Date: 20080923

Docket: A-97-08

Citation: 2008 FCA 281

CORAM: **DÉCARY J.A.**
BLAIS J.A.
RYER J.A.

BETWEEN:

HUI YANG

Appellant

and

MINISTER OF PUBLIC SAFETY

Respondent

Heard at Vancouver, British Columbia, on September 15, 2008.

Judgment delivered at Ottawa, Ontario, on September 23, 2008.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: BLAIS J.A.
CONCURRING REASONS BY: RYER J.A.

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] This is yet another appeal in recent months pertaining to the interpretation of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000 c. 17 (the Act) (see *Minister of Public Safety and Emergency Preparedness v. Pham*, 2007 FCA 141; *Tourki v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FCA 186, [2008] 1 F.C.R. 33; *Dag v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 95; *Sellathurai v. Minister of Public Safety and Emergency Preparedness (Solicitor General of Canada)*, 2008 FCA 255). As in these cases, the within appeal proceeded on the basis of the legislation as it existed prior to the amendments that came into effect on February 10, 2007 (see an Act to amend the *Proceeds of*

Crime (Money Laundering) and Terrorist Financing Act and the *Income Tax Act* and to make a consequential amendment to another Act, S.C. 2006, c.12; see, also, *Pham*, supra).

[2] In April 2006, as the appellant was preparing at the Vancouver International Airport to board a flight to China, she was asked by a customs officer whether she was carrying currency of $10,000 or more. She answered that she was not, but it was ultimately discovered that she was carrying a sum of 21,843.35 in Canadian, American, Hong Kong, and Chinese currency. In failing to report that she was carrying currency of a value of $10,000 dollars or more, the appellant was contravening subsection 12(1) of the Act.

[3] The customs officer, being of the view that there was reasonable suspicion that the currency was the proceeds of crime, seized the money as forfeited to Her Majesty in Right of Canada in accordance with subsection 18(2) of the Act.

[4] On June 2, 2006, the appellant, as allowed under section 25 of the Act, requested a decision of the Minister as to whether subsection 12(1) was contravened. In her request she gave a version of the facts different from the one she had given the customs officer. On June 23, 2006, as contemplated by subsection 26(2), she was invited by the adjudicator to furnish any evidence that she desired to furnish. She answered on July 14, 2006 and filed further evidence on July 21, 2006. In letters dated July 24, 2006 and August 3, 2006, the adjudicator again invited the appellant to provide additional information or documentation. On October 27, 2006, the adjudicator completed a document titled "case synopsis and reasons for decision" that

summarized the material received in the context of the ministerial review and contained a recommendation to the ministerial delegate who had been delegated the authority to render a decision pursuant to sections 27 and 29 of the Act.

[5] On December 8, 2006, in a letter sent to the appellant, the ministerial delegate rendered his decisions. He advised her that he had determined, pursuant to section 27, that subsection 12(1) had been contravened, and that he had determined, pursuant to section 29, that the forfeiture of the seized currency shall be maintained. The appellant having acknowledged that she was in breach of subsection 12(1), the section 27 decision is not at issue in this appeal.

[6] The appellant sought judicial review of the Minister's decision (it was not in dispute that the Minister's delegate holds the authority of the Minister to render a section 29 decision and I find it more convenient in these reasons to refer to the Minister's decision rather than to the Minister's delegate's decision).

[7] The application was denied by Madam Justice Snider (2008 FC 158). Hence the within appeal.

[8] The appellant raises two series of grounds of appeal. One relates to the basis upon which the Minister exercises his discretion pursuant to section 29 of the Act. The other relates to procedural fairness. I will deal with them in turn.

The Exercise of Discretion

[9] Very recently, this Court has held that the standard of review with respect to the exercise of the ministerial discretion under section 29 of the Act was that of reasonableness (see *Dag*; *Sellathurai*). The Court also had the occasion, a few days ago, to examine the nature of a section 29 decision and the basis upon which the Minister exercises his discretion (*Sellathurai*).

[10] At the hearing before us, counsel for the respondent invited the Court to disregard the reasons for judgment of Pelletier and Nadon JJ.A. in *Sellathurai*, and use, instead, the test set out in the concurring reasons of Ryer J.A. Counsel did not advance any argument as to why the rule of *stare decisis* did not apply. I will therefore decline his invitation.

[11] As both the Minister's decision and Snider J.'s decision were rendered prior to *Sellathurai*, they were not couched in the terms used by the Court in its recent decision. For the sake of expediency I am prepared to accept that the test developed by Snider J. was not literally the proper test and therefore, reviewing *de novo* the decision of the Minister, to examine whether the Minister actually did exercise his discretion in a way that is permissible under *Sellathurai*.

[12] It will be useful, at the start, to reproduce the relevant passages of the reasons for judgment of Pelletier J.A. in *Sellathurai*:

> 25. The question of the standard of review of the Minister's decision under section 29 was settled by this Court in *Dag v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 95, 70 Admin. L.R. (4th) 214, at paragraph 4 (*Dag*), where it was held that the standard of review of the Minister's decision under section 29 was reasonableness. Consideration of the issue of the standard of review

of the decision as to the standard of proof to be met by the applicant will, for reasons which will become apparent, be deferred to a later point in these reasons.

36. It seems to me to follow from this that 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.

49. Where the Minister repeatedly asks for proof that the seized currency has a legitimate source, as he did in this case, it is a fair conclusion that he made his decision on the basis of the applicant's evidence on that issue. The underlying logic is unassailable. If the currency can be shown to have a legitimate source, then it cannot be proceeds of crime.

50. If, on the other hand, the Minister is not satisfied that the seized currency comes from a legitimate source, it does not mean that the funds are proceeds of crime. It simply means that the Minister has not been satisfied that they are not proceeds of crime. The distinction is important because it goes directly to the nature of the decision which the Minister is asked to make under section 29 which, as noted earlier in these reasons, is an application for relief from forfeiture. The issue is not whether the Minister can show reasonable grounds to suspect that the seized funds are proceeds of crime. The only issue is whether the applicant can persuade the Minister to exercise his discretion to grant relief from forfeiture by satisfying him that the seized funds are not proceeds of crime. Without precluding the possibility that the Minister can be satisfied on this issue in other ways, the obvious approach is to show that the funds come from a legitimate source. That is what the Minister requested in this case, and when Mr. Sellathurai was unable to satisfy him on the issue, the Minister was entitled to decline to exercise his discretion to grant relief from forfeiture.

51. This leads to the question which was argued at length before us. What standard of proof must the applicant meet in order to satisfy the Minister that the seized funds are not proceeds of crime? In my view, this question is resolved by the issue of standard of review. The Minister's decision under section 29 is reviewable on a standard of reasonableness. It follows that if the Minister's conclusion as to the legitimacy of the source of the funds is reasonable, having regard to the evidence in the record before him, then his decision is not reviewable. Similarly, if the Minister's conclusion is unreasonable, then the decision is reviewable and the Court should intervene. It is neither necessary nor useful to attempt to define in advance the nature and kind of proof which the applicant must put before the Minister.

[13] The Minister, quite properly, sought to obtain from the appellant additional information respecting the legitimacy of the funds. He was not satisfied that any credible one had been presented. He came to the conclusion that the appellant had "failed to provide any legitimate documentary evidence or information to demonstrate that the funds were legitimately obtained" and that "Reasonable suspicion still stands" (A.B. p. 06). The Minister not having been satisfied, to use the words of Pelletier J.A. at para. 50, "that the seized funds are not proceeds of crime", it was reasonably open to him to confirm the forfeiture.

Procedural Fairness

[14] The arguments raised by the appellant are examined by Snider J. in paragraphs 27 to 30 of her reasons. I fully agree with her analysis.

[15] I wish only to add that her conclusion, in paragraph 29, that non-disclosure of information which would have been of no benefit to the appellant did not result in a breach of procedural fairness is in accord with the ruling of this Court in *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co.*, 2006 FCA 398, [2007] 4 F.C.R. 101.

[16] The appeal should be dismissed with costs.

"Robert Décary"
J.A.

"I agree.
Pierre Blais J.A."

RYER J.A. (Concurring)

[17] I agree with the conclusion of my colleague, Décary J.A., that the appeal should be dismissed.

[18] I wish to add that, in my view, the Minister, in exercising his discretion under subsection 29(1), was not required to consider the factors put forward by the appellant; namely:

(a) whether confirming the forfeiture of the funds in issue would serve the public interest or the purposes of the Act;

(b) the likely reason that the individual contravened subsection 12(1) of the Act; and

(c) the impact of the confirmation of the forfeiture on the individual.

[19] In so concluding, I am in agreement with the endorsement of Snider J. of the position of Simpson J. in *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 208, wherein she stated at paragraph 58:

> 58. The Respondent says that in enforcing Part 2 of the Act, the Minister's Delegate is engaged in a balancing of the interests of the Applicant with those of the Canadian public. However, I do not accept this characterization. In my view, the balancing of private and public interests was done by Parliament when it established the legislative scheme. A Minister's Delegate has a much narrower role under section 29. He is simply determining whether, on the facts in a particular applicant's case, a forfeiture should be confirmed.

"C. Michael Ryer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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