

Federal Court



Cour fédérale

Date: 20150602

Docket: T-1759-14

Citation: 2015 FC 698

Ottawa, Ontario, June 2, 2015

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

EMILIA KACZOR

Applicant

and

CANADA (MINISTER OF TRANSPORT)

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review, the applicant, Emilia Kaczor, seeks to set aside the July 21, 2014 decision of the Minister of Transport's delegate refusing her application for a transportation security clearance [TSC] at the Calgary International Airport. Ms Kaczor claims that as a result of this decision she will no longer be able to work as a flight attendant with Enerjet in Calgary.

[2] Ms Kaczor argues that the decision denying her application for a TSC should be set aside because her procedural fairness rights were violated by the decision-maker and because the decision is unreasonable. For the reasons set out below, I have determined that neither of these arguments has merit and that this application will accordingly be dismissed.

I. Were Ms Kaczor's Procedural Fairness Rights Breached?

[3] In terms of Ms. Kaczor's procedural fairness claims, two issues arise, namely, determination of the scope of her procedural fairness entitlements and assessment of whether those entitlements were respected. Each of these points is discussed below.

A. *The Nature of the Duties Owed to Ms Kaczor*

[4] As concerns the nature of the duties owed to Ms Kaczor, the jurisprudence recognises that a TSC applicant's procedural fairness entitlements vary depending on whether the applicant is seeking a TSC for the first time or is seeking the renewal or facing a revocation of an existing TSC.

[5] In situations of initial applications, several cases have held that all an applicant is entitled to, by way of procedural fairness, is that his or her application be considered and, if dismissed, that there be a reasonable basis for so doing as in such circumstances an applicant has no pre-existing rights that are being impacted.

[6] In *Pouliot v Minister of Transport, Infrastructure and Communities*, 2012 FC 347, [2012] FCJ No 427 [*Pouliot*], Justice Rennie explained at para 13 the reasons for the minimal requirements of procedural fairness in the context of an initial application for a TSC in the following terms:

Where what is at issue is a simple application for clearance or a permit made by a person who has no existing right to that clearance or permit, the requirements imposed by the duty to act fairly are minimal. The Minister must render a decision that was not based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before him.

[7] Similarly in *Motta v Canada (Attorney General)*, [2000] FCJ No 27 at para 13, Justice Pinard noted that where “the Minister’s refusal to grant access clearance does not involve the withdrawal of any of the plaintiff’s rights [...] the requirements imposed by the duty to act fairly are minimal and that, after allowing the plaintiff to submit his application in writing as he did, the Minister only had to render a decision that was not based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it”.

[8] Conversely, in situations where an existing security clearance is either being revoked or not renewed, applicants have been afforded a higher degree of procedural fairness that entitles them to be informed of the reasons their TSC is potentially in jeopardy and to an opportunity to make submissions before an adverse decision is made. Such individuals are entitled to a greater degree of procedural fairness because in such circumstances their right to earn a livelihood is likely to be impacted.

[9] For example, in *Dimartino v Canada (Minister of Transport)*, 2005 FC 635, 272 FTR 250, Justice Gauthier held that the duty of fairness in situations of a revocation or non-renewal of a TSC does not require a formal hearing but does require that applicants “be afforded a meaningful opportunity to present their views at one point before the final decision is made. To do so, they must know the case they have to meet” (at para 36). Likewise, in *Rivet v Canada (Attorney General)*, 2007 FC 1175, Justice Pinard noted that “the procedural safeguards available to the applicant [in situations where an existing security clearance is being revoked or not renewed] are limited to the right to know the facts alleged against [the applicant] and the right to make representations about those facts” (at para 25).

[10] Here, Ms Kaczor argues that her entitlements fall into the latter category and that she was therefore entitled to the higher degree of procedural fairness because she was employed by Enerjet as a flight attendant and lost her ability to work in that capacity due to the refusal of the TSC. More specifically, her duties required she be afforded access to certain restricted areas at the Calgary International Airport. In order to gain access to these areas she was required to obtain a Restricted Area Identity Card [RAIC] from the Airport Authority. To obtain the RAIC, it was necessary that Ms Kaczor first be issued a TSC. Thus, she is correct in asserting that she required a TSC to perform her work as a flight attendant.

[11] While her application for a TSC was pending, Ms Kaczor was employed as a flight attendant by Enerjet and was issued a temporary pass by the Calgary Airport Authority, which afforded her the right to access restricted areas in the airport. Once her TSC application was refused, the Calgary Airport Authority revoked Ms Kaczor’s temporary pass, and she was no

longer able to gain access to the restricted areas. From the materials before the Court, it is not clear whether this impediment, in turn, led to her dismissal by Enerjet, but it is clear that the refusal of the TSC made it impossible for Ms Kazor to continue to perform the full range of duties of a flight attendant at Enerjet.

[12] The respondent argues that because Ms Kaczor had never been issued a TSC, she is entitled only to the minimal procedural fairness rights available to initial applicants. I disagree and believe that in the circumstances of this case Ms Kazor was entitled to the higher degree of procedural fairness as she was not a mere job applicant and had been issued a temporary permit (albeit by the Airport Authority and not the Minister of Transport) that afforded her access to restricted areas in the airport in order to perform her job. Her situation is therefore akin to that of applicants who face the revocation or non-renewal of a TSC as her ability to continue to perform her job duties for her employer has been impacted by the refusal of the TSC. Thus, Ms Kaczor was entitled to be advised of the concerns with respect to her TSC application and to an opportunity to address those concerns before her TSC was revoked.

B. *Were Ms Kaczor's Procedural Fairness Entitlements Respected?*

[13] Having determined the scope of Ms Kaczor's entitlements in terms of procedural fairness, I turn now to examination of whether those entitlements were respected.

[14] In her TSC application form, Ms Kaczor consented to Transport Canada's conducting all necessary verifications, including obtaining a security clearance, to assess her suitability for a TSC. Transport Canada requested a security clearance from the RCMP. The RCMP indicated in

reply that, while Ms Kaczor did not have a criminal record, she had previously been associated with members of two criminal gangs, the Independent Soldiers and the Hells Angels. In the report the RCMP sent to Transport Canada, the RCMP wrote as follows:

2. Some of the individuals associating with the applicant, here below, are known members of the Independent Soldiers:

a. In December 2007, the applicant was observed by Calgary Criminal Intelligence Unit (CCIU) officers at the Tantra Lounge in company of individuals.

b. In June 2008, a Calgary Police Service (CPS) officer spoke with the applicant who indicated that she was residing with an individual who she named.

c. In June 2008, the applicant was observed by a CPS officer arriving at the Tantra Nightclub in the company of an individual.

d. In March 2009, an individual was observed by a CPS officer driving a vehicle registered to the applicant.

e. In June 2010, the applicant was with a group of individuals when spoken to by CPS officers.

i. The Independent Soldiers (IS) organized crime group are no longer operating as a cohesive group but were believed to be involved in all aspects of the drug trade including production, trafficking, and brokering of cocaine, MDMA, methamphetamine, heroin, ecstasy and marijuana. The group is cellular in nature, and has been known to be involved in drug trafficking in Kamloops, Kelowna, Prince George, Metro Vancouver, Calgary, and Edmonton. Many members of the Vancouver cell continue to associate with one another. They are also involved in weapons offences and they have an alliance with the West Point Chapter of the Hells Angels.

3. Subjects mentioned in this report:

a. Subject "A":

i. Was with the applicant in many of the above reported incidents

- ii. Is a very close associate of the applicant
- iii. Has no known Criminal Convictions
- iv. Is presently accused for Possession for the Purpose of Trafficking X 9, Fraud X2, Possession of Property Obtained by Crime X7, Forgery X8 and False Pretense
- v. Is known to be a Hells Angels associate

b. Subject "B":

- i. Was with the applicant in one of the above reported incidents
- ii. Was convicted of several (29) charges between 1997 and 2010 including Possession of Scheduled I Substance, Possession of a Firearm or Ammunition Contrary to Prohibition Order, Assault, Possession of a Credit Card, Obstruct Peace Officer, Possession of Break in Instrument, Robbery, Carry Concealed Weapon and Possession of Property Obtained by Crime; some of these convictions included jail term the longest being six months
- iii. Was charged of several offences between 2005 and 2010 including Traffic in Scheduled Substance, Assault, Obstruct Police Officer, Possession of Counterfeit Money and Exporting Counterfeit Money; these charges were either stayed or withdrawn
- iv. He is presently accused for Possession for the Purpose of Trafficking, Possession of Substance, and the Possession of Property Obtained by Crime and Unauthorized Possession of a Firearm.

[15] Following receipt of this report from the RCMP, Transport Canada wrote to Ms Kaczor, advising her that "during the verification process, adverse information was made available that [raised] concerns as to [her] suitability to obtain a [TSC]". The letter then went on to provide Ms Kaczor all the particulars contained in the RCMP's report.

[16] Ms Kaczor replied to the Transport Canada's letter, stating that during the periods in question she had worked at the Tantra nightclub, where she was required to socialize with patrons, but had not been involved in any illegal activities or affiliations. She also noted that she had moved frequently and had previously had several roommates, but stated that she had never knowingly lived with anyone that had a criminal conviction or who was involved in criminal activity. She went on to continue that while she could only surmise as to the identity of the individuals discussed in Transport Canada's letter, she "had no contact with any of the referenced subjects since the referenced incident dates". She also noted that as of the date of her application for the TSC she did not have or want to have any association with those involved in criminal activity and commented on the favourable changes she had made in her life, including her work with Enerjet, for which the TSC was required.

[17] Following receipt of her reply, the Transport Canada Security Clearance Program Advisory Body recommended rejection of Ms Kaczor's TSC application, due to her "multiple associations to known members of organised crime" which "raised concerns regarding her judgment, trustworthiness and reliability". The recommendation went on to note that insufficient time had passed since the criminal associations to demonstrate a change in Ms Kaczor's behaviours and associations, that her reply letter did not provide sufficient information to allay the Advisory Body's concerns and that the Advisory Body concluded that she might have been "prone or induced to commit an act, or assist or abet" someone else to commit an act that might interfere with civil aviation.

[18] The Minister's delegate accepted the Advisory Body's recommendation and rejected Ms Kaczor's TSC application for much the same reasons invoked by the Advisory Body.

[19] Ms Kaczor argues that she was denied procedural fairness in this process for three reasons: first, she claims she needed to know the identity of Subjects "A" and "B" to have been in a position to properly respond to Transport Canada's concerns; second, she argues she needed more particulars about the concerns to properly formulate a reply; and, finally, she says that she ought to have been specifically told in Transport Canada's letter to her that there were concerns with her judgment, trustworthiness and reliability.

[20] I find no merit in these assertions.

[21] With respect to the identity of the individuals, Ms Kaczor's reply indicates that she knew who they were as she stated that she had not had contact with the subjects since the referenced dates. Had she not known who the individuals were, she could not have made this statement.

[22] As concerns the particulars provided, Transport Canada's letter set out a substantial amount of detail regarding the identity of the individuals with whom Ms Kaczor was suspected of associating and also clearly underlined that it was the fact of these associations that gave rise to concerns regarding her suitability for a TSC. More specifically, in the letter, she was advised that:

- She had lived with one of the individuals who was suspected of criminal affiliation in 2008 and that the Calgary police had questioned her in 2008 after she confirmed whom she was living with;
- She was spoken to by the police again in 2010 when she was with a group of individuals suspected of being involved with the Independent Soldiers;
- She lent her car in 2009 to one of these individuals; and
- She was observed arriving at the Tantra nightclub in December 2007 in the company of suspected members of the Independent Soldiers.

[23] In my view, these details were sufficient for Ms Kaczor to have been in position to reply to the concerns and to have denied the assertions (if they were untrue) or to have provided an explanation for them. Indeed, in her reply she did attempt to explain what had occurred and tried to downplay the significance of her association with the individuals in question, by claiming that the associations arose from her work at the Tantra nightclub and were well in her past by the time she applied for the TSC.

[24] In some respects, this case is similar to *MacDonnell v Canada (Attorney General)*, 2013 FC 719, 435 FTR 202 [*MacDonnell*]. There, Transport Canada wrote a letter to the applicant that set out particulars of suspected drug dealing between the applicant and five unnamed individuals. In *MacDonnell*, like here, the applicant argued that it was procedurally unfair for the names of these individuals to have been withheld, but there was evidence that the applicant knew the identity of some of them (and, indeed, had lived with one of them). Justice Harrington concluded that there was no procedural unfairness as it was not necessary for the names of the individuals

to have been provided to the applicant for him to have known what he was being reproached with and accordingly to have been in a position to defend himself.

[25] Likewise, in this case, Ms Kaczor was provided particulars of the dates she lived with one of the suspected gang members, the dates she was suspected of having lent her car to another of them and the dates she was questioned by police either in the gang members' presence or about them. It is inconceivable that these particulars were insufficient for Ms Kaczor to have appreciated who the individuals in question were, and, indeed, she does not claim in the affidavit she filed in support of this application that she did not know who Subject "A" and "B" were. In addition, as in *MacDonnell*, Ms Kaczor was provided with particulars of her conduct that gave rise to the concerns, namely, that she was suspected of affiliating with members of the Independent Soldiers and the Hells Angels.

[26] As for the allegation that Ms Kaczor was not aware that Transport Canada was assessing her for her trustworthiness, suitability and reliability, in my view it should have been obvious to her that these issues are related to her suitability for a TSC as this is self-evident. In addition, as noted in *Pouliot*, it is not necessary for Transport Canada to advise TSC applicants of the particular grounds under the relevant Transport Canada policy that might be invoked to deny a TSC. In this regard at para 14, of *Pouliot* Justice Rennie noted as follows:

The considerations of susceptibility to influence and his association with others are both indicated in the Transport Canada policy, although not in the February 25, 2011 letter. The letter expressly invites the applicant to consult the policy. What the applicant seeks in this case is to require, as a component of procedural fairness, an opportunity to refute or respond to the conclusions reasonably arising from his conduct. To require that Transport Canada identify in advance, as an aspect of advising the

applicant of the case he had to meet, which of the potential factors it might consider to be determinative of the security clearance review would be to impose a higher standard of fairness than is owed in this context and is unsupported by the jurisprudence [...]

[27] Thus, Ms Kaczor was provided with sufficient details regarding the concerns with her TSC application and with an opportunity to address those concerns. Her rights to procedural fairness were therefore respected in this case and her first ground of review accordingly fails.

II. Was the Delegate's Decision Reasonable?

[28] As concerns the second ground raised by Ms Kaczor, it is undisputed that the standard applicable to the review of the decision of the ministerial delegate in this case is reasonableness (see e.g. *Clue v Canada (Attorney General)*, 2011 FC 323, 200 ACWS (3d) 4 [*Clue*] at para 14 and *MacDonnell* at para 29). The hallmarks of a reasonable decision are that it be justified, transparent and intelligible and that the result reached fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[29] Section 4.8 of the *Aeronautics Act*, RSC 1985, c A-2, the provision under which TSCs are granted, affords broad discretion to the Minister to grant or refuse a TSC, providing that “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”. Those purposes include promotion of aviation security (see e.g. *Fontaine v Canada (Attorney General)*, 2007 FC 1160, 313 FTR 309 at para 26 [*Fontaine*]).

[30] In exercising his or her discretion under Section 4.8 of the *Aeronautics Act*, the Minister (or the ministerial delegate) may refuse or revoke a TSC where there are reasonable grounds to believe that an applicant may be prone or induced to commit or assist an act that may unlawfully interfere with civil aviation, which involves an assessment of the person's character or propensities (see e.g. *Clue* at para 15). These propensities may reasonably be determined to provide the basis to refuse or revoke a TSC where the applicant has faced criminal charges that did not result in a conviction or where the applicant has been associated with those considered to be a security threat.

[31] For example, in *Clue*, Justice Barnes upheld the refusal of a TSC to an applicant who had been charged with (but not convicted of) being in possession of stolen property and who was suspected of having placed a gun aboard an aircraft in circumstances where there was insufficient proof to lay charges against the applicant. In *Fontaine*, Justice Shore upheld a decision to refuse a TSC based on an individual's affiliation with known members of a criminal organization. In both cases, the proof fell well below the level required for a criminal conviction.

[32] In the present case, I believe that there was sufficient information before the Minister's delegate for the delegate to have reasonably concluded that Ms Kaczor might have been prone or induced to commit or assist an act that may unlawfully interfere with civil aviation. This, as Justice Barnes noted in *Clue* at para 20, is a low standard of proof. The delegate was not required to have proof on the criminal standard that the Ms Kaczor had a close relationship with the individuals referred to above, that she was aware of their criminality, that she continued to associate with them or that she would commit an act or assist in the commission of an act that

may unlawfully interfere with civil aviation. Rather, all that was required was a reasonable basis for belief that Ms Kaczor might have been prone or induced to commit or assist an act that may unlawfully interfere with civil aviation.

[33] In my view, the Minister's delegate was entitled to find on the basis of the evidence before her that Ms Kaczor might have been such a potential security threat on the basis of her past relationship with members of the Independent Soldiers and Hells Angels. Such relationships, by definition, give rise to a security risk, as Justice Shore found in *Fontaine*. The mere passage of time since the last of the events with which Ms Kaczor was reproached did not mandate an opposite conclusion, especially in light of the explanation that Ms Kaczor provided.

[34] In her letter responding to Transport Canada, Ms Kaczor did not dispute her past associations and provided explanations that were at odds with the information in her TSC application. More specifically, in her application she made no mention of having worked in the nightclub industry or at the Tantra lounge when asked to list her prior employment. However, in her letter to Transport Canada, Ms Kaczor claimed she had worked at the Tantra lounge. She also stated in her letter that she had moved around a lot and had a number of different roommates but this is not consistent with the information provided in her application, in which she only listed three previous addresses.

[35] Moreover, in her letter to Transport Canada, Ms Kaczor provided no explanation for several of the instances of her known interactions with Independent Soldier members. For example, she did not explain why one was seen using her car, why she could not recall with

whom she was living in June of 2008 or why she arrived at Tantra nightclub with members of the Independent Soldiers if she only interacted with them through her employment there.

[36] Based on this, there were reasonable grounds for legitimate concern about Ms Kaczor's trustworthiness, suitability and reliability. It is therefore not possible to say that the reasons in this case lack justification, transparency and intelligibility or that the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. In short, there was more than ample basis for the delegate to have been reasonably concerned about the security risk that Ms Kaczor might pose in light of her prior associations and failure to account for them. Thus, the decision to refuse her a TSC is reasonable.

III. Conclusion

[37] This application for judicial review will therefore be dismissed. The parties concurred that costs should follow the event and agreed that they should be fixed in the lump sum amount of \$700.00. I concur that this amount is appropriate in this case and therefore award costs to the respondent in the amount of \$700.00.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed; and
2. Costs are fixed on a lump sum basis in the amount of \$700.00, inclusive of taxes and disbursements, and are to be paid by the applicant to the respondent.

"Mary J.L. Gleason"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1759-14

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PLACE OF HEARING: CALGARY, ALBERTA

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