activity. As I interpret the scheme of the Act, the person concerned can simply ask for a Ministerial review of the decision of the customs officer on the issues of non-compliance with the Act and the disposition of the seized funds (ss. 25, 29). The review amounts to a fresh assessment of the evidence. A request for a review does not, in itself, create a legal burden and certainly not one on the criminal standard of proof beyond a reasonable doubt. As a practical matter, of course, if the person cannot marshal enough evidence to negate a reasonable suspicion, he or she will fail to persuade the delegate to return the seized funds. But that reality reflects an evidentiary burden, not a legal one, and it is important to keep the two distinct. If a party fails to discharge a legal burden, the decision-maker must, as a matter of law, decide against him or her. If a party fails to discharge an evidentiary burden, he or she simply takes the risk that the decision-maker may make a finding against him or her.

[19] It appears to me, in fact, that the legal burden under the Act falls on the officials who seek to have the seized funds forfeited. Under s. 18(2), an officer has a duty to return the seized funds, less a penalty, *unless* he or she has reasonable grounds to suspect that they represent the proceeds of crime. This provision creates a presumption that most of the funds will normally be returned to the person from whom they were seized unless there is good reason to suspect that they were derived from criminal activity. It suggests that officials must prove the presence of those reasonable grounds in order to justify retaining the funds. The same burden and standard of proof would appear to apply equally in respect of proceedings before a Minister’s delegate (under ss. 25 and 29).

[20] Second, I believe that an emphasis on this evidentiary burden may distract the delegate from the actual determination that must be made; that is, whether there is reliable and objective evidence supporting a suspicion that the funds were generated from criminal activities. If the delegate focuses unduly on the evidence produced by the person concerned and measures it against the standard of "proof beyond a reasonable doubt", he or she may lose sight of the real issue. In fact, a reasonable doubt about the origins of the funds may not amount to the same thing as a reasonable suspicion that the funds come from crime. The delegate must evaluate the evidence as a whole, both the evidence supporting a suspicion that the money came from crime, as well as the evidence presented by the person concerned showing that the funds have a legitimate provenance. The Act creates a low standard for seizing what may be a very large sum of money, possibly representing a person's entire life savings. The evidentiary standard for these seizures ("reasonable suspicion") is even lower than the threshold that applies to searches for evidence of crime ("reasonable grounds to believe"). While I accept and respect Parliament's intentions and the overarching purposes of the Act, I see no reason to make the scheme more onerous than it already is by imposing an excessive standard of proof on the person whose funds have been seized.

[21] Third, reliance on the language of the criminal law is not particularly helpful in this context. The standard of "proof beyond a reasonable doubt" is notoriously difficult to describe and explain, as the Supreme Court of Canada has repeatedly stated (see, *e.g.*, *R.* v. *Lifchus*, [1997] 3 S.C.R. 320). Accordingly, the Supreme Court has urged trial judges to take great care in charging juries on the meaning of proof beyond a reasonable doubt in order to reduce the likelihood of wrongful convictions. I am doubtful whether it helps those who must make decisions under the Act to try to

apply the criminal standard of proof, instead of simply determining whether a reasonable suspicion exists.

[22] To my mind, these concerns arise on the facts of this case. As mentioned, the adjudicator concluded (and the delegate appears to have accepted) that Mr. Qasem had "not provided in sufficient detail and with enough credible, reliable and independent evidence to establish that no other reasonable explanation is possible." This language is actually a particularly strict form of the criminal standard of proof beyond a reasonable doubt that is sometimes used where the Crown's case is made up entirely of circumstantial evidence. It cautions jurors to use extreme care before convicting on the strength of circumstantial evidence alone (see, *e.g.*, CRIMJI, *Canadian Criminal Jury Instructions* (4th ed.), (Vancouver: The Continuing Legal Education Society of British Columbia, 2005) at 4.15, para. 3); *Ontario Specimen Jury Instructions (Criminal)*, (Toronto: Thomson/Carswell, 2002) at Final 18, footnote 1). It is no longer strictly required in criminal cases (see *R.* v. *Cooper*, [1978] 1 S.C.R. 860).

[23] I agree with Mr. Qasem that the effect of this approach was to impose on him a burden and standard of proof that was too high. The standard applied by the adjudicator was even more demanding than the usual criminal standard which, as I have already explained, is of questionable value in this context. In effect, it required Mr. Qasem to prove that his explanation of the source of the funds was the only one possible. This approach imposed a burden on Mr. Qasem to do more than present evidence to dispel a reasonable suspicion that the funds came from crime. I see no basis for that requirement either in the Act or in the cases cited above.

[24] Further, it seems to me that the adjudicator's approach was to place undue emphasis on Mr. Qasem's inability to show that his was the only possible explanation for the source of the funds, rather than focusing on the question whether there was a reasonable suspicion that the money came from crime. A decision-maker could find that the person's explanation for the source of the funds was not the only one possible and still conclude that the evidence as a whole does not support a reasonable suspicion that the money came from crime. The two are not mutually exclusive. This differs from the criminal context where, if the Crown fails to discharge its burden of proof, there will, by definition, be a reasonable doubt about the accused's guilt. Again, this suggests to me that reliance on the language and requirements of the criminal law is not apt in this context.

3. Conclusion

[25] Based on the foregoing, I find that the delegate made an error of law in imposing a burden and standard of proof on Mr. Qasem that was too high. Further, I have general concerns about the use of the criminal standard of proof beyond a reasonable doubt in this context. Reliance on that standard may distract decision-makers from the real issue – whether there is a reasonable suspicion that the funds in issue represent the proceeds of crime.

[26] While I see that there was evidence before the delegate that could have satisfied the reasonable suspicion standard in any case, I believe it would be prudent to send the matter back to another delegate for reconsideration. It is not clear to me that the conclusion of the delegate would

inevitably have been the same if the error of law had not been made. The matter should be reconsidered by a different delegate in keeping with these reasons. The application for judicial review is allowed, with costs.

JUDGMENT

THIS COURT'S JUDGMENT IS that

1. The application for judicial review is allowed, with costs.

2. The matter should be reconsidered by a different delegate of the Minister.

"James W. O'Reilly"
Judge

Annex

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17

Currency and monetary instruments

12. (1) Every person or entity referred to in subsection (3) shall report to an officer, 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.

Seizure and forfeiture

18. (1) If an officer believes on reasonable grounds that subsection 12(1) has been contravened, the officer may seize as forfeit the currency or monetary instruments.

Return of seized currency or monetary instruments

(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.

Request for Minister's decision

25. A person from whom currency or monetary instruments were seized under

Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes, L.R. 2000, ch. 17

Déclaration

12. (1) Les personnes ou entités visées au paragraphe (3) sont tenues de déclarer à l'agent, conformément aux règlements, l'importation ou l'exportation des espèces ou effets d'une valeur égale ou supérieure au montant réglementaire.

Saisie et confiscation

18. (1) S’il a des motifs raisonnables de croire qu’il y a eu contravention au paragraphe 12(1), l’agent peut saisir à titre de confiscation les espèces ou effets.

Mainlevée

(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.

Demande de révision

25. La personne entre les mains de qui ont été saisis des espèces ou effets en vertu de

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.

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.

If there is a contravention

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,

(*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.

Cas de contravention

29. (1) S’il décide qu’il y a eu contravention au paragraphe 12(1), le ministre peut, aux conditions qu’il fixe :

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*).

FEDERAL COURT

SOLICITORS OF RECORD

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