

Federal Court



Cour fédérale

Date: 20160426

Docket: T-2018-15

Citation: 2016 FC 469

Ottawa, Ontario, April 26, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ZAHID SATTAR

Applicant

and

CANADA (MINISTER OF TRANSPORT)

Respondent

JUDGMENT AND REASONS

[1] This a judicial review of a decision of a delegate of the Minister of Transport [the Minister] dated November 6, 2015, cancelling the Applicant's Transportation Security Clearance [TSC] at Vancouver International Airport pursuant to section 4.8 of the *Aeronautics Act*, RSC, 1985, c A-2 [the Act]. For the reasons that follow, I would dismiss the application.

I. Background

[2] The Applicant, Zahid Sattar, has been an employee of Securiguard Services Ltd. at the Vancouver International Airport since 1999. He currently holds the position of Airside Safety Escort, which requires that he hold a restricted area identity card [RAIC]. A RAIC can only be acquired after having received security clearance under the Transport Canada Security Clearance Program [TSCP] (*Canadian Aviation Security Regulations*, 2012, SOR/2011-318, subsections 165(a), 146(1)(c); *Transportation Security Clearance Program Policy*, Article II.1 [TSCP Policy]).

[3] The Applicant obtained a TSC and a RAIC in 2004, which have been renewed several times since.

[4] The TSCP's objective is to prevent unlawful interferences with civil aviation. Specifically, it prohibits certain individuals from uncontrolled access to airports' restricted areas, including any individual who the Minister reasonably believes, on a balance of probabilities, may be prone or induced to commit an act, or assist or abet any person to commit an act, that may unlawfully interfere with civil aviation (TSCP Policy, Article I.4).

[5] The Minister has unfettered discretion to grant, refuse to grant or suspend a security clearance under section 4.8 of the Act. In applying this discretion, the Minister relies on the TSCP Policy (*Meyler v Canada (Attorney General)*, 2015 FC 357 at para 3 [Meyler]; *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 26 [Henri]).

[6] The TSCP Policy outlines the process to be followed in the case of a TSC refusal, cancellation or suspension, including the affected person's right to be given notice of the allegations and a right to make submissions. The matter is initially referred to an Advisory Body, which in turn makes a recommendation to the Minister, or his or her delegate. Upon receipt of the Advisory Body's recommendation, the Minister makes the final determination whether to refuse or cancel an individual's TSC.

[7] By letter dated May 12, 2015 [the May Letter], Transport Canada informed the Applicant that as a result of adverse information, his suitability to hold a TSC was being reviewed. The May Letter set out the concerning information obtained from an RCMP Law Enforcement Record Check Report [LERC Report]. It encouraged the Applicant to provide additional information and explain the following six incidents:

- i. In 2005, the Applicant was listed as the new owner of the Players Club bar in Surrey, known to be frequented by Hells Angels' members;
- ii. In November 2005, the Applicant was identified at a Hells Angels' event at the Players Club;
- iii. In August 2009, the Applicant was a passenger in a vehicle stopped by RCMP for a traffic violation, along with three individuals;
- iv. In March 2010, police identified the Applicant in a bar with individuals known to be current or past gang associates and ejected them under the Bar Watch Program;
- v. In July 2010, the RCMP observed the Applicant and another individual, who was linked to Indo-Canadian gang members, attempting to evade police detection and when

identified, the Applicant was intoxicated and belligerent with police: he was arrested, and soon afterwards released; and

- vi. In March 2011, police learned that the Applicant was in Penticton to attend a stag for a UN Gang member.

[8] The May Letter also provided details of ten subjects with whom the Applicant associated in the above situations who were tied to various criminal organizations and who had committed significant crimes, including drug trafficking, homicide, assault, possession of a scheduled substance for the purpose of trafficking, and possession of a prohibited weapon.

[9] The Applicant contacted Transport Canada and requested to appear in person, but was advised his submissions must be in writing.

[10] On July 9, 2015, the Applicant responded to Transport Canada by letter. He described personal details regarding his work and education history; his strong connections with his family, local Mosque and community; his acquaintances; and his personal life. In specific reply to the May Letter's noted concerns, the Applicant explained he was not associated or involved with any criminal activity, and provided the following details:

- i. Regarding the Players Club, he had paid a deposit with the intention of purchasing the club but the sale did not complete. In his experience, members of the Hells Angels did not frequent the Players Club;

- ii. Regarding the November 2005 Hells Angels' event, the Applicant had been called to the bar as its manager to deal with police: he had no knowledge the event that night was hosted by the Hells Angels;
- iii. With respect to the incident of March 2010, the Applicant explained he was ejected from the bar after speaking with individuals who simply recognised him from his DJ work;
- iv. The July 2010 allegation was a misunderstanding: the Applicant was working as a DJ and was having a drink behind the bar with a childhood acquaintance. When approached by police, he claims he felt discriminated against, but maintains he was not drunk, did not attempt to evade police and was not belligerent;
- v. He attended the stag party of an acquaintance, unknowing of the bachelor's alleged gang connections; and
- vi. The Applicant could not identify any of the subjects by their description, but denied that any family members were gang associates.

[11] The Applicant also provided supporting documentation that included 12 personal reference letters, a thank you letter to Vancouver International Airport mentioning the Applicant, a letter from an Islamic studies institute thanking the Applicant for financial contributions, and a copy of the Players Club Liquor License from November 2005.

[12] On September 22, 2015, an Advisory Body, comprised of five Transport Canada officials, reviewed the Applicant's submissions and file. Seven other non-voting individuals were present. The Advisory Body recommended that the Minister cancel the Applicant's TSC

based on LERC Report details about his association with four gangs and ten individuals associated with those gangs.

[13] The Advisory Body found it reasonable to believe that the Applicant knew he was associating with gang members, and that the frequency and history of the Applicant's associations to the ten individuals demonstrated the unlikelihood of mere coincidence. It also considered the Applicant's submissions to be dismissive, lacking personal accountability, and minimizing of each situation. Moreover, the discrepancies between the LERC Report and the Applicant's submissions caused them to question his credibility.

[14] By letter dated November 6, 2015, the Minister, through its delegate Ms. Hensler-Hobbs (Director General of Aviation Security), informed the Applicant that his TSC had been cancelled [the Decision]. The Decision was based upon review of the Applicant's file, the May Letter, the Advisory Body's recommendation, the TSCP Policy and the Applicant's submissions.

[15] The Decision states that the Applicant's associations raised concerns regarding his judgement, trustworthiness and reliability. The Applicant was listed as owner of the Players Club, which police know the Hells Angels frequent, and the Applicant attended a Hells Angels' event there. In addition to this association with the Hells Angels, the Applicant is associated with individuals linked to three other criminal organizations: nine individuals linked to the DUHRE Crime group, one individual associated with Indo-Canadian gangs and one UN Gang member. The Minister concluded that the frequency and history of the Applicant's associations to people within these crime groups indicate that these associations are not mere coincidence. As well, the

association of the Applicant, a security clearance holder, to individuals involved in serious criminal activities, endangers airport security.

[16] The Decision notes that the Applicant's submission was insufficient to address the Minister's concerns.

[17] The Minister thus cancelled the Applicant's security clearance, concluding that there was reason to believe, on a balance of probabilities, that the Applicant may be prone or induced to commit and act, or assist or abet an individual to commit an act, that may unlawfully interfere with civil aviation.

II. Issues

[18] The issues are:

- A. Did the Minister breach any principle of procedural fairness in cancelling the Applicant's TSC?
- B. Was the Minister's Decision to cancel the Applicant's TSC reasonable?

III. Standard of Review

[19] The standard of review for procedural fairness is correctness. The substantive elements of the Minister's Decision will be reviewed on the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Clue v Canada (Attorney General)*, 2011 FC 323 at para 14).

IV. Analysis

[20] The relevant legislation is attached as Annex A.

A. *Did the Minister breach any principle of procedural fairness in cancelling the Applicant's TSC?*

[21] The Applicant submits that since the Decision affects his livelihood, he is entitled to a greater level of procedural fairness (*Xavier v Canada (Attorney General)*, 2010 FC 147 at para 13; *Meyler*, above, at para 26). While there is no guaranteed right to an oral hearing, the Applicant submits that procedural fairness requires an oral hearing or at least an opportunity to clarify conflicting information where a decision rests on credibility.

[22] The Applicant also argues the Decision was unfair, as he did not know the case he had to meet. The Applicant was not informed the Minister was reviewing his trustworthiness, judgment and reliability, or that his likelihood of being prone or induced to commit an unlawful act or to assist or abet an individual in interfering with aviation was at issue.

[23] Moreover, the Applicant submits that the presence of two RCMP officers as non-voting attendees at the Advisory Body meeting denied him of a meaningful opportunity to respond. He contends that presumably those officers provided further insight into the LERC Report or security concerns, and that it is unfair to permit one side to bolster their allegations while denying that same opportunity to the Applicant. He was not present, nor apprised of concerns arising at the meeting or permitted to provide further information following those discussions.

[24] I find that the Applicant's right to procedural fairness was respected for the reasons that follow.

[25] The case law has established that where an existing security clearance is being revoked, the duty of fairness, although slightly more than minimal, is still on the lower end of the spectrum (*Brown v Canada (Attorney General)*, 2014 FC 1081 at paras 84-85 [*Brown*]; *Pouliot v Canada (Transport)*, 2012 FC 347 at paras 9-10 [*Pouliot*]).

[26] The Minister enjoys a broad discretion in determining whether to grant, refuse to grant or suspend security clearances and ensuring the public safety under section 4.8 of the Act (*Fontaine v Canada (Transport Safety and Security)*, 2007 FC 1160 at para 80).

[27] Any dispute over the level of procedural fairness due in this context has been recently considered by the Federal Court of Appeal: procedural fairness demands only that persons in the Applicant's situation be provided with a meaningful opportunity to respond to the facts alleged against them, and for that response to be considered. There was no obligation on the Minister or Advisory Board to provide the Applicant an oral hearing or interview (*Henri*, above, at para 35).

[28] Additionally, I disagree with the Applicant that the Minister's decision turned on the Applicant's credibility: it was but one of many issues the Advisory Body noted.

[29] Nothing in the process followed in rendering the Decision suggests the duty of fairness owed the Applicant was breached. The procedures designated by the TSCP Policy were

observed: the Applicant was advised of the allegations in the LERC Report with sufficient disclosure to respond, which he did. The Advisory Body reviewed the adverse information and the Applicant's submissions and made a recommendation to the Minister. In light of this recommendation and upon review of the Applicant's file, the Minister made a final determination to cancel the Applicant's TSC.

[30] Moreover, as stated by Justice Catherine Kane in *Salmon v Canada (Attorney General)*, 2014 FC 1098 at para 60:

In addition, neither the Advisory Body or the Director General had a duty to give the applicant a second opportunity to respond to concerns that remained after considering his submissions upon making its decision (*Lorenzen*, above, paras 51-52). Procedural fairness does not require an ongoing opportunity to respond to the remaining concerns of the decision-maker.

[31] Nor was the Minister obliged to inform the Applicant of each and every particular ground upon which he may be denied security clearance (*Pouliot*, above, at paras 12-14).

[32] The presence of non-voting attendees at the Advisory Body meeting did not violate procedural fairness. The Record of Discussion from the meeting illustrates that the Advisory Body considered the LERC Report, which was detailed to the Applicant in the May Letter. The Applicant has provided no basis to support his claim that the non-voting attendees provided additional factual allegations against him to the Advisory Body. Nor is there anything in the record to support that assertion. Where the record indicates the non-voting attendees did nothing more than address factual information of which the Applicant had prior knowledge, the

requirements of procedural fairness have not been breached (*Jada Fishing Co v Canada (Minister of Fisheries & Oceans)*, 2002 FCA 103 at para 17).

B. *Was the Minister's Decision to cancel the Applicant's TSC reasonable?*

[33] The Applicant argues that the Minister's conclusion that he may pose a risk to aviation transportation because he could be suborned by his alleged associates is unreasonable on the grounds that the Minister failed to give sufficient or any weight to the Applicant's submissions and made the Decision without sufficient factual basis.

[34] The Applicant states that since the allegations in the LERC Report are hearsay in nature, it was unreasonable to favour it over his submissions without providing justification why. He cites the decision in *Ho v Canada (Attorney General)*, 2013 FC 865 at para 28 [*Ho*], in which Justice Sean Harrington found that the Minister's statement that Mr. Ho's submissions did not contain sufficient information to address concerns was "in and of itself insufficient and opaque" and did not meet the transparency standard outlined by *Dunsmuir*. While the Court acknowledged that a decision may be justified on the record (*NLNU v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62), there was no indication that Mr. Ho's explanations were actually considered.

[35] The Applicant analogises that reasoning to the present case. Notwithstanding his detailed submissions that were supported by reference letters, the Applicant argues that the Advisory Body found them "dismissive" and minimizing of the situations. In the event of discrepancies, the Advisory Body preferred the LERC Report without explaining why. The Minister's

conclusion that the Applicant was not credible on the basis of discrepancies between his account and the LERC Report was also unreasonable, as there were no indicia to support the inference the Applicant was untruthful. Moreover, the Applicant's references attested to his character and his non-involvement in gangs, yet the Minister gave no reasons for questioning their credibility and afforded them no weight.

[36] Further, the Applicant argues that nothing about the events listed in the LERC Report, individually or together, leads to a reasonable conclusion the Applicant is at risk of being suborned to harm aviation transport security. The Applicant submits there is abundant evidence to the contrary: his references attested to the Applicant's positive reputation, trustworthiness, commitment to his work in security, his strength of character, and his desire to be a role-model.

[37] For purposes of revocation of a TSC the standard of proof requires only a reasonable belief, on a balance of probabilities, that a person may be prone or induced to commit an act (or to assist such an act) that may unlawfully interfere with civil aviation (TSCP Policy, Article I.4). This is a low standard involving a forward-looking propensity to do such an act. In light of the TSCP's purpose of protecting public safety, and the Minister's broad discretion in carrying out that aim, I find the Decision fell within the range of acceptable outcomes.

[38] In arguing that the Minister failed to give sufficient or any weight to the Applicant's submissions, the Applicant is essentially requesting that the Court re-evaluate the evidence. It is not the Court's role on judicial review to reweigh the evidence, or to substitute its views for

those of the responsible decision-maker by preferring the Applicant's evidence over the LERC Report.

[39] While I acknowledge and accept the Court's finding in *Ho*, above, that simply rejecting the Applicant's reasons without anything further failed to meet the requirement that reasons be transparent, I do not find it applicable here. Although the Minister did not individually assess each and every discrepancy in explaining why she preferred the LERC Report over the Applicant's submissions, she gave reasons explicitly rejecting several of the Applicant's explanations as unreasonable. It was open to the Advisory Body and to the Minister to find the Applicant's evidence unsatisfactory to quell concerns surrounding his trustworthiness, judgement and propensity for influence.

[40] As noted by the Advisory Body and in the Decision, it was the frequency and history of the Applicant's association over six years with ten individuals who had committed serious crimes, and who were connected to four violent criminal organizations, that led to the belief that those associations were more than mere coincidence, and the ultimate decision to cancel the Applicant's TSC.

[41] While I am sympathetic to the implications this decision will have on the Applicant's employment, the Minister is entitled to err on the side of public safety when balancing it against the Applicant's interests in accessing airport restricted areas – granted as a privilege, not a right (*Brown*, above, at paras 64, 70-71, 74; *Clue*, above, at para 20).

[42] I find that the Decision is justified by transparent and intelligible reasons and that it falls within the range of reasonable acceptable outcomes based on the evidentiary record before the Advisory Body and the Ministerial delegate, and considering the Minister's broad, forward-looking perspective and role in ensuring public safety. Accordingly, this application is dismissed.

[43] The parties agreed at the hearing that the successful party shall be entitled to \$2000 in costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;
2. Costs to the Respondent in the amount of \$2000.

"Michael D. Manson"

Judge

ANNEX A

Aeronautics Act, RSC, 1985, c A-2

Security Clearances

Granting, suspending, etc.

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.

Habilitations de sécurité

Délivrance, refus, etc.

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

Canadian Aviation Security Regulations, 2012, SOR/2011-318

Issuance of Restricted Area Identity Cards

Issuance criteria

146 (1) The operator of an aerodrome must not issue a restricted area identity card to a person unless the person ...

(c) has a security clearance;

Control of Access to Restricted Areas

Unauthorized access prohibition

165 A person must not enter or remain in a restricted area unless the person

(a) is a person to whom a restricted area identity card has been issued; or ...

Délivrance des cartes d'identité de zone réglementée

Critères de délivrance

146 (1) Il est interdit à l'exploitant d'un aérodrome de délivrer une carte d'identité de zone réglementée à une personne à moins qu'elle ne réponde aux conditions suivantes :

c) elle possède une habilitation de sécurité;

Contrôle de l'accès aux zones réglementées

Interdiction d'accès non autorisé

165 Il est interdit à toute personne d'entrer ou de demeurer dans une zone réglementée à moins qu'elle ne soit, selon le cas :

a) titulaire d'une carte d'identité de zone réglementée; ...

FEDERAL COURT
SOLICITORS OF RECORD

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