

Federal Court



Cour fédérale

**Date: 20160815**

**Docket: T-2571-14**

**Citation: 2016 FC 935**

**Ottawa, Ontario, August 15, 2016**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**AYAAN MOHAMMED FARAH**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] This is an application for judicial review of a decision by the delegate of the Minister of Transport dated November 25, 2014 [Decision] to cancel the transportation security clearance of Ms. Farah at the Lester B. Pearson International Airport [airport]. Because of that decision, Ms. Farah's Restricted Area Identity Card [RAIC] was revoked. She was also placed on suspension by her employer US Airways without pay or benefits as she requires a RAIC to perform her job.

[2] The objective of the security clearance process is “to prevent the uncontrolled entry into a restricted area of a listed airport” by persons that, in this case, “the Minister reasonably believes, on a balance of probabilities, may be prone or induced to assist or abet any person to commit an act that may unlawfully interfere with civil aviation” (Transportation Security Clearance Program, [TSCP] Objective). The basis for that belief in this case was a finding that Ms. Farah associated with known criminals. Ms. Farah denies such association and alleges the Respondent revoked her security clearance at the airport without proper justification while relying on unverified and unreliable evidence.

[3] This case looks at whether the Minister appropriately balanced the interests of Ms. Farah and the public given the facts of the case.

[4] Relevant excerpts of legislation referred to in this judgment may be found in the Annex attached.

[5] For the reasons that follow, I have determined the cancellation of Ms. Farah’s security clearance, leading to revocation of her RAIC, was both procedurally unfair and substantively unreasonable. It must be set aside.

## II. Preliminary Motion – Supplementary Affidavits

[6] By motion dated May 5, 2015, Ms. Farah sought to file two supplementary affidavits. By Order of Prothonotary Kevin R. Aalto on June 9, 2015, Ms. Farah was permitted to file the affidavits as part of her record while reserving the issue of their admissibility to me as the hearing judge.

[7] One of the affidavits, made by Ms. Farah, is about the contract she signed and the process involved when she applied for and received her security clearances at the airport in 2006 and 2013. The other affidavit is from her father. It provides additional information about an incident where Ms. Farah's car was observed at a funeral with two gang affiliated members in it. It also outlines Somalian culture and Islamic tradition regarding attending funerals of community members.

A. *Positions of the Parties*

[8] Ms. Farah submits that the affidavits should be admitted because they are relevant and their admission will not prejudice the Respondent. She says she could not make a full and fair response to the Decision in her initial evidence and the new affidavits address critical issues and facts which she could not anticipate until receiving the Respondent's affidavit. She submits she should reasonably be given the opportunity to respond.

[9] The Respondent submits that the new evidence is inadmissible and irrelevant and therefore fails to satisfy the two preliminary criteria under Rule 312. With respect to the father's affidavit, the Respondent submits that the evidence was available and should have been offered in response to a letter from Transport Canada on February 3, 2014, which was sent nine months before the Decision. The Respondent also notes that the affidavit is not sufficiently probative to be admitted as, amongst other things, the affiant is not sure of the dates nor whether he attended the funeral in question.

[10] With respect to Ms. Farah's additional affidavit, the Respondent states that the information surrounding the contract signed with the airport authority at the time Ms. Farah was issued her RAIC is not relevant to whether the Minister's delegate made a reasonable decision to

cancel her security clearance. The Respondent notes Ms. Farah raised the terms and conditions of her RAIC for the first time as part of this motion. In both cases the Respondent submits the information was not before the decision-maker and so should be rejected. Ms. Farah was represented by counsel at the relevant times when the information in the affidavits could have been offered in response to queries made to her. The Respondent states this is not an exceptional case and the information will not assist the Court in making a final determination on the merits.

B. *Analysis*

[11] It is a matter of the Court's discretion as to whether or not new or supplementary evidence is admitted under Rule 312. In *Forest Ethics Advocacy Assn v Canada (National Energy Board)*, 2014 FCA 88, Mr. Justice Stratas identifies two preliminary requirements that must be met before the Court can exercise this discretion:

1. The evidence must be admissible on an application for judicial review. Subject to some exceptions, if it is not in the record that was before the decision-maker, it will not be considered.
2. The evidence must be relevant to an issue that is properly before the reviewing court.

[12] Here, the new affidavits fail to pass the principles articulated by Mr. Justice Stratas in *Bernard v Canada (Customs and Revenue Agency)*, 2015 FCA 263 [*Bernard*]. Generally, evidence that could have been placed before the decision-maker but was not is not admissible, because the Court is evaluating the legality of the decision under review, not conducting a new hearing on the merits. There are three recognized exceptions to this general rule:

1. background information to understand the history of the case but that does not provide new evidence;
2. an affidavit drawing attention to the lack of evidence in the record before the decision-maker; and

3. evidence not available at the time of the decision and which is relevant to an issue of natural justice, procedural fairness, improper purpose or fraud.

[13] While the list of exceptions is not closed, the affidavits in this matter do not contain the kind of information that might create or uncover another exception. The allegation that Ms. Farah had associated with known criminals was first communicated to Ms. Farah by letter dated February 3, 2014.

[14] Neither affidavit contains “simple background information” which would assist the Court to understand the nature or history of the case. Rather, in breach of the general rule, they offer new evidence for the record. Similarly, they do not show a key finding of fact made by the Respondent was unsupported by any evidence at all. The evidence tendered in the affidavits was available prior to the Decision being rendered.

[15] I find the affidavits do not come within any exceptions to the general rule that evidence not before the decision-maker is not admissible on a judicial review. It therefore is unnecessary to consider the second preliminary requirement of whether the evidence is relevant. I note, though, that much of what is contained in the affidavit of Ms. Farah’s father is already on the record through her letter of July 3, 2014 to Transport Canada.

[16] For the foregoing reasons, Ms. Farah’s motion to admit the supplementary affidavits is denied.

### III. **Background Facts**

#### A. *The Information Underlying the Decision*

[17] Ms. Farah was employed at the airport on or about July 10, 2006 as a Customer Service Agent with US Airways. Following a successful background check she received full security

clearance and was issued a RAIC. From May 2010 until June 2012 she was on furlough from her employment as a result of job reductions. On returning to her employment in June 2012, a fresh security review was conducted which ultimately led to these proceedings.

[18] On her return to work in June 2012, Ms. Farah initially received a medium level security clearance. In January 2013, she received full security clearance and was issued a new RAIC. Until the time of the Decision to cancel it, her security clearance had been valid until July 18, 2017.

[19] On or about January 9, 2014, Transport Canada received a Law Enforcement Records Check [LERC] report from the RCMP's Security Intelligence Background Section as part of the standard security clearance review. It indicated Ms. Farah was the registered owner of a vehicle that the Toronto Police had observed leaving the cemetery of a gang member's funeral in September 2012. Although Ms. Farah was not in the vehicle, two of the occupants (Subjects "B" and "C") were known to the police as criminals.

[20] Ms. Farah was also observed with an individual (Subject "A") in 2011 who was a known member of the "Dixon Crew", a street gang of primarily Somali males based in Toronto's west end. Subject "A" had been charged with or convicted of eleven serious offences between 2001 and 2011, which offences ranged from drug trafficking to home invasions to counterfeit money. Subject "A" was said to be involved in firearms trafficking and to have admitted at the time to being a very close associate to Ms. Farah.

[21] Given Ms. Farah's security level, Transport Canada advised her on February 3, 2014, by letter, of the concerns that arose as a result of this information. Two allegations were made:

In 2011, you were observed by police on one (1) occasion with Subject "A", who admitted at the time being a very close associate of yours. The current status of your association is unknown.

In September 2012, Toronto Police reported observing a vehicle leaving a gang member's funeral from a cemetery. You were the registered owner of the vehicle but were not present at the time. Other individuals were identified inside the vehicle including Subject "B" and Subject "C".

[22] The letter invited Ms. Farah to make comments. A contact number was provided should she have any questions. On February 12, 2014 a note to file by the Advisory Body records a telephone call from Ms. Farah. It records that she "stated she was confused as to what the letter was all about." She went on to state she had "no relations or associations to anyone who is involved in criminal activity and the incident in 2011 may be a case of mistaken identity" as she does not know anyone who would meet the description of Subject "A". Ms. Farah also stated her cousin had presented herself as Ms. Farah on occasion when receiving speeding tickets.

[23] Through a letter from her counsel to Transport Canada on February 25, 2014, Ms. Farah indicated again that she did not know anyone who meets the description of Subject "A". She sought further information including "the date, location and the name or description for Subject "A"". She also provided details of a 2008 Honda Civic car that was registered in her name but stated it was in the possession of, and driven by, her cousin. She included the license plate number for that car.

[24] On April 10, 2014, Transport Canada made an email inquiry of the RCMP seeking to confirm the details of the vehicle mentioned in the LERC. Regarding the statement "that Subject "A" admitted in 2011, of being very closely associated to the applicant," Transport Canada

requested “any further information related to the method by which this information was received by the Police.”

[25] On June 11, 2014, Transport Canada received a response from the RCMP with respect to both Subject “A” and the vehicle. In answer to the query regarding “the method by which this information was received by the Police” the RCMP response was:

Police had direct interaction with the Applicant and subject “A” at which time both were together.

[26] The information provided by Ms. Farah that she owned a 2008 Honda Civic resulted in this reply:

The vehicle . . . was a 2003 Saturn 4door sedan brown (BLST073) which was confirmed . . . registered to the applicant and was observed by York Police. The vehicle mentioned by the applicant (2008 HONDA CIVIC 4D GRY) is also registered to her.

[27] On June 13, 2014, Transport Canada sent Ms. Farah’s counsel a letter containing these further details. The letter indicated that they had not been provided with names or details of the third parties or sources because of the provisions of the *Privacy Act* and so could not provide them to Ms. Farah. Ms. Farah was asked to submit any other relevant information or documentation within twenty days of receipt of the letter. She was also provided again with the name and telephone number of a contact person should she wish to discuss the matter.

[28] On July 3, 2014, Ms. Farah personally emailed Transport Canada with additional written representations. She stated her father was the primary driver of the car that had been at the funeral and she did not see the relevance of the individuals being tied to her as she was not in the car. She said the following with respect to the allegations concerning the police, Subject “A” and the car at the funeral:



Toronto Police is falsely accusing me of having ties to gangsters. I am a law-abiding citizen with no criminal convictions.

The alleged association I have to this individual is also unknown to me. For one, I have no recollection of this occurrence or even for that matter, as the individual is also unnamed in the report, I do not know who this individual happens to be. Furthermore, I have no idea as to what is meant by “direct interaction.”

The fact remains, the events transpired over 2 years ago without any laws being broken or without charges being laid. In the end, as I was not the driver of the vehicle and not at the scene, I ask that the police clear my name of any involvement in this matter.

B. *The Process Leading to the Decision and the Decision*

[29] After the background facts were gathered as outlined above, Ms. Farah’s security clearance was considered by the Transportation Security Clearance Advisory Body [Advisory Body] on September 16, 2014. The Advisory Body consisted of 5 voting members and 5 non-voting members all of whom possess a background in security screening or security operations. The Advisory Body makes recommendations to the Director General, Aviation Security, regarding security clearances. They recommended that Ms. Farah’s security clearance be cancelled “based on the police report detailing the applicant’s close association to an individual who is known by police to be a long-standing member of the “Dixon Crew” and who has a lengthy criminal record, as well as her association to two (2) individuals with criminal records.”

[30] Although the Record of Recommendation by the Advisory Body is succinct, the Record of Discussion shows the Board considered Ms. Farah’s written statements, including her denial of any knowledge of Subject “A” and her statement that she had given or loaned to her father the vehicle that was seen at the funeral. Although not noted, it also contained the Note to File where Ms. Farah stated her cousin had impersonated her when driving her car. The Advisory Body concluded that “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.” This wording complies with the objective of the TSCP guidelines to prevent such persons from accessing restricted areas of airports.

[31] In October 2014, Ms. Farah’s employer called to let her know that her full security clearance had been re-instated and she should pick up her new RAIC.

[32] On November 18, 2014, the Advisory Body recommendation was forwarded to the Director General, Aviation Security, for decision together with five other case files. On November 21, 2014, the Decision was rendered. With respect to Ms. Farah’s statement that she did not know the identity of Subject “A”, the Director General adopted the Advisory Body Recommendation and the wording found in the Record of Discussion that said:

I find it unlikely that an individual would have no recollection of a direct interaction with police and, due to her very close association with Subject A, I believe the applicant either knew or was wilfully blind to Subject A’s activities.

and

Furthermore, the written explanation provided by the applicant and her counsel did not provide sufficient information to dispel my concerns.

[33] The Decision was then communicated by letter dated November 25, 2014, to Ms. Farah advising her that the Minister of Transport had cancelled her clearance based on review of her file. The letter set forth the text of the Decision and concluded with the statement that Ms. Farah had the right to seek review of the decision in this Court within 30 days.

[34] Ms. Farah’s employer wrote to her on December 4, 2014 indicating she would be suspended without pay or benefits because her RAIC was cancelled.

[35] The Notice of Application was filed in this Court on December 18, 2014.

C. *Relevant Statutory Provisions*

[36] Airport security falls under section 4.8 of the *Aeronautics Act*, R.S., 1985, c.A-2. It provides that the Minister of Transport may grant or refuse to grant a security clearance to any person or suspend or cancel a security clearance. The regulations made under the *Aeronautics Act* include the *Canadian Aviation Security Regulations, 2012*, SOR/2011-318 [Regulations]. Section 165 of the Regulations requires anyone who, as part of their employment, requires access to a restricted area to hold a RAIC. A RAIC is issued pursuant to section 146 by or under the authority of the operator of the airport. In practice, RAICs are activated by CATSA (Canadian Air Transport Security Authority) but only once the Minister informs them that the person has a security clearance.

[37] To implement his authority the Minister relies on guidelines in the TSCP. The TSCP provides that the Advisory Body shall review information supplied by an applicant and make recommendations to the Minister concerning cancellation of clearances.

[38] In formulating the recommendation to the Minister, various background checks are performed including a finger-print based criminal record check with the RCMP, a CSIS indices check and a check of the relevant files of law enforcement agencies. If concerns arise during the initial review, the security applicant is provided with a letter outlining the concerns and advising them they may make written representations to address the concerns. All the information is then reviewed by the Advisory Body and a recommendation is made to the Minister. The Minister in turn has delegated security clearance decisions to the Director General of Aviation Security.

[39] In making the recommendation to cancel a security clearance, the TSCP provides in Part II.35 that the Advisory Body may consider any factor that is relevant to the determination of whether the individual's presence in the restricted area of the airport would be inconsistent with the aim and objective of the program. Certain enumerated factors include whether the person has been convicted or otherwise found guilty in Canada or elsewhere of an indictable offence or is likely to become involved in activities threatening or using serious violence against property or persons. All the factors involve serious levels of criminality.

#### IV. **Issues and Analysis**

##### A. *Issues*

[40] Ms. Farah has alleged a lack of procedural fairness in the process that cancelled her security clearance and challenges the Decision as being unreasonable. In addition, Ms. Farah says her section 7 rights under the *Canadian Charter of Rights and Freedoms* found in Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11*, [Charter] have been breached.

##### B. *Standard of Review*

[41] A full analysis of the appropriate standard of review is not required if it has already been determined by prior jurisprudence: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57 [Dunsmuir]. The parties agree, and I concur, that for the revocation of a security clearance, the standard of review is reasonableness: see *Brown v Canada (Attorney General)* 2014 FC 1081, *Kaczor v Canada (Minister of Transport)* 2015 FC 698 and *Clue v Canada (Attorney General)* 2011 FC 323.

[42] There is also no dispute between the parties that the standard of review for issues of procedural fairness is correctness. I also agree this is the standard. The same three cases referred to above have each have previously determined that correctness applies to questions of procedural fairness in reviewing security clearance revocations.

[43] Ms. Farah has also raised an issue with respect to whether her rights under section 7 of the *Charter* were breached by the Respondent. As I have determined there is no evidence that Ms. Farah's *Charter* rights were breached, I will deal with that issue first.

C. *Were Ms. Farah's Charter Rights Breached?*

[44] Although not argued at the hearing of this matter, Ms. Farah in her written submissions alleged that the Respondent breached her *Charter* rights. Paragraph 36 of Ms. Farah's memorandum of fact and law puts the heart of her argument this way:

[I]t is evident that, an individual could objectively suffer serious psychological stress where that person cannot ever dispute or escape the shadow of criminal accusations that were never pursued in court or substantiated.

[45] While "serious state-imposed psychological stress" may breach section 7 of the *Charter*, not all forms of psychological prejudice, if caused by government, lead to automatic section 7 violations: *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paragraph 57.

[46] The question here is not as generic as whether "an individual" could suffer such harm. The question is whether this Applicant has suffered serious psychological stress that was caused by government action.

[47] There is no evidence in the record or before the Court that Ms. Farah has suffered any psychological stress—serious or otherwise. While it is entirely possible that the events experienced by Ms. Farah have proven stressful to her and, perhaps, even psychologically stressful, in order to reach the level of a *Charter* breach there must be evidence before the Court of a high level of psychological stress. There simply is no such evidence and therefore nothing upon which I could determine Ms. Farah's *Charter* rights were breached. Accordingly, this issue will not be addressed further.

D. *Was the Decision Procedurally Fair?*

(1) Submissions of the Parties

[48] Ms. Farah alleges that the Decision was procedurally unfair because the Minister failed to provide her with sufficient disclosure, did not fully consider her submissions and did not provide adequate reasons, particularly given the level of procedural fairness Ms. Farah says was required. She also alleges that she should have been provided with an opportunity to appear in person before the tribunal. It is important, therefore, to ascertain the nature of procedural fairness owed to Ms. Farah in these circumstances.

[49] Counsel for Ms. Farah submitted that her credibility was in issue as the Minister and Advisory Body disbelieved her statement that she does not know any criminals. He submits, relying on *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, that she was entitled to an oral hearing because of the centrality of the credibility assessment and the serious consequences to her of the decision.

[50] Counsel also referred to *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 837, where the Supreme Court enunciated five factors affecting the content

of the duty of fairness in administrative decisions. Counsel argued that the factors lead to a higher degree of procedural fairness given the importance of the decision to Ms. Farah's job, the fact that there was a withdrawal of an existing clearance that had twice been issued and the choice of procedure being no oral hearing and insufficient disclosure.

[51] The Respondent submits that while there is a slightly higher degree of procedural fairness required when a security clearance is cancelled, it still falls at the lower end of the spectrum. The Respondent also says, citing *Henri v Canada (Attorney General)*, 2014 FC 1141 in support, that there is no entitlement to a hearing.

[52] As to whether the written submissions of Ms. Farah were taken into account, the Respondent points to the Decision itself, which makes explicit reference to the submissions and why they were not accepted.

## (2) Analysis

[53] Two of the procedural fairness issues raised by Ms. Farah can be immediately resolved. Firstly, in *Pouliot v Canada (Transport)*, 2012 FC 347 at paragraph 10, Mr. Justice Rennie confirmed that the level of procedural fairness in matters involving revocation of a security clearance is slightly higher than the initial issuance of a clearance but is still on the lower end of the spectrum. He then confirmed that there is no right to a hearing in revocation matters. Secondly, in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62 at paragraph 14, Madam Justice Abella established that inadequacy of reasons is not a matter of procedural fairness, but is part of a reasonableness review. The reasons must be read together with the outcome to determine whether the decision falls within a range of possible outcomes.

[54] Finally, Ms. Farah's submissions were clearly considered. The Decision refers to the letters submitted by her or her counsel and the explanations provided.

[55] In my view however, Ms. Farah did not receive adequate disclosure after Transport Canada misstated to the RCMP Ms. Farah's request for particulars concerning Subject "A".

[56] Ms. Farah was simply not provided with enough information to allow her to make any kind of meaningful response. The best she could do given the paucity of information was to deny knowing Subject "A" and state she had no idea what a "direct interaction" meant.

[57] Ms. Farah stated throughout the process, from beginning to end, that she did not believe she knew anyone who met the description of Subject "A", nor did she know any criminals. To help her refute the bald allegations made against her about Subject "A", Ms. Farah's counsel on February 25, 2014, wrote to Transport Canada and asked for further information about Subject "A" including "the date, location and the name or description". The Respondent states that as a result of the letter, steps were taken to provide information to Ms. Farah and an inquiry was made to the RCMP to obtain more information concerning Subject "A". Unfortunately, that step did not accurately pass along the request.

[58] On April 10, 2014, by email to the RCMP, Transport Canada asked "for any further information related to the method by which this information was received by Police". Ms. Farah's counsel had requested information to assist her in identifying Subject "A", specifically, "the date, location and the name or description". Transport Canada's re-statement of the request fundamentally changed the question.



[59] The response received by Transport Canada from the RCMP was “Police had direct interaction with the Applicant and subject “A” at which time both were together.” It did not address the date, location, description or name of Subject “A” nor whether they could be disclosed.

[60] The initial misstated request by Transport Canada was compounded in their written reply to Ms. Farah’s counsel. The letter on June 13, 2014 stated that information had been provided in accordance with the *Privacy Act* and, “[a]s such since we were not provided with names or details associated to third party individuals or sources, we are unable to provide any further details to you.” But that statement is somewhat misleading as, the request not having been made, there was no privacy issue raised by the RCMP in reply. In fact, information about the “direct interaction” was held up by the RCMP while they sought authorization from York Police. If Ms. Farah’s questions had been properly posed to the police then they might have relied on the *Privacy Act*, but they also might have provided more details.

[61] Counsel for Ms. Farah submits that the cases dealing with cancellation of security clearances are very fact specific. He says that vagueness in the reasons leads him to conclude that there is possibly a “smell test” involved. I agree that the cases are fact specific. Most cases contain significant factual detail because the Applicant for the clearance usually has direct involvement in criminal matters or, at a minimum, a clear, ongoing relationship with a person engaged in serious criminal activity. As Mr. Justice Rennie put it in *Meyler v Canada (Attorney General)*, 2015 FC 357 [*Meyler*], in those cases the basis of the security concerns is readily apparent.

[62] Even with a slightly higher level of procedural fairness, there is a minimal amount of meaningful information that must be disclosed in order to ensure natural justice occurs and a meaningful response can be made. The nature and amount of information will always vary with the context. In this case Ms. Farah's record speaks for itself. She has no criminal convictions or investigations. She may have had one direct encounter in 2011 with a known criminal but she has denied knowing any criminals. In September, 2012 her second car, but not Ms. Farah, attended a gangster's funeral with Subject "B" and "C" inside. These sparse allegations are unique in the annals of security clearance revocation cases.

[63] Ms. Farah sought further information but did not receive any part of what she had requested. She was interested in the date, location, name or description. Was there any information that Ms. Farah did not know that could have allowed her to make sense of the allegations and provide a meaningful response? Any one or more of the following could have been of assistance in understanding the alleged interaction with Subject "A":

- i. The gender of Subject "A".
- ii. The approximate age or age range of Subject "A".
- iii. The nationality of Subject "A".
- iv. The city or province or country in which she and Subject "A" were seen together.
- v. When the direct interaction occurred: morning, afternoon, evening or late evening?
- vi. Could it be narrowed down to one of the four seasons of the year?
- vii. Was the "direct interaction" indoors or outdoors?
- viii. The specific date of the direct interaction and who was present.

[64] Ms. Farah's fact situation is very similar to that found in *Meyler*, where Mr. Justice Rennie dealt with an applicant facing an unspecified association with an unidentified individual named Subject "A" who was the group leader of a drug importation ring at Lester B. Pearson International Airport. When looking at the issue of disclosure, Mr. Justice Rennie said that if *Meyler* was one of those rare cases where no information could be disclosed without

compromising a source, “the decision letter must include, in the interests of procedural fairness, evidence that the decision maker addressed his or her mind to the extent to which information could be disclosed without compromising the source. Therefore to the extent that disclosure can be made without identifying an informer or source, information should be disclosed if necessary to satisfy the requirements of natural justice.” That did not occur in this case. Ms. Farah’s efforts to obtain details were frustrated by the misstated request and the improper blanket reliance on the *Privacy Act*.

[65] I adopt the observations of Mr. Justice Evans in *Reference re Marine Transportation Security Regulations* (CA), 2009 FCA 234 at paragraph 38, that an applicant’s association with a person may be entirely innocent, “whether or not the applicant was aware of the person’s criminal or terrorist activities” and “innocent associations will not normally warrant the denial of a security clearance”. It is important to strive to make that distinction with full and complete information at hand wherever possible. Without sufficient disclosure for her to identify Subject “A”, Ms. Farah could not meaningfully explain the nature of a relationship that may have been formed with no knowledge of the criminal activities of Subject “A” or that may not have existed at all. Instead, she was forced to give a blanket denial of having any criminal associates.

[66] By not properly considering what additional information could have been made available to Ms. Farah to assist her in making a meaningful response, the Advisory Body and the Director General acted in a manner that was procedurally unfair. As a result, Ms. Farah was denied natural justice.

E. *Was the Decision Reasonable?*

[67] Notwithstanding my finding that the process was procedurally unfair, I also wish to comment on the reasonableness of the Decision as, in this case, the line between a reasonable decision and a procedurally unfair one is not as clear as it otherwise might be.

[68] The Supreme Court has stated that reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. To be reasonable the decision itself must fall within the range of acceptable outcomes, defensible on the facts and law: *Dunsmuir* at paragraph 47.

[69] Ms. Farah has no criminal convictions and, unlike the applicant in *Meyler*, was never personally the subject of any investigation—particularly one into the importation of drugs at the airport. This is so even though it appears from the jurisprudence that at the times relevant to Ms. Farah’s matter there was an extensive investigation undertaken by a vast array of enforcement agencies, including most Toronto area police forces, CBSA, airport drug enforcement and intelligence units and three RCMP projects all operating in concert to investigate an organized crime group facilitating the importation of drugs into Canada via Pearson airport: see generally *Brown v Canada (Attorney General)*, 2014 FC 1081.

[70] Ms. Farah steadfastly maintained from the beginning that she did not know who Subject “A” was and that she did not associate with criminals. The conclusion drawn by the Director General, adopting the language of the Advisory Body Recommendation was, “I find it unlikely that an individual would have no recollection of a direct interaction with police”. The clear implication is that Ms. Farah was not telling the truth. The resulting conclusion was that “due to

her very close association with Subject "A", I believe the Applicant either knew or was wilfully blind to Subject A's activities."

[71] Inherent in the conclusion is that the police officer with whom there was a "direct interaction" was in uniform. If so, then there was no need to provide so little information in the allegation as there was no source to protect. If the police officer was not in uniform or identifiable as a police officer, then it makes sense that Ms. Farah would have no recollection of an interaction.

[72] The Advisory Body and the Director General considered the right question – why was Ms. Farah unable to recollect a direct interaction with the police? It should have prompted them to more closely scrutinize the evidence. There are two possible reasons apparent on the face of the record. One, the police may not have been in uniform and did not identify themselves. Two, as recorded in the Note to File, Ms. Farah's cousin, who had previously impersonated her when receiving speeding tickets, may have been the person with Subject "A".

[73] Ms. Farah's denials, while common place with people accused of possible wrongdoing, should have nonetheless caused the decision-makers to make sure the evidence upon which they were relying supported the statement that she was "unlikely" to "have no recollection of a direct interaction with police". The question of whether the police were in fact identifiable is crucial under the circumstances. Also, how the police were able to identify that the person with Subject "A" was indeed Ms. Farah should have been examined given his criminality and her cousin's prior impersonation of Ms. Farah. Without verifying the information they were relying upon, the Advisory Body and the Director General risked making the decision based on erroneous findings of fact.

[74] In *Lavoie v Canada (Attorney General)*, 2007 FC 435, Mr. Justice Beaudry at paragraph 18 explained the security clearance review process this way:

The purpose of the legislation is to ensure security for civil aviation and to protect the public. The Director and the Advisory Body must assess the evidence and analyze both public documents and those submitted by the person concerned. This factor also commands a high level of deference.

(my emphasis)

[75] Neither the Advisory Body nor the Director General appears to have turned their minds to the possibility that the police were undercover or in plain clothes. There is no indication in the Advisory Body Record of Discussion or Recommendation or in the Decision of any analysis of the LERC or assessment of the subsequent information from the RCMP. There is reference to an in-depth “review” of the information but no indication that it involved more than noting the information. No confirmation was sought from the RCMP that the police officer who had the direct interaction was in uniform or otherwise identifiable as police and, if so, by what means. The clear assumption was that the police person was known to Ms. Farah to be a member of the police. Both the Advisory Body and the Director General proceeded to use the “fact” of direct police interaction as the definitive reason for finding Ms. Farah’s denials were not credible. If the police were not identifiable as police, however, it is reasonable to expect Ms. Farah would have no recollection of a single event that occurred over two years prior.

[76] Given the gravity of the consequences to Ms. Farah, the Advisory Body ought to have carefully considered the documents they reviewed, but failed to do so. The Director General also has an obligation to ensure that the critical facts upon which she relies are very clear. Without an analysis of the important evidence that police interacted with Ms. Farah, the conclusion in the

Decision is not intelligible or transparent. It does not meet the *Dunsmuir* criteria and is therefore unreasonable.

V. **Conclusion**

[77] The application is allowed and the Decision will be set aside. The parties agreed at the outset of the hearing that costs of \$2,000 would be appropriate. Ms. Farah as the successful party is entitled to that amount for her costs.

**JUDGMENT**

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

1. The application for judicial review is granted and the decision to revoke the Applicant's security clearance is quashed.
2. The matter is remitted to the Minister for re-determination in accordance with these reasons.
3. Costs to the Applicant in the amount of \$2,000.

"E. Susan Elliott"

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Judge



ANNEX

***Aeronautics Act***  
**R.S.C., 1985, c. A-2**

...

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.

***Canadian Aviation Security Regulations, 2012***  
**(SOR/2011-318)**

...

Issuance criteria

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

- (a) applies in writing;
- (b) is sponsored in writing by their employer;
- (c) has a security clearance;
- (d) consents in writing to the collection, use, retention, disclosure and destruction of information for the purposes of this Division; and
- (e) confirms that the information displayed on the card is correct.

Activation requirement

(2) The operator of an aerodrome must not issue a restricted area identity card to a person unless the card has been activated.

...

***Loi sur l'aéronautique***  
**L.R.C. (1985), ch. A-2**

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

***Règlement canadien de 2012 sur la sûreté aérienne***  
**(DORS/2011-318)**

...

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 :

- a) elle présente une demande par écrit;
- b) elle est parrainée par écrit par son employeur;
- c) elle possède une habilitation de sécurité;
- d) elle consent par écrit à la collecte, à l'utilisation, à la conservation, à la communication et à la destruction des renseignements pour l'application de la présente section;
- e) elle confirme l'exactitude des renseignements qui figurent sur la carte.

Exigence — activation

(2) Il est interdit à l'exploitant d'un aérodrome de délivrer à une personne une carte d'identité de zone réglementée à moins qu'elle n'ait été activée.

Control of Access to Restricted Areas

Contrôle de l'accès aux zones réglementées

Unauthorized access prohibition

Interdiction d'accès non autorisé

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

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

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

(b) is in possession of a document of entitlement, other than a restricted area identity card, for the restricted area.

b) en possession d'un document d'autorisation, autre qu'une carte d'identité de zone réglementée, pour la zone réglementée.

***Transportation Security Clearance Program - Aviation***

***Programme d'habilitation de sécurité en matière de transport aérien***

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

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

people or property;

3. is suspected of being closely associated with an individual who is known or suspected of ◦ being involved in activities referred to in paragraph (1);

◦ being a member of an organization referred to in paragraph (2); or

◦ being a member of an organization referred to in subsection (5) hereunder.

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.

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;

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

Cancellation or Refusal

## 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.

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

biens;

3. soupçonnée d'être étroitement associée à une personne connue ou soupçonnée ◦ de participer aux activités mentionnées à l'alinéa (1);

◦ d'être membre d'un organisme cité à l'alinéa (2); ou

◦ être membre d'un organisme cité à l'alinéa (5).

4. qui, selon le ministre et les probabilités, est sujette ou peut être incitée à: ◦ 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. 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. est membre d'un groupe terroriste, tel que défini à l'alinéa 83.01(1)(a) du Code criminel du Canada.

Annulation ou refus

## II.35

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

including whether the individual:

1. has been convicted or otherwise found guilty in Canada or elsewhere of an offence including, but not limited to:

1. any indictable offence punishable by imprisonment for more than 10 years,

2. trafficking, possession for the purpose of trafficking or exporting or importing under the Controlled Drugs and Substances Act,

3. any offences contained in Part VII of the Criminal Code - Disorderly Houses, Gaming and Betting,

4. any contravention of a provision set out in section 160 of the Customs Act,

5. any offences under the Security Of Information Act; or

6. 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.

compris:

1. si la personne a été condamnée ou autrement trouvé coupable au Canada ou à l'étranger pour les infractions suivantes:

1. tout acte criminel sujet à une peine d'emprisonnement de 10 ans ou plus;

2. 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;

3. tout acte criminel cité dans la partie VII du Code criminel intitulée « Maison de désordre, jeux et paris »;

4. tout acte contrevenant à une disposition de l'article 160 de la Loi sur les douanes;

5. tout acte stipulé dans la Loi sur les secrets officiels; ou

6. 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-2571-14

**STYLE OF CAUSE:** AYAAN MOHAMMED FARAH v ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 11, 2016

**JUDGMENT AND REASONS:** ELLIOTT J.

**DATED:** AUGUST 15, 2016

**APPEARANCES:**

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FOR THE APPLICANT

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