

Federal Court



Cour fédérale

**Date: 20141114**

**Docket: T-1800-13**

**Citation: 2014 FC 1081**

**Ottawa, Ontario, November 14, 2014**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**HORATIUS VITOLIS BROWN**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] The applicant, Mr Brown, seeks judicial review of the decision of Erin O’Gorman, Director General of Aviation Security [Director General], on behalf of the Minister of Transport [Transport Canada], which cancelled his Transportation Security Clearance [TSC], thereby preventing his continued employment with Servisair at the Lester B. Pearson International Airport.

[2] The decision was made pursuant to the Minister's discretion under section 4.8 of the *Aeronautics Act*, RSC 1985, c A-2 [the Act], and in accordance with the Transportation Security Clearance Program Policy [TSCPP].

### **Overview**

[3] The applicant argues that the decision was unreasonable because the Director General erred in her consideration of the facts and his explanations, and misconstrued the evidence. In addition, he submits that he was denied procedural fairness because he was not provided a hearing or the names of the individuals with whom he was allegedly associated, which prevented him from making a full response. The applicant also suggests that he was targeted in the investigations described in the Law Enforcement Record Check [LERC] report considered by the Advisory Board and the Director General.

[4] The applicant argues that the decision is based on unproven information that consists of a series of incidents and on speculation that he may have been associated with individuals who have not been identified by name and who may have been involved in drug importation and exportation at Pearson Airport.

[5] The applicant made extensive oral submissions to the Court, offering possible explanations that were not provided to the Advisory Body or Director General, challenging the information in the LERC report and seeking to explain the nature of his work with Servisair. He highlights the impact of the decision on him, noting that the loss of his Security Clearance has resulted in the loss of his Restricted Access Identity Card [RAIC] and the termination of his job

at Pearson Airport, which he has held for over a decade. Ideally, the applicant seeks to have this Court re-instate his security clearance. However, as noted at the hearing, this is not the role of the Court.

[6] The respondent submits that the decision was reasonable based on the significant evidence before the Advisory Body and the Director General, and that the applicant was afforded full procedural fairness. The respondent also submits that there is no evidence to support the applicant's allegation of bias.

[7] Although I have sympathy for the applicant's situation, the role of the Court is to determine whether the decision under review is reasonable and whether the process in reaching that decision was procedurally fair. As noted at the oral hearing, the Court may only rely on the record – that is, on the information that was before the decision-maker – to determine whether the decision was reasonable.

[8] The record before the decision-maker provides more than sufficient grounds to justify the decision reached. The decision was also reached in a procedurally fair manner; the applicant was provided with all the details of the allegations in the possession of Transport Canada and given an opportunity to make submissions in response, which were considered by the Advisory Body and the Director General.

[9] For the more detailed reasons that follow, the application for judicial review is dismissed.

## **Preliminary Issue**

[10] As noted by the respondent, the “Attorney General of Canada” should replace “Transport Canada Safety and Security Aviation Security” as the named respondent in this matter.

## **Background**

[11] The applicant has worked as a ramp agent for Servisair at Lester B. Pearson Airport in Toronto, Ontario since October 2000. He was initially granted a TSC in 2001, which was renewed every five years.

### *The LERC Report*

[12] On June 3, 2013 Transport Canada received a LERC report from the Royal Canadian Mounted Police [RCMP], which identified the applicant as being involved in an organized crime group made up of baggage handlers at the airport that facilitates the importation of drugs into Canada.

[13] The LERC report was based on several sources including: intelligence reports from the Toronto Airport Drug Enforcement Unit [TADEU] and YYZ Airport Intelligence Unit; police reports from RCMP, Peel Regional Police, Toronto Police Service and the Canada Border Services Agency [CBSA]; police and CBSA surveillance; three RCMP Projects (Project OVRIDJAG, Project ONTANA and Project OTAG); confidential human sources; and court documents.

[14] The LERC report indicates that the RCMP investigations (specifically, Projects OTAG and ONTANA) gathered evidence through surveillance, drug seizures and other investigative techniques. The investigations identified several baggage handlers, groomers, station attendants and other service providers who, together, facilitated the importation and exportation of substances into Canada and other countries. These investigations led to multiple warrants and arrests.

[15] The LERC report lists 11 individuals with whom the applicant was alleged to be associated who were also suspected, charged or convicted of being involved in drug-related activity, including Subject "A" who pleaded guilty and was sentenced to 23 months in jail for importing drugs.

[16] The report notes that the investigations did not reveal sufficient evidence to charge the applicant, but that the RCMP maintains that he represents a well-established and successful "door" at the airport (i.e. a person who provides access) and continues to facilitate the movement of drugs with the assistance of co-workers.

[17] The report describes 21 incidents or events dating from 2005 to 2013. The report notes that, although the applicant was never criminally charged, he was the "common denominator" in many of the failed importation attempts. These incidents include several drug seizures where the applicant was present or in the area of the flight when not scheduled to work; information from a reliable human source that the applicant and three others attended the airport on their days off to retrieve controlled substances from international flights; an airport intelligence report that

identified the applicant as part of a group who were believed to be smuggling narcotics out of the airport and were at the airport on their scheduled days off and accessing secure doors using their RAIC; information that a supervisor with Servisair was manipulating shifts to permit the applicant to work certain flights; and, more recently, the January 2013 seizure of 12 kg of cocaine at a time the applicant was working overtime managing the bags from that flight.

*The Letter From Transport Canada*

[18] On June 18, 2013, Ms N. Dupuis, Chief of Security Screening Programs at Transport Canada, wrote to the applicant, repeating almost word-for-word the information provided in the LERC report and informing him that, as a result of this information, his security clearance was under review by the Transportation Security Clearance Advisory Body.

[19] Ms Dupuis also referred to an additional incident that occurred in October 2011, while CBSA was conducting a luggage examination of a “high risk” flight in Terminal 3. At around 2:40 am, three hours after his shift had ended, the applicant was seen quickly leaving on a tug (i.e., the vehicle that pulls baggage carts). The applicant admitted to YYZ Intelligence that he had returned to the airport after his shift and remained for almost 4 hours to work on his laptop. He denied ever working with or knowing anyone who had lost their RAIC or job for participating in criminal endeavours. He stated that the only reason an employee would constantly show up to the airport to offload bags when they were not scheduled would be to remove contraband and that they should be dealt with to the full extent of the law and lose their RAIC.

[20] Ms Dupuis referred the applicant to the TSCPP online and encouraged him to provide any additional information outlining the circumstances surrounding the incidents and associations, as well as any other relevant information or explanation or any extenuating circumstances within 20 days, noting that any information provided would be carefully considered in making the decision in respect of his security clearance.

[21] The applicant then contacted Transport Canada by phone, on July 2, 2013. The Transport Canada Note to File indicates that he expressed disbelief and denied ever having done anything illegal in his life or knowing anyone involved in illegal activity at the airport. He noted that if he had known of people being involved in such activity, he would have reported it. He asked where he could get the information from all the listed sources in the letter. He explained that he had been a lead station attendant, worked overtime, had contacts with many people and assisted CBSA whenever required. He added that he would never be able to remember the events of the older dates, which would make it difficult to defend himself.

[22] Transport Canada advised him to submit any supporting documents he wished and reminded him of the deadline.

*The Applicant's Response to Transport Canada*

[23] The applicant's lawyer submitted a response addressing each event set out in the June 18, 2013 letter from Transport Canada.

[24] The response notes the applicant's commendable work performance with Servisair, that he worked 60 hour weeks and that he did not have a close relationship with anyone at the airport.

[25] The response denies the applicant's involvement in each of the incidents. With respect to the cocaine seizure on August 7, 2009, the applicant denies knowledge and questions why he would be under investigation, suggesting that this is because of his colour, background or origin.

[26] He asserts that he is being targeted as a suspect in investigations of Caribbean flights because of his Jamaican background, but that there is nothing to link him to the allegations, other than that he worked at the airport as a lead agent and in the company of employees arrested and/or charged with drug-related offences, none of whom were known to him to be involved in such activities. He also cites his high visibility at the airport, due to his frequent 60 hour work weeks, as a possible cause for being targeted. He submits that the allegations against him are speculative and unfounded.

[27] The response concludes by reiterating the applicant's denials of involvement with any illegal activity or association with anyone involved. The applicant adds that, in the past, he contacted the police to report suspicious activities.

### **The Decision under Review**

[28] The Advisory Body met on August 28, 2013 to review the allegations and the applicant's submissions before making a recommendation to the Director General.



[29] The Advisory Body noted that criminal record checks indicate that the applicant has no criminal record or charges.

[30] The Advisory Body referred to the LERC report, which provided information regarding the applicant's suspected involvement in the importation and exportation of drugs through the airport and his association with 11 other individuals also implicated, including one who had pled guilty to importing hashish and was sentenced to 23 months in jail.

[31] The Advisory Body noted that this information was provided by multiple reliable sources. In addition, several police agencies, acting independently, determined that the applicant was involved in the importation and exportation of drugs through the airport. Both RCMP investigations related to the importation and exportation of drugs through the airport in 2007 and 2010 (Projects ONTANA and OTAG) identified the applicant as the common denominator. Although no charges were laid against the applicant, the RCMP, Toronto Drug Enforcement Unit, believed that he represents a well-established "door" at the airport and continues to facilitate the movement of drugs through the airport.

[32] The Advisory Body noted that the applicant was in the vicinity of drug seizures on many occasions over a prolonged period of time and that on several occasions he had used his RAIC to access the restricted area of the airport when he was not scheduled to work. Additionally, different sources, including reliable human sources working with the RCMP and YYZ Airport Intelligence, had indicated that the applicant was actively involved in facilitating the illegal importation of controlled substances to Canada. In particular, one source had reported

overhearing the applicant stating “The money is still there, they [CBSA] will find what they find, but we will bring stuff in on every flight.”

[33] The Advisory Body also noted the relevance of importing and exporting drugs through the airport to unlawful acts of interference with civil aviation.

[34] The Advisory Body considered the applicant’s submissions which denied knowledge of any criminal activity within or outside the airport and that he stated that he contacted the police in the past to report suspicious activities at work. However, due to the applicant’s presence during several drug seizures, as well as the fact that charges had been laid against other airport workers, the Advisory Body did not find the applicant’s statements that he was unaware of any illegal activity at the airport to be believable.

[35] Its record of discussion states:

“Although Mr. Brown’s counsel provided a written statement, when considering the numerous incidents, the fact that multiple police agencies, in a number of independent investigations which gathered evidence from multiple sources including intercepting communications, as well as reliable human sources, came to the same conclusion that the applicant was involved in the drug importation and exportation at Lester B. Pearson International Airport, his statement was not sufficient to dispel concerns.”

[36] It then concluded, based on a review of the file and reflecting the wording of the TSCPP, that it had reason to believe, on a balance of probabilities, that the applicant may be prone or induced to commit an act, or assist or abet an individual to commit an act that may unlawfully interfere with civil aviation.

[37] The Director General accepted the Advisory Body's recommendation and cancelled the applicant's security clearance. The Director General's decision letter sent to the applicant indicates that the cancellation was based on a review of the file, including the concerns outlined in the June 18, 2013 letter, the written submissions by counsel for the applicant, the recommendation of the Advisory Body and a consideration of the TSCPP. The Director General highlights the multiple reliable sources that came to the same conclusion that the applicant was involved in the importation and exportation of drugs through the airport and that these incidents directly link to aviation security.

[38] The Director General concluded her decision noting "Although your counsel provided a written statement, when considering the direct link of these incidents to aviation security, the statement was not sufficient to address my concerns".

### **Issues**

[39] The applicant set out several issues, but they are, more generally: the applicable standard of review; whether the decision to refuse the Applicant's security clearance is reasonable; and whether the decision was made in a procedurally fair manner.

### **Standard of Review**

[40] The applicant argues that the decision is wrong and reflects an error of law and that the Court should, therefore, judicially review the matter on the standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCR 190 [*Dunsmuir*]).

[41] The respondent points out that the appropriate standard of review of the decision, which is based on an assessment of the facts and the law, is reasonableness. This standard has been confirmed in many cases dealing with the cancellations or refusals of TSCs (*Clue v Canada (Attorney General)*, 2011 FC 323, 200 ACWS (3d) 4 [*Clue*]; *Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59, 224 ACWS (3d) 538 [*Thep-Outhainthany*]; *Lorenzen v Canada (Transport)*, 2014 FC 273, 239 ACWS (3d) 10 [*Lorenzen*]), based on the public importance of aviation security and the discretionary, specialized nature of security clearance decision-making.

[42] As I noted at the hearing, where the standard of reasonableness applies, the role of the Court on judicial review is not to make its own decision, but to determine whether the Minister's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47; see also *Thep-Outhainthany*, above, at para 18 and *Lorenzen*, above, at para 14, both of which dealt with security clearance decisions).

[43] The Court may not re-weigh the evidence or make its own decision. If the decision is found not to be reasonable, it would be referred back to the Minister for reconsideration.

[44] With respect to the applicant's submissions that he was denied an opportunity to properly present his case and to respond to details contained in the LERC report, the standard of review for alleged breaches of procedural fairness is the standard of correctness.

### **Relevant statutory provisions**

[45] The relevant provisions are set out at Annex A.

[46] For ease of reference, the key provision of the TSCPP at issue, section I.4.4 provides:

The objective of this Program is to prevent the uncontrolled entry into a restricted area of a listed airport by any individual who...

4. the Minister reasonably believes, on a balance of probabilities, may be prone or induced to:

- commit an act that may unlawfully interfere with civil aviation; or
- assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

***Is the decision to revoke the applicant's TSC reasonable?***

*The applicant's position*

[47] The applicant argues that the Director General failed to give proper consideration and weight to the evidence before her, ignoring his explanations about his lack of knowledge of incidents of drug smuggling at the airport, his denials of involvement, his lack of criminal record and his explanation for being at the airport outside of working hours.

[48] The applicant submits that his statements were made under oath and are true, and that there is no reason to doubt their truthfulness. He adds that where the veracity of testimony is not in question, the testimony cannot be ignored or rejected (citing *Maldonado v Minister of Employment and Immigration*, [1980] 2 FC 302, 1 ACWS (3d) 167 (FCCA); *Permaul v Canada (Minister of Employment & Immigration)* (1983), 23 ACWS (2d) 496, 53 NR 323). The applicant argues that the Director General reached conclusions that were contrary to his evidence, which he submits is uncontested, and that this was tantamount to ignoring relevant evidence on the record.

[49] The applicant further argues that the Advisory Body should have considered the evidence in light of the fact that he had never been criminally charged or convicted of any crime on or off the airport grounds. It also unreasonably found that he was associated with individuals who were charged and convicted of criminal acts based only on circumstantial observations and because they worked in the same place.

[50] As noted in the overview, the applicant made additional submissions and possible explanations at the oral hearing, which were not provided to Transport Canada.

[51] Specifically, the applicant challenges the information in the LERC report. He submits that the allegations are vague and do not point to any direct involvement by him in the movement of baggage containing drugs. He states that the schedule must be flexible to accommodate changes in arrival and departure times, that he worked whatever flights were assigned and that he does not know who the other individuals are, given that they have only been identified by letters. He questions why the security cameras, which could verify his comings and goings in parts of the airport, were not working on the dates of several incidents noted in the report. He also questions why, if he was suspected of such involvement, he was never charged, never interviewed by police and his security clearance was previously renewed.

[52] He also seeks to explain his history of employment with Servisair, his willingness to work overtime, how it is not possible to manipulate shifts or crews to work on a particular flight, that he worked primarily in Terminal 3 and as needed in other terminals and could, as a result, be in the vicinity or area of certain flights, and similar information regarding the overall operations

of ramp agents and other airport workers. He also notes that he had been a union representative and a health and safety representative as possible explanations for being at the airport when not scheduled to work.

[53] He continues to deny any involvement in the importation of drugs or with those who may be involved. The applicant submits that the vague allegations of associations with others, being in the general vicinity of drug seizures and other incidents, which he denies, and the test that he “may be” prone to interfere with aviation safety is simply not enough to result in a consequence so harsh as the revocation of his security clearance.

#### *The Respondent’s Position*

[54] The respondent submits that the decision was reasonable noting the broad discretion of the Minister provided by section 4.8 of the Act when determining whether to cancel a TSC. This broad discretion is necessary to ensure the objective of both the Act and the TSCPP – preventing illegal acts of intervention to civil aviation so as to ensure air safety and security in Canada.

[55] The respondent notes that the Federal Court has consistently held that this objective is of substantial importance, with the interests of the general public taking precedence over those of persons whose clearance is revoked (*Fontaine v Canada (Transport)*, 2007 FC 1160 at para 30, 313 FTR 309 (Eng) [*Fontaine*]; *Rivet v Canada (Attorney General)*, 2007 FC 1175 at paras 15 and 20, 325 FTR 178 (Eng) [*Rivet*]). As such, access to a restricted area is to be considered a privilege, not a right (*Fontaine*, above, at para 59).

[56] The respondent notes that the TSCPP contains certain specific factors that the Minister may consider, including a person's involvement in criminal activities or suspicion of being closely associated with persons involved in criminal activities. In addition, the Minister may also take into account any other factor considered relevant (*Fontaine*, above, at para 78).

[57] The respondent notes the test in the TSCPP and that the standard of proof is relatively low compared to the criminal requirement that guilt must be proven beyond a reasonable doubt.

[58] The LERC report was based on information from multiple police agencies, acting independently, and was informed by evidence gathered through surveillance, several police intelligence reports, multiple confidential human sources and two major investigation projects. The Advisory Body and the Director General were entitled to rely on this information.

[59] The respondent also notes that several of the alleged associates were charged in connection with the illegal activities noted in the LERC report. This information on its own would be sufficient to justify a reasonable concern regarding the applicant's suitability to retain a security clearance. The Court has previously found that associations with individuals who could have a negative influence constitute a sufficient basis for the Minister's reasonable belief that an individual might be prone or induced to commit an act that may unlawfully interfere with civil aviation (*Fontaine*, above, at paras 83-84).

[60] The respondent disputes the applicant's contention that the Advisory Board and the Director General ignored his evidence. Both the Advisory Body and the Director General



specifically noted and considered the applicant's submissions, but found them to be insufficient to dispel their concerns. Clear reasons were given for rejecting the submissions including that the applicant's denials lacked credibility given his frequent presence at the airport during several drug seizures and the fact that charges had been laid against some of the other co-workers.

[61] With respect to the additional oral submissions made by the applicant to the Court, the respondent notes that the Court may only consider the reasonableness of the decision based on the record that was before the decision-maker. Many of the oral submissions elaborate on that record and others are completely new and were not provided by the applicant in response to the letter from Transport Canada.

#### **The decision was reasonable**

[62] Section 4.8 of the *Aeronautics Act* gives the Minister, and the Director General on his or her behalf, wide discretion to "grant or refuse to grant a security clearance to any person or suspend or cancel a security clearance" and to take into account any relevant factor in doing so.

[63] The decision was based on the Director General's reasonable belief on a balance of probabilities that the applicant "may be prone or induced to commit an act that may unlawfully interfere with civil aviation; or assist or abet any person to commit an act that may unlawfully interfere with civil aviation", which is the standard set out in the TSCPP.

[64] The applicant argued that this low standard should not justify the harsh consequences of losing his security clearance. While I understand his position and agree that the consequences are

serious, the TSCPP is clear and the case law from this Court has confirmed that the standard is somewhat lower than simply the balance of probabilities given the words “may be prone” and “may unlawfully interfere”.

[65] The Director General based her decision on the evidence from the LERC report, which she was entitled to rely upon, related to Mr Brown’s association with those involved in the importation and exportation of drugs at the airport and the evidence that Mr Brown was involved, and could be a key player, in these activities. The LERC report was detailed and based on information from multiple law enforcement sources and at least two different human sources who provided information to different law enforcement agencies.

[66] The applicant raised possible explanations in his oral submissions, but many of these were not presented in his submissions to the Advisory Body.

[67] The results of the RCMP investigations, the information from the airport intelligence units and the CBSA seizures provided justification for the Advisory Body and Director General’s belief.

[68] Although the applicant has no criminal record and was not charged with any offences arising from the investigation over the last 10 years, criminal convictions are not the benchmark to justify the revocation of a security clearance.

[69] As noted by Justice Rennie in *Thep-Outhainthany*, above, at para 20:

Secondly, the absence of a criminal conviction cannot be determinative given the different standards of proof which prevail in the two discrete legal contexts. A criminal conviction is sustained on proof beyond a reasonable doubt. Denial of a security clearance requires only a reasonable belief, on a balance of probabilities, that a person may be prone to or induced to commit an act that may interfere with civil aviation.

[70] The Director General's decision focuses on the propensity of airport employees to engage in conduct that could affect aviation safety. This requires a broad and forward-looking perspective. As noted by Justice Harrington in *MacDonnell v Canada (Attorney General)*, 2013 FC 719 at para 29, 435 FTR 202 (Eng):

The Policy is forward looking; in other words, a prediction. The Policy does not require the Minister to believe on a balance of probabilities that an individual "will" commit an act that "will" lawfully interfere with civil aviation or "will" assist or abet any person to commit an act that "would" unlawfully interfere with civil aviation, only that he or she "may".

[71] In addition, the Minister is entitled to err on the side of public safety. In *Rivet*, above, at para 15, Justice Pinard notes that in the balancing of the interests of the individual affected and public safety, the interests of the public take precedence:

Moreover, both the purpose of the Act and the nature of the question deal with protecting the public by preventing acts of unlawful interference in civil aviation. Although the Minister's decision directly affects the applicant's rights and interests, it is the interests of the general public that are at stake and that take precedence over the applicant's ability to have his TSC to be able to work as a pilot. The purpose of the Act emanates from a larger problem that encompasses the interests of society as a whole, not just those of the applicant.

[72] With respect to the applicant's submissions that he was not directly involved (or involved at all) in illegal activities and that he would never jeopardise aviation safety, the case law has

established that direct involvement is not required. In *Thep-Outhainthany*, the applicant's husband was involved in a dial-a-dope scheme, but the applicant, an airport worker, denied any involvement (above, at para 27). However, the Court noted that the applicant's access to a restricted area of an airport could attract the attention of her husband or his criminal associates and found the connection between trafficking drugs at the community level and aviation security.

[73] Other cases also support the proposition that the conduct at issue need not be a direct interference with aviation security (see for example *Pouliot v Canada (Transport)*, 2012 FC 347, 216 ACWS (3d) 527 [*Pouliot*]; *Russo v Canada (Transport)*, 2011 FC 764, 406 FTR 49 (Eng); *Rivet*, above; and *Canada (Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56, 238 ACWS (3d) 282 [*Farwaha*]).

[74] The Advisory Body may consider associations with others as relevant to whether an individual would be prone to commit or to assist or abet an individual to commit an act that might unlawfully interfere with civil aviation such that his or her security clearance should be revoked (see *Fontaine*, above, at para 7; *Farwaha*, above, at para 101).

[75] With respect to the applicant's submissions that his statements were made under oath and his evidence was not contradicted, this is not the case. The Advisory Body clearly stated that it did not believe the applicant's denials based on the evidence before it.

[76] The Advisory Body and the Director General considered all the evidence before them, including the LERC report and the applicant's submissions in response to the letter from

Transport Canada, which reiterated the information included in the LERC report as well as the applicant's denials of involvement that were mentioned in the Note to File. The Advisory Body and the Director General were entitled to give the appropriate weight to this evidence and did so. The evidence was sufficient to support the reasonable belief on a balance of probabilities that the applicant *may* be prone to commit an act that *may* interfere with civil aviation. The Advisory Body and the Director General provide clear reasons for their decision. The decision is reasonable.

***Was the applicant denied procedural fairness?***

*The Applicant's position*

[77] The applicant submits that he was denied procedural fairness because: i) he was denied an oral hearing; ii) he was denied the names of his alleged co-conspirators; and iii) the investigation may have targeted him. In the applicant's written submissions he suggests bias on the part of the Advisory Body and the Director General.

[78] The applicant argues that because of the serious consequences of the decision – he has lost his job and his ability to support his large family – he should have been given every procedural safeguard in accordance with the principals of fundamental justice (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193). The Minister failed to do so by denying him a hearing to respond to the allegations.

[79] In addition, the limited information provided to him regarding the identity of his alleged co-conspirators, which were identified only by letter, prevented him from fully responding to the allegations.

[80] In his written submissions, the applicant further alleges that the Advisory Body and the Director General were biased. In his oral submissions, the applicant instead suggests that he was targeted for reasons unknown to him in the investigations by the RCMP and CBSA and that the “reliable human sources” may have had a conflict with him.

*The Respondent’s Position*

[81] The respondent submits that the procedural safeguards available in these circumstances are limited to the right to know the allegations and the right to make representations in response (*Peles v Canada (Attorney General)*, 2013 FC 294 at paras 15-16, 228 ACWS (3d) 314). There is no right to a hearing (*Pouliot*, above, at paras 9-10).

[82] The applicant was fully informed of the allegations and incidents to be considered by the Advisory Body and the Director General in the June 18, 2013 letter. All the information available to Transport Canada was shared with the applicant. Transport Canada did not have information about the names of the coworkers identified only by letter. The applicant had the opportunity to make representations and to provide evidence, and his lawyer responded to the June 18, 2013 letter on his behalf.

[83] The respondent notes that allegations of bias are serious allegations, the threshold for establishing them is high, and that there is simply no evidence on the record that would support these allegations.

**There was no breach of procedural fairness**

[84] The scope of the duty of procedural fairness varies and depends on the context. The duty owed in the context of revoking an existing security clearance is higher than in the context of refusing an initial application for a security clearance, however, it still remains at the lower end of the spectrum or scale.

[85] As noted by Justice Pinard in *Rivet*, above, at para 25, “Thus, the procedural safeguards available to the applicant in this case are limited to the right to know the facts alleged against him and the right to make representations about those facts. These procedural guarantees do not include the right to a hearing.”

[86] The June 18, 2013 letter from Ms Dupuis at Transport Canada advised the applicant of the incidents and allegations with the same level of detail as the LERC report. The letter provided him with sufficient information about the concerns and allegations to permit him to respond. Ms Dupuis invited him to provide additional information and explanations. His telephone call to Transport Canada upon receipt of the letter was detailed in a Note to File and was part of the information considered by the Advisory Body and Director General.

[87] The Director General noted that she reviewed the file and considered the submissions of the applicant’s counsel, the recommendations of the Advisory Body and the TSCPP. Her decision focused on the evidence disclosed in the LERC report. The applicant’s submissions – which amounted to denials and assertions that his presence at the airport when not otherwise scheduled was due to working overtime – did not alleviate the Director General’s concerns. As

noted in *Lorenzen*, above, at para 52, the Minister's Delegate does not have to accept an applicant's explanation or position.

[88] Allegations of bias are serious allegations and are not to be made lightly. In the present case, although the applicant used the term "bias", it was used without a full appreciation of what such an allegation entails and likely arises from his disagreement with the decision, the harsh consequences, his continued denials of involvement and his frustration because he cannot turn back the clock and make more compelling submissions to the Advisory Body or the Director General.

[89] The Minister and the Director General have a broad discretion to ensure aviation security. There is absolutely no hint that the applicant's race or background had any bearing on the decision – rather, the decision was based on the well-documented and extensive evidence provided to the Advisory Body and the Director General.

[90] Nor did the applicant point to any evidence that the investigations noted in the LERC report targeted the applicant for unknown or bad faith reasons. Moreover, if such evidence existed, it should have been raised at the time submissions were made to the Advisory Body.

[91] In conclusion, there was no breach of procedural fairness.



## Conclusion

[92] The Court appreciates that the consequences of the decision to revoke Mr Brown's security clearance are very serious and that he has made significant efforts before this Court to have this decision reconsidered. As noted above, he offered explanations that were not made to the Advisory Body. That is not to say that the Advisory Body or Director General would have necessarily accepted these explanations, given the detailed information from the LERC report which they gave significant weight to and which they reasonably regarded as reliable. The issue before the Court is whether the decision of the Director General, based on the recommendation of the Advisory Body, is reasonable. That determination is based on the information on the record provided to the Advisory Body and the Director General. On that record, as explained above, the decision is reasonable and should not be disturbed.

[93] The respondent noted that in *Lorenzen*, above, where the applicant also denied any involvement in the alleged activities, Justice Russell stated, at para 53:

It may be that what the Applicant says about herself is true. The Court has no means of assessing that. But that is not the issue. The issue is whether, given the allegations and evidence before the Minister's Delegate, the Decision that the Applicant may be prone or induced to commit an act that may unlawfully interfere with civil aviation was reasonable. I cannot say it wasn't.

[94] The same is true in the present case; it is not the Court's role to determine whether the applicant was or was not involved in the activities alleged. The Court's role is to determine if the decision was reasonable and procedurally fair. It was both.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. No costs are ordered.

"Catherine M. Kane"

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Judge

## ANNEX A

*Aeronautics Act*, RSC 1985, c A-2, s 4.8

**4.8** The Minister may, for the purposes of this Act, grant or refuse to grant a security clearance to any person or suspend or cancel a security clearance.

**4.8** Le ministre peut, pour l'application de la présente loi, accorder, refuser, suspendre ou annuler une habilitation de sécurité.

*Transportation Security Clearance Program Policy* – sections I.1, I.4 and II.35

Aim

Objet

I.1

I.1

The aim of the Transportation Security Clearance Program Policy is the prevention of unlawful acts of interference with civil aviation by the granting of clearances to persons who meet the standards set out in this Program.

L'objet du Programme d'habilitation de sécurité en matière de transport est de prévenir les actes d'intervention illicite dans l'aviation civile en accordant une habilitation aux gens qui répondent aux normes dudit programme

Objective

Objectif

I.4

I.4

The objective of this Program is to prevent the uncontrolled entry into a restricted area of a listed Airport by any individual who

L'objectif de ce programme est de prévenir l'entrée non contrôlée dans les zones réglementées d'un aéroport énuméré dans le cas de toute personne:

1. is known or suspected to be involved in activities directed toward or in support of the threat or use of acts of serious violence against persons or property;

1. connue ou soupçonnée d'être mêlée à des activités relatives à une menace ou à des actes de violence commis contre les personnes ou les biens;

2. is known or suspected to be a member of an organization which is known or suspected to be involved in activities directed toward or in support of the threat or use of acts of serious violence against people or property;

2. connue ou soupçonnée d'être membre d'un organisme connu ou soupçonné d'être relié à des activités de menace ou à des actes de violence commis contre les personnes ou les biens;

3. is suspected of being closely associated with an individual who is known or suspected of

3. soupçonnée d'être étroitement associée à une personne connue ou soupçonnée

- being involved in activities referred to in paragraph (a);
- being a member of an organization referred to in paragraph (b); or
- being a member of an organization referred to in subsection (e) hereunder.

- de participer aux activités mentionnées à l'alinéa (a);
- d'être membre d'un organisme cité à l'alinéa (b); ou
- être membre d'un organisme cité à l'alinéa (e).

4. the Minister reasonably believes, on a balance of probabilities, may be prone or induced to

4. qui, selon le ministre et les probabilités, est sujette ou peut être incitée à:

- commit an act that may unlawfully interfere with civil aviation; or
- assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

- commettre un acte d'intervention illicite pour l'aviation civile; ou
- aider ou à inciter toute autre personne à commettre un acte d'intervention illicite pour l'aviation civile.

5. is known or suspected to be or to have been a member of or a participant in activities of criminal organizations as defined in Sections 467.1 and 467.11 (1) of the Criminal Code of Canada;

5. est connu ou soupçonné d'être ou d'avoir été membre d'une organisation criminelle ou d'avoir pris part à des activités d'organisations criminelles, tel que défini aux articles 467.1 et 467.11 (1) du Code criminel du Canada;

6. is a member of a terrorist group as defined in Section 83.01 (1)(a) of the Criminal code of Canada

6. est membre d'un groupe terroriste, tel que défini à l'alinéa 83.01(1)(a) du Code criminel du Canada.

#### Cancellation or Refusal

#### Annulation ou refus

#### II.35

#### II.35

1. The Advisory Body may recommend to the Minister the cancellation or refusal of a security clearance to any individual if the Advisory Body has determined that the individual's presence in the restricted area of a listed Airport would be inconsistent with the aim and objective of this Program.

1. L'Organisme consultatif peut recommander au ministre de refuser ou d'annuler l'habilitation d'une personne s'il est déterminé que la présence de ladite personne dans la zone réglementée d'un aéroport énuméré est contraire aux buts et objectifs du présent programme.

2. In making the determination referred to in subsection (1), the Advisory Body may consider any factor that is relevant, including whether the individual:

2. Au moment de faire la détermination citée au sous-alinéa (1), l'Organisme consultatif peut considérer tout facteur pertinent, y compris:

a. has been convicted or otherwise found guilty in Canada or elsewhere of an offence

a. si la personne a été condamnée ou autrement trouvé coupable au Canada ou à l'étranger pour

including, but not limited to:

- i. any indictable offence punishable by imprisonment for more than 10 years,
  - ii. trafficking, possession for the purpose of trafficking or exporting or importing under the Controlled Drugs and Substances Act,
  - iii. any offences contained in Part VII of the Criminal Code - Disorderly Houses, Gaming and Betting,
  - iv. any contravention of a provision set out in section 160 of the Customs Act,
  - v. any offences under the Security Of Information Act; or
  - vi. any offences under Part III of the Immigration and Refugee Protection Act;
3. is likely to become involved in activities directed toward or in support of the threat or use of acts of serious violence against property or persons.

les infractions suivantes:

- i. tout acte criminel sujet à une peine d'emprisonnement de 10 ans ou plus;
  - ii. le trafic, la possession dans le but d'en faire le trafic, ou l'exportation ou l'importation dans le cadre de la Loi sur les drogues et substances contrôlées;
  - iii. tout acte criminel cité dans la partie VII du Code criminel intitulée « Maison de désordre, jeux et paris »;
  - iv. tout acte contrevenant à une disposition de l'article 160 de la Loi sur les douanes;
  - v. tout acte stipulé dans la Loi sur les secrets officiels; ou
  - vi. tout acte stipulé dans la partie III de la Lois sur l'immigration et la protection des réfugiés.
3. si elle possède une mauvaise réputation en matière de crédit et qu'elle occupe un poste de confiance; ou
4. qu'il est probable qu'elle participe à des activités directes ou en appui à une menace ou qu'elle se livre à des actes de violence sérieuse contre la propriété ou des personnes.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1800-13

**STYLE OF CAUSE:** HORATIUS VITOLIS BROWN v ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

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**DATED:** NOVEMBER 14, 2014

**APPEARANCES:**

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