Federal Court Cour fédérale

Date: 20160809

Docket: T-2041-15

Citation: 2016 FC 907

Ottawa, Ontario, August 9, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

RAJKAMAL SINGH MANGAT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application for judicial review of a decision of a delegate of the Minister of Transport, the Director General of Aviation Security [Minister's Delegate], dated November 2, 2015, which refused the Applicant a Transportation Security Clearance [TSC] at the Lester B. Pearson International Airport in Toronto, Ontario and subsequently, the Vancouver

International Airport in Richmond, British Columbia, pursuant to s 4.8 of the *Aeronautics Act*, RSC, 1985, c A-2 [*Aeronautics Act*].

II. BACKGROUND

[2] The Applicant was born in Vancouver, British Columbia. He is a Canadian citizen and is 39 years old.

[3] The Applicant has worked full-time for Air Canada since March 24, 1997. He is a Licensed Aircraft Maintenance Engineer and was first granted his Aircraft Maintenance Engineer Licence [Licence] in 1999. The Applicant's Licence was previously granted for a 6-year term and is set to expire on June 30, 2017.

[4] In order to perform his duties as an Airplane Mechanic or Airplane Station Attendant, the Applicant submits that he is required to obtain and maintain a Restricted Area Identification Card [RAIC] and Airside Vehicle Operators Permit [AVOP].

[5] As per s 165(a) of the *Canadian Aviation Security Regulations*, 2012 (SOR/2011-318), only individuals holding a RAIC can access listed Canadian airports, including the Toronto Pearson International Airport, without an escort. To obtain a RAIC, an applicant must first apply to Transport Canada for a security clearance under the Transport Canada Security Clearance Program [TSCP]. The Minister of Transport has discretion under s 4.8 of the *Aeronautics Act* in choosing to grant, refuse, suspend or cancel a security clearance.

[6] The TSCP subjects applicants for security clearance to background checks including, but not limited to: a Royal Canadian Mounted Police [RCMP] fingerprint-based criminal record check; a Canadian Security Intelligence Service check; and a check of relevant files of law enforcement agencies. Where a background check raises concern, an Advisory Body will review an individual's suitability for a security clearance and make a recommendation to the Minister. A final determination on the status of an individual's security clearance will then be made.

[7] On March 5, 2015, Transport Canada wrote to the Applicant to advise him that it had become aware of adverse information that raised concerns about his suitability for a security clearance [March Letter]. The March Letter described information from a January 9, 2015 RCMP Law Enforcement Record Check [LERC] related to four specific events involving the Applicant:

1. In March 2003, the Applicant was charged with assault and mischief after causing a disturbance at a fast food restaurant with another male. Both charges were stayed in 2003 for unknown reasons;

2. In September 2008, the Applicant was charged with theft under $5000 following a shoplifting incident. However, the RCMP was not able to secure sufficient information from store security personnel and the charge was withdrawn;

3. In September 2008, the Applicant was charged with uttering threats, including death threats, to fellow employees. The charges were withdrawn in 2009 when the Applicant entered into two one-year peace bonds;

4. In June 2012, the Applicant was charged again with uttering threats to tenants of a residence which the Applicant appeared to be attempting to break into. The charges were stayed later in 2012 as the victims did not pursue them.

[8] In the March Letter, Transport Canada invited the Applicant to provide, within 20 days, additional information about the incidents, as well as any other relevant information, explanation or extenuating circumstances.

[9] On March 30, 2015, the Applicant replied to the March Letter and provided background information on his personal life as well as his family and work history. He admitted to each of the incidents noted to be of concern to Transport Canada, but claimed his involvement was less than they had described. Specifically, he said that it was actually his ex-wife who stole the clothes that led to the 2008 shoplifting charge, that it was his brother who uttered the threats in 2008, and that he was yelling at squatters and made no attempt to break into the property in question in 2012.

[10] On June 23, 2015, an Advisory Body, made up of senior Transport Canada officials, reviewed the Applicant's submissions and file, detailing the four incidents of theft, mischief, uttering threats and violence and recommended that the Minister not grant the Applicant a security clearance because, on a balance of probabilities, the Applicant "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."

III. DECISION UNDER REVIEW

[11] On October 28, 2015, the Minister's Delegate reviewed the Applicant's file, including: the information in the March Letter; the Advisory Body's recommendation; the TSCP policy and the Applicant's submissions. She ultimately refused to grant the Applicant a security clearance, stating that the information relating to the Applicant's involvement in criminal activities related to theft, mischief, uttering threats and violence raised concerns regarding his judgment, trustworthiness and reliability.

[12] The Minister's Delegate noted the following:

- In the 2008 shoplifting incident, the Applicant denies his involvement, stating that it was his ex-wife who stole the items. However, the Applicant clearly had some involvement as he was detained and ultimately charged.
- In the 2008 incident involving uttering threats, the police report indicates that the Applicant uttered death threats to hit two co-workers over the head with a 2x4 and slit their throats. The Applicant said that it was actually his brother who uttered the threats but decided to lie to the courts and accept the charges to protect his brother's business.

[13] The Minister's Delegate says that, after her review, she had reason to believe 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.

[14] On November 2, 2015, Toronto Pearson International Airport and the Applicant were notified of the Decision refusing to grant the Applicant's application for a TSC.

IV. ISSUES

[15] The Applicant submits that the following points are at issue in this application:

1. On its merits, was the Minister's Delegate's Decision to refuse the Applicant's security clearance reasonable?
2. What is the level of procedural fairness required when refusing a security clearance under the *Aeronautics Act*, and did the Minister's Delegate's satisfy her duty of procedural fairness in this case?

V. STANDARD OF REVIEW

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where

the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[17] Looking to the first issue raised, the parties agree that in the context of TSCs, the standard of review that will apply to the merits of the Minister's Delegate's Decision is that of reasonableness. This has been confirmed by the jurisprudence addressing the cancellations or refusals of TSCs: *Brown v Canada (Attorney General)*, 2014 FC 1081 at para 41 [*Brown*]; *Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59 at para 11 [*Thep-Outhainthany*]; *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 16 [*Henri*].

[18] As regards the second issue, I again agree with both parties that standard of review with respect to whether there has been a breach of procedural fairness is correctness: *Lorenzen v Canada (Transport)*, 2014 FC 273 at para 12 [*Lorenzen*].

[19] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above,

at para 47, and *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[20] The following provisions of the *Aeronautics Act* are relevant in this proceeding:

Definitions	**Définitions**
3 (1) ***security clearance*** means a security clearance granted under section 4.8 to a person who is considered to be fit from a transportation security perspective;	3 (1) ***habilitation de sécurité*** Habilitation accordée au titre de l'article 4.8 à toute personne jugée acceptable sur le plan de la sûreté des transports.
…	**…**
Granting, suspending, etc.	**Délivrance, refus, 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.	4.8 Le ministre peut, pour l'application de la présente loi, accorder, refuser, suspendre ou annuler une habilitation de sécurité.

VII. ARGUMENTS

Issue 1 – Reasonableness of the Minister's Delegate's Decision

(a) Applicant

[21] The Applicant says that the Minister's Delegate's Decision to refuse the Applicant's TSC was not reasonable and that, pursuant to the definition of "security clearance" in the *Aeronautics Act*, he is a person fit to be granted a TSC.

[22] The Applicant submits that the public interest with respect to aviation security is furthered by enabling him, an experienced, skilled and valued contributor to the economy, to continue working in the field of Aircraft Maintenance and Aircraft Stationing: *Singh Kailley v Canada (Transport)*, 2016 FC 52 [*Singh Kailley*]. The Minister can only confirm the cancellation of a security clearance when reasonable grounds for suspicion exist, not whenever the Minister thinks it's appropriate.

[23] There is no sufficiently reliable and trustworthy evidence for the Minister's Delegate to reasonably 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 litigation.

[24] The Applicant says he endeavoured to tell the truth and address all the circumstances in his reply to the March Letter from the Minister, explaining the following:

1. The Applicant has two young children he is raising and supporting;

2. The Applicant has joint custody and equal parenting time of his young children on alternating weeks;

3. The Judge hearing his family court matter acknowledged the respect the Applicant showed to the Court, and its procedure and process;

4. The Applicant has been working in the airline industry since 1997, without incident;

5. The Applicant has worked on the Prime Minister's aircraft;

6. During his employment at YYZ, the Applicant would often have to fly in the cockpit from YVR to YYZ and from YYZ to YVR, and flying with the pilot and co-pilot requires the utmost responsibility;

7. As an Airplane Mechanic, the Applicant traveled on short notice to various Canadian International Airports to assess the structural integrity of various aircrafts and facilitate any required repairs;

8. Regarding the 2003 incident, the Applicant apologized for his actions. This matter was not representative of who the Applicant is, and took place a long time ago;

9. Regarding the 2008 incident, the Applicant explained that he did not steal anything and was unlawfully detained because his wife had the children;

10. Regarding the 2009 peace bond, the Applicant said "This is the truth and I can't sugar coat it." The Applicant attended counselling services as a result, which helped him gain insight into the matters he was dealing with;

11. Regarding the 2012 incident, the Applicant was prepared to proceed to trial, and attended Court on the scheduled trial date, and the alleged complainants did not attend Court, when attendance would inherently be pursuant to an order of the Court by way of personal service subpoena;

12. The Applicant asserted that he has become a more responsible person and his TSC is important to him, his career and his ability to support himself and his children.

[25] The Applicant submits that not enough weight was attributed to the fact that he was allowed to maintain his temporary TSC at the Vancouver International Airport, which provides reliable and trustworthy evidence that he is not a risk to the security of aviation transportation. Similarly, inadequate weight was granted to the Applicant's roots in his community and in

Canada, the nature of his work, his training and expertise, his prospects of advancement, and his financial obligations and family circumstances. Further, the refusal of his security clearance application was not the result of previous, recent or ongoing associations or suspected associations, with a criminal organization, or persons associated with drug trafficking or other ongoing criminal activity.

[26] Therefore, the Applicant claims that he should be granted his TSC as he falls within the definition of "security clearance."

(b) Respondent

[27] The Respondent submits that the Decision to cancel the Applicant's security clearance was reasonable as it was justified, transparent and intelligible. Furthermore, the Decision was consistent with the TSCP and the *Aeronautics Act*'s three-fold overall approach to security which involves: preventing unlawful acts of interference with civil aviation; preventing uncontrolled entry into a listed airport's restricted area by individuals who pose any risk to transportation security; and only granting clearances to individuals who meet Transport Canada's standards and who possess judgment, trustworthiness and reliability.

[28] While the Applicant argues that the Decision was unreasonable because it was founded on erroneous facts and that the Minister's Delegate unreasonably exercised her discretion, the Respondent asserts the opposite: (1) the Minister's Delegate based her Decision on an adequate factual basis, and she can rely on the background report without verifying or investigating its

allegations; and (2) the Minister's Delegate reasonably exercised her broad, forward-looking discretion.

[29] First, the Minister's Delegate can exclusively rely on RCMP or other background reports in making decisions under s. 4.8 of the *Aeronautics Act* and does not need to verify or further investigate the report's contents: *Christie v Canada (Transport),* 2015 FC 210 at para 23 [*Christie*]. This is the case even where the background report contains information that includes hearsay or summary material: *Singh Kailley*, above, at paras 28-29; *Henri*, above, at para 40. Even while the jurisprudence establishes that the Minister's Delegate had no obligation to independently investigate or verify background check reports, the Respondent submits that the Applicant confirmed much of its contents anyway in his reply to the March Letter, admitting to all four incidents of concern.

[30] Second, as regards the Minister's Delegate's discretion under the *Aeronautics Act*, the Respondent says that the jurisprudence that the Applicant relies upon (*Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 [*Farwaha*]) is from the marine security regime, i.e. security clearance under the *Marine Transportation Security Regulations*, SOR/2004-14 and the *Marine Transportation Security Act*, SC 1994, c 40. A different standard applies under the *Aeronautics Act*, which operates to give the Minister and his delegates a wide, forward-looking discretion to cancel a security clearance and to consider any relevant factor: *Brown*, above, para 62. Therefore, the *Aeronautics Act* does not require the Minister's Delegate to find that "reasonable grounds for suspicion exist" before making a decision. Rather, it allows her to consider and base her decision on any factor, including whether

the Applicant may unlawfully interfere with civil aviation based on his previous behaviour and his lack of judgment, trustworthiness and reliability.

[31] The Respondent further submits that when the Minister's Delegate and the Advisory Body were considering the Applicant's behaviour, they could review and rely on the Applicant's dated behaviour and four events involving stayed and withdrawn charges because those events demonstrate that the Applicant may unlawfully interfere with civil aviation: *Christie*, above, at paras 23-25.

[32] While the Minister's analysis in the security clearance context is cumulative (see *Sidhu v Canada (Citizenship and Immigration)*, 2016 FC 34 at para 19), the Applicant has admitted to lying to the police and judiciary. The Respondent asserts that this alone is sufficient to demonstrate the Decision's reasonableness.

[33] Furthermore, the Respondent says that any temporary access card that the Vancouver International Airport has issued to the Applicant has nothing to do with his application at the Pearson International Airport in Toronto and was not information that was before the Advisory Body or the Minister's Delegate.

Issue 2 – Procedural Fairness

(a) Applicant

[34] The Applicant submits that the Minister's Delegate's Decision to refuse his TSC denied him natural justice and was made in a perverse or capricious manner without regard to the evidence.

[35] The Applicant claims that he is entitled to a higher degree of procedural fairness than a mere job applicant or a first time TSC applicant as his ability to continue to perform his job duties for his long standing employer will be significantly impacted by the Minister's Delegate's refusal.

[36] The Applicant suggests that the Minister's Delegate erred in law by not considering the five factors that the Supreme Court of Canada said ought to be considered to determine procedural fairness: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23-27 [*Baker*]. Specifically, the Applicant says that the Advisory Body did not give sufficient weight to the importance of the decision to him and other individuals affected, or the legitimate expectations of the Applicant. Too much weight was placed on the unreliable and untested facts of the background check reports – information that the Applicant submits was not provided under oath and was not subject to cross-examination.

[37] Furthermore, the Applicant says that he was not given a meaningful opportunity to respond. Information from his response to the March Letter went ignored by the Advisory Body

and the Minister's Delegate and an email sent by the Minister on April 1, 2015 requesting any additional information that he would like to provide was a hollow attempt to buttress the procedural fairness he was entitled to. Finally, the Applicant argues that a further lack of procedural fairness resulted from the Decision itself which does not provide adequate and sufficient reasons.

(b) Respondent

[38] The TSCP policy setting out the procedure for granting or refusing a security clearance limits an individual applicant's procedural fairness rights: *Brown*, above, at paras 84-85. All that the Minister or the Minister's Delegate must do in making a decision is (1) not base it on an erroneous finding of fact or (2) not make it in a perverse or capricious manner or without regard for the relevant material. The Respondent argues that the Minister's Delegate in this case did neither and met the procedural fairness requirements she owed the Applicant.

[39] The Respondent says that the Minister's Delegate only had to provide the Applicant with the lowest level of procedural fairness: *Pouliot v Canada (Transport)*, 2012 FC 347 at para 9 [*Pouliot*]. Justice Mosley recently held that a slightly higher duty of fairness is owed to someone who has held their Transport Canada security clearance for some time: *Doan v Canada (Attorney General)*, 2016 FC 138 at paras 16-18. As someone who has not held any Transport Canada security clearance for any time, the Applicant is not, contrary to what he argues, entitled to any higher level of procedural fairness.

[40] In reaching the Decision, the Minister's Delegate used evidence that demonstrated that the Applicant may pose a risk to transportation and aviation security. She was not required to demonstrate whether the facts she relied on were true: *Canada (Attorney General) v Select Brand Distributors Inc*, 2010 FCA 3 at para 45; *Lorenzen*, above, at paras 52-53.

[41] The Minister's Delegate exceeded her procedural fairness obligation by informing the Applicant of the facts alleged against him and giving him the chance to respond. The March Letter provided the Applicant with a meaningful opportunity to make whatever submissions he felt would assist him. The Respondent asserts that the Applicant cannot now argue that he did not know the case against him.

[42] The Respondent says that the Minister's Delegate provided meaningful reasons, meeting the duty of procedural fairness. When reasons are provided, an applicant cannot argue that they are procedurally unfair; the challenge must instead be brought in regards to a substantive issue. This is not a stand-alone fairness issue: *Mitchell v Canada (Attorney General)*, 2015 FC 1117 [*Mitchell*].

[43] For all of the above reasons, the Minister's Delegate provided and exceeded the procedural fairness obligations.

[44] Finally, the Respondent submits that should the Court find that the Decision was not procedurally fair or was in some way unreasonable, it should be remitted back for reconsideration as *mandamus* orders cannot dictate how statutory discretion will be exercised:

Canada (Attorney General) v Arsenault, 2009 FCA 300 at para 32; *Ho v Canada (Attorney General)*, 2013 FC 865 at para 28.

VIII. ANALYSIS

A. *Introduction*

[45] It is obvious from the way this application has been presented that the Decision is of extreme personal and professional importance for the Applicant, particularly from the point of view of his family obligations.

[46] I say this because the Applicant raised his custody and parenting obligations in response to the March Letter, as well as his emphasis on his long involvement in the airline industry since 1997 and the fact that he regards himself as "an experienced, skilled and valued contributor to the Canadian economy."

[47] There are also indications in this application that the Applicant would like the Court to consider the whole matter *de novo* and order that he be granted a TSC.

[48] I say this because the Applicant argues that insufficient weight was given to various factors, because of the relief he seeks, and because he has submitted an affidavit with this application that refers to facts and evidence that were not before the Minister's Delegate and that go well beyond procedural fairness or jurisdiction issues.

[49] On the other hand, of course, this application also involves a heightened public interest and, as the decision of this Court in *Brown*, above, makes clear, the Minister is entitled to err on the side of public safety:

> [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.

[50] I have no doubt that this matter is extremely important to the Applicant but, in the end, the Applicant's family obligations can have little relevance for the matter in hand, and it is not the job of the Court to re-weigh evidence and substitute its own decision for that of the Minister's Delegate. With great sympathy for the Applicant and the position he now finds himself in as a result of the Decision, all the Court can do is review the Decision for a reviewable error and, if it finds one, return the matter for reconsideration. The Applicant's disagreement with the weight that was given, or not given, to certain factors is not a ground for reviewable error.

B. *Reasonableness*

[51] The Applicant makes the following assertions at paragraph 30 of this written submissions:

> 30. The Applicant submits that the "range of acceptable and rational solutions depends on "all relevant factors" surrounding the decision-making".
>
> 1. The Minister's decision is a matter of great importance to [the Applicant], affecting the nature of his work, his finances, and his prospects for advancement.
>
> 2. The decision concerns security matters. Wrong decisions can lead to grave consequences.
>
> 3. Security assessments involve some policy appreciation and sensitive weighings of facts.
>
> 4. The Minister's decision in this case requires assessments of risk based on whether reasonable grounds for suspicion exist.
>
> [footnote omitted]

[52] For the most part, these assertions are unsubstantiated or just plain wrong.

[53] Subsection 4.8 of the *Aeronautics Act* gives the Minister an unfettered discretion to consider any facts in deciding whether to grant, refuse, suspend or cancel a TSC. However, saying that security assessments "involve some policy appreciation and sensitive weighing of facts" is no justification for a conclusion that the Minister's Delegate did not appropriately weigh the facts, and the jurisprudence is clear that the Minister's Delegate does not have to consider whether reasonable grounds for suspicion exist.

[54] The case law is also clear that the Minister's Delegate can exclusively rely on RCMP or LERC reports without verifying or investigating the content of those reports. See *Christie*, above, at para 23. The Minister's Delegate can regard RCMP information as reliable and sufficient even if that information is hearsay and is not cross-checked. See *Henri*, above, at para 40. Much the same goes for information in a LERC report. See *Singh Kailley*, above, at paras 28-29.

[55] In fact, as Justice Shore made clear in *Singh Kailley*, above, information from the RCMP – including any hearsay or summary material – is entirely sufficient for security decisions and can be relied on exclusively.

[56] The Applicant's reliance on *Farwaha*, above is misplaced because *Farwaha* was a case involving the *Marine Transportation Security Act* and *Regulations*, which has a different security regime from the *Aeronautics Act*.

[57] As Justice Kane made clear in *Brown*, above, when addressing how s 48 operates, the *Aeronautics Act* does not require the Minister's Delegate to consider and find whether reasonable grounds for suspicion exist before making a decision:

> [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.

…

[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.

…

[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".

…

[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.
>
> …
>
> [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).

[58] The Applicant further argues that the circumstances under which his TSC application was refused were "not at the time the result of previous, recent or on-going associations, or suspected associations…" and the Decision was based upon dated, withdrawn and stayed criminal charges. Here again, the Applicant is simply ignoring the Court's jurisprudence on point. The Minister's Delegate can rely upon dated behaviour, even if that behaviour has ceased (see *Christie*, above, at paras 23-25), and dated behaviour includes any stayed and withdrawn criminal charges. See *Thep-Outhainthany*, above, at paras 18-20.

[59] The Applicant also argues that the fact that he was issued a temporary TSC at Vancouver International Airport in July 2015 "provides reliable and trustworthy evidence that [he] is not a risk to the security of aviation transportation, and which the Applicant respectfully submits should be attributed significant weight in these proceedings." Here again, the Applicant is asking the Court to re-weigh evidence.

[60] However, even if it were appropriate for the Court to do this, this temporary access card which stated "clearance pending" and "escort required" is no evidence whatsoever as to his judgment, trustworthiness and reliability, and was not, in any event evidence before the Minister's Delegate and so is irrelevant for purposes of this judicial review application.

[61] For the most part, the Applicant's submissions on the issue of reasonableness are no more than assertions of disagreement with the Decision that do not engage with the basis of the reasons and/or simply disregard the clear jurisprudence of this Court.

[62] At the hearing before me on July 21, 2016, the Applicant placed most emphasis on the fact that he has acknowledged his past problems and the Minster's Delegate failed to consider that he has gained in maturity and is now, in fact, a significant contributor to the public interest in safety. There is nothing to suggest that the Minister's Delegate overlooked any aspect of his submissions and, once again, the case law is clear that it is for the Minister to decide which factors to take into account. See *Brown*, above, at para 62 and *Fontaine v Canada (Transport)*, 2007 FC 1160 at para 78. It is for the Minister to decide which factors he considers important, not the Applicant or the Court.

C. *Procedural Fairness*

[63] The Applicant asserts as follows:

> The Applicant is entitled to the higher degree of procedural fairness than a mere job applicant or first time TSC applicant, and the duty of procedural fairness in these circumstances are akin to the highest duty of procedural fairness associated with someone who faces the revocation or non-renewal of their TSC, as their

> ability to continue to perform their job duties for their long standing employer will be significantly impacted by the Minister's Decision to refuse the Applicant the granting of a TSC.

[64] He then goes on to assert as follows:

> 56. The Applicant submits that the Advisory Board - Record of Discussion on June 23, 2015 did not properly or adequately address the factors listed in *Baker* at paras. 23 - 27, and therefore erred in law when refusing the Applicant's TSC.
>
> 57. The Applicant submits that the Advisory Board failed to give sufficient weight to the importance of the decision to him and individuals affected, and the legitimate expectations of the Applicant, in addition to the other requisite factors prescribed in *Baker*, given that his employment depends on being granted a TSC.
>
> 58. The Applicant submits the Advisory Board placed too much weight on the unreliable and untested facts provided in the LERC Report, and which information, and underlying information, the Applicant submits was not provided under oath (sworn or solemn affirmation) and was not subject to cross-examination.
>
> 59. The Applicant accepts that the Minister's email dated April 1, 2015 to the Applicant, the Applicant was advised "If there is **any further documentation** that you wish to provide, this is your opportunity to do so". However, the Applicant submits that no direction regarding the type of "any further documentation" was provided to the Applicant, nor did the Minister explain why any further documentation was required, since the Applicant had already provided a sincere, forthright, and honest response to the Minister's inquiry, and to which the Applicant endeavored to tell the truth and address all of the circumstances presented in the Minister's encouraged request to the Applicant on March 5, 2015.
>
> 60. The Applicant submits that since the Advisory Board - Record of Discussion (June 23, 2015) and the Decision of the Advisory Board (October 28, 2015) made no reference to the following information provided in the Applicant's March 30, 2015 response:
>
> 1. The Applicant has two young children, he is raising and supporting;

2. The Applicant has joint custody and equal parenting time of his young children on alternating weeks;

3. The Judge hearing his family court matter acknowledged the respect the Applicant showed to the Court, and its procedure and process;

4. The Applicant had been working in the airline industry since 1997, without incident;

5. The Applicant has worked on the Prime Minister's aircraft;

6. During his employment at YYZ, the Applicant would often have to fly in the cockpit from YVR to YYZ and from YYZ to YVR, and acknowledge flying with the pilot and co-pilot requires the utmost responsibility;

7. As an Airplane Mechanic, the Applicant traveled on short notice to various Canadian International Airports to assess the structural integrity of various aircrafts and facilitate any required repairs to such aircrafts;

8. Regarding the 2003 incident, the Applicant apologized for his actions, this matter was not representative of who the Applicant is, and took place a long time ago;

9. Regarding the 2008 incident, the Applicant explained that he did not steal anything and was unlawfully detained because his wife had the children;

10. Regarding the 2009 peace bond, the Applicant said "This is the truth and I can't sugar coat it." The Applicant attended counselling services as a result, which helped him gain insight into the matters he was dealing with;

11. Regarding the 2012 incident, the Applicant was prepared to proceed to trial, and attended Court on the scheduled trial date, and the alleged complainants did not attend Court, when attendance would inherently be pursuant to an order of the Court by way of personal service subpoena;

12. The Applicant asserted that he has become a more responsible person and his TSC is important to him, his career and his ability to support himself and his children.

Accordingly, the Applicant submits that the Minister did not "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 him or her".
>
> 61. Furthermore, the Applicant submits that he was not provided with a "meaningful" opportunity to respond because none of the aforementioned information was incorporated into the Advisory Board - Record of Discussion (June 23, 2015) and the Decision of the Advisory Board (October 28, 2015).
>
> 62. The Applicant submits that the Minister's April 1, 2015 email to the Applicant was a hollow attempt to buttress an atmosphere of procedural fairness that the Applicant was entitled to.
>
> 63. The Applicant submits the Decision of the Advisory Board dated October 28, 2015 that refused the Applicant's TSC failed to provide adequate and sufficient reasons for the Decision, and therefore denied the Applicant the meaningful opportunity to be heard.
>
> [footnotes omitted, emphasis in original]

[65] Some of this is not about procedural fairness, but if I extrapolate from it, it seems to me that the Applicant raises the following procedural fairness issues:

(a) He was not afforded a high enough level of procedural fairness in accordance with the *Baker*, above, factors;

(b) He was not allowed to meaningfully respond;

(c) The Minister's Delegate failed to provide sufficient reasons.

[66] The jurisprudence of the Court is clear that the Applicant was only entitled to the lowest level of procedural fairness. *Pouliot*, above, provides as follows:

> [9] The content of the duty of procedural fairness is largely informed by context, as outlined in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. Previous cases of this Court have found that the level of fairness owed in this context is minimal. 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 for the material before him: see *Motta v Canada (Attorney General)*, [2000] FCJ No 27 at para 13.
>
> [10] In cases in which an existing security clearance was either being revoked or not renewed, the standard has been found to be slightly higher, but still on the lower end of the spectrum. In *Rivet v Canada (Attorney General)*, 2007 FC 1175 at para 25, the Court held:
>
> > With these factors in mind, I agree with the respondent that the duty of procedural fairness in this case is more than minimal but does not require a high level of procedural safeguards (see, for example, *DiMartino v. Minister of Transport*, 2005 FC 635, [2005] F.C.J. No. 876 (F.C.) (QL), at paragraph 20). 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.

[67] The Applicant was only a first time applicant for a TSC and has not held any Transport Canada security clearances for any time. In any event, the record shows that the Applicant received a high level of procedural fairness in this case.

[68] In addition, the Decision in this case was not based upon any erroneous findings of fact, made in a perverse or capricious manner, or without regard for the material before the Minister's Delegate.

[69] The four events which were the basis of the Decision were clearly set out and communicated to the Applicant. He was free to respond in any way he saw fit. He did respond.

[70] Inadequate reasons are not a stand-alone ground of review. See *Mitchell*, above, at para 14 where Justice Southcott confirmed that "as long as reasons are provided, the duty of procedural fairness is met and the question for the Court is whether the conclusions reached were reasonable."

[71] Reasons were provided in this case so that procedural fairness was met.

D. *Inappropriate Affidavit*

[72] The Respondent objects to portions of the Applicant's affidavit on the following grounds:

> 32. On a judicial review, an applicant should only provide additional evidence relating to procedural fairness or jurisdictional issues. Most of the Applicant's Affidavit relates to neither procedural fairness nor jurisdiction. Therefore, this Court should strike those paragraphs in their entirety.
>
> 33. As Manson J. reiterated in *Peles v. Canada (Attorney General)*, a judicial review involving a cancelled Transport Canada security clearance, the Federal Court conducts judicial reviews using only the material before the Minister; indeed, affidavit evidence is usually only admissible on procedural fairness and jurisdictional issues. If an applicant's affidavit does not address either issue, a court should strike it out.
>
> 34. Paragraphs 5-11, 13-29, 35-37 do not relate to procedural fairness or jurisdictional issues. They summarize facts and attach evidence that were not before the decision-maker; they also contain impermissible opinion and argument.
>
> 35. Therefore, this Court should do as Manson J. did in *Peles* and strike them out in their entirety.
>
> 36. Paragraphs 2-4 & 12, summarize material that was before the decision-maker. Paragraphs 30 & 40-41 appear to relate to procedural fairness. And paragraphs 31-34, 38-39, & 42-43 summarize background information about this judicial review. As these paragraphs fit within the narrow admissibility exception, this Court should not strike them out.

> 37. In summary, this Court should strike paragraphs 5-11, 13-29, & 35-37 of the Applicant's affidavit and admit paragraphs 2-4, 12, 30, 31-34, 38-39, & 40-43.

[73] I have reviewed the affidavit and the portions objected to by the Respondent and I agree that they should be struck for reasons given by the Respondent.

[74] However, I have read the affidavit in full and, even if I were to admit it into evidence in full, it would not change my conclusions in this judgment.

E. *Costs*

[75] The parties have agreed that a fixed sum of $2,500.00 would be an appropriate award of costs in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. The Respondent shall have costs in the fixed amount of $2,500.00.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2041-15
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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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