

Federal Court



Cour fédérale

Date: 20161223

Docket: T-1979-15

Citation: 2016 FC 1410

Ottawa, Ontario, December 23, 2016

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

GEOFFREY AGOSTI

Applicant

and

MINISTER OF TRANSPORT

Respondent

JUDGMENT AND REASONS

[1] Geoffrey Agosti's application for a Transportation Security Clearance was refused by a Minister's delegate at Transport Canada, based upon his "propensity toward violence", and the finding that he was "known or suspected to be involved in activities directed toward the use of acts of serious violence against persons or property".

[2] While I appreciate that the Minister's delegate's decision will have a serious impact on Mr. Agosti's career in aviation, he has not persuaded me that he was treated unfairly in the way that his application for a Transportation Security Clearance was handled, nor has he persuaded

me that the Minister's delegate's decision was unreasonable. Consequently, his application for judicial review will be dismissed.

I. The Transportation Security Clearance Program

[3] The *Aeronautics Act*, R.S.C. 1985, c. A-2 and the *Canadian Aviation Security Regulations*, 2012, SOR/2011-318 provide that a person may not enter or remain in restricted areas of airports unless that person has been issued a Restricted Area Identity Card ("RAIC"). Before obtaining a RAIC, a person must first obtain a Transportation Security Clearance. The Minister of Transport or his delegate has the discretion to grant, refuse, or cancel a Transportation Security Clearance.

[4] Individuals who apply for Transportation Security Clearances are subject to a comprehensive background check, including a fingerprint-based criminal records check and a review of the files of relevant law enforcement agencies, including information gathered for law enforcement purposes.

[5] A specific objective of the Transportation Security Clearance Program is to prevent uncontrolled entry into the restricted area of an airport by individuals who the Minister reasonably believes *may* be prone or induced to commit acts that may unlawfully interfere with civil aviation.

[6] In the event that concerns are raised as to whether an applicant is suitable to hold a Transportation Security Clearance, the Director of Security Screening Programs will convene the Advisory Body. The Advisory Body is chaired by the Director and is made up of persons familiar with the aims of the Transportation Security Clearance Program.

[7] The Advisory Body then reviews the application in issue and makes a recommendation to the Minister or the Minister's delegate as to whether to grant, refuse or cancel an individual's Transportation Security Clearance.

[8] Prior to reviewing an application for a Transportation Security Clearance, the Director provides information to the applicant regarding the area or areas of concern. The applicant is encouraged to make written submissions regarding these concerns, and to provide relevant information or explanations, or any extenuating circumstances that they wish to have considered by the Advisory Body.

[9] If the Advisory Body determines that an applicant's presence in a restricted area of an airport is inconsistent with the aims of the Transportation Security Clearance Program, the Advisory Body may recommend to the Minister or his delegate that the application be refused. A Transportation Security Clearance may be refused if the decision-maker has a reasonable belief, on a balance of probabilities, that an individual may be prone or induced to commit an act that may unlawfully interfere with civil aviation.

II. Mr. Agosti's Application for a Transportation Security Clearance

[10] Mr. Agosti applied for a Transportation Security Clearance in February of 2014. A subsequent Law Enforcement Record check revealed that Mr. Agosti had been involved in the following four incidents between 2004 and 2013:

1. In October of 2004, a victim contacted the Port Moody Police Department advising that his work vehicle had sustained damage from a hit and run while parked in front of his residence. The police spoke to the owner of the suspect

vehicle and discovered that the vehicle had been loaned to Mr. Agosti. After a number of attempts, the Police were eventually able to make contact with Mr. Agosti, whereupon he admitted to being the driver of the vehicle that caused the accident. Mr. Agosti was issued a provincial traffic violation for leaving the scene of the accident.

2. In July of 2007, the RCMP in Dawson City, Yukon responded to an assault at a local area music festival. Police were informed that Mr. Agosti had punched a security guard twice in the face when he was asked for identification before being allowed to enter a beer tent. Mr. Agosti was arrested, and he was uncooperative and displayed violent behaviour throughout his arrest and detention. A charge against Mr. Agosti was stayed in August of 2008 after he agreed to provide an apology to the security guard, a written apology to the jail guard, and to participate in 15 hours of community service.
3. In April of 2009, the Toronto Police Service observed a woman being assaulted by two individuals, one of whom was Mr. Agosti. Police noted two individuals punching and shoving the victim. When police approached, both individuals ran from the scene although they were later arrested and charged with assault. In September 2009, the assault charge against Mr. Agosti was withdrawn.
4. In January of 2013, the West Vancouver police stopped a vehicle driven by Mr. Agosti that was travelling at a high rate of speed, passing all other traffic on the roadway. Mr. Agosti was confrontational and uncooperative with police, and

displayed no remorse for his actions. He was issued a traffic violation and his vehicle was impounded.

[11] In February of 2015, the Chief of Security Screening Programs sent a letter to Mr. Agosti advising him that Transport Canada had been made aware of these incidents, and that they raised concerns about his suitability to hold a Transportation Security Clearance. The letter encouraged Mr. Agosti to provide additional information regarding the circumstances of the events in question, as well as any other relevant information or explanation (including extenuating circumstances) that he wished to have Transport Canada consider in making a decision with respect to his application for a Transportation Security Clearance.

[12] Mr. Agosti provided a written response acknowledging that all four incidents had occurred, stating that he took full responsibility for his role in the incidents in question. Mr. Agosti indicated that as young person, he had struggled with emotional stress stemming from his parents' divorce, which had occurred when he was 17 years old. He further provided a lengthy explanation of his version of the context and circumstances surrounding each of the four incidents.

[13] Insofar as the October 2004 hit and run incident is concerned, Mr. Agosti stated that he was 20 years old at the time of this incident. He admitted to the facts, and acknowledged that he "wasn't prompt" in responding to calls from the Port Moody Police regarding the accident, explaining that he did not know how to handle the situation. Mr. Agosti claimed that he was told by an officer that there would be no repercussions apart from a ticket being issued to him. Mr. Agosti acknowledged in his letter to Transport Canada that, with the benefit of hindsight, he realized that he had handled the matter very poorly.

[14] Mr. Agosti also did not dispute the facts related to the July 2007 assault of the security guard at the music festival. Mr. Agosti explained that he was 23 years old at the time of the incident, and that he had been working as a “bush pilot” in the Yukon. He provided a detailed account of an experience the month before the incident, where a friend had been killed in a plane crash. Mr. Agosti said that he had been present at the scene of the crash, and that the trauma of this event contributed to what he describes as an “emotional outbreak” just prior to the altercation at the music festival. Mr. Agosti says that he was angry at the circumstances of his friend’s death, and that he had taken this anger out on the security guard.

[15] Mr. Agosti acknowledged in his written response that his conduct was wrong. He stated that he had subsequently participated in a circle discussion with the law enforcement agency involved, and had apologized to the security guard and the police station attendant. Mr. Agosti indicated that collectively, they developed a “balancing arrangement” whereby he agreed to work a security position at the music festival the following year.

[16] Insofar as the April 2009 incident involving the alleged assault of a woman is concerned, Mr. Agosti’s description of this incident diverges from the summary of the incident provided by Transport Canada. Mr. Agosti claimed that he and his friends had been involved in an altercation at a night club. When they ran into two of the individuals involved in the altercation later in the evening, Mr. Agosti says that the man and woman were belligerent, and that the man tried to attack one of his friends. According to Mr. Agosti, there was shoving between all five individuals.

[17] When the police subsequently arrived at the scene, Mr. Agosti and his friend ran away. Mr. Agosti stated in his response that he and his friend “had no idea of the seriousness of the

altercation” and that they “thought it was a joke in the moment”. Mr. Agosti acknowledged that he acted immaturely, adding that the police also handled the situation poorly, as the statement given by the woman present at the scene was later found not to be credible.

[18] Finally, insofar as the January 2013 speeding infraction is concerned, although he admitted to having been driving at 133 km/hour, Mr. Agosti described this incident as being “the most benign and kind of a non-event that is inaccurately recorded”. According to Mr. Agosti, the police officer who had pulled him over for speeding was aggressive, and told him he was impounding the car. Mr. Agosti left the car with the police officer and later disputed the ticket in traffic court before a judge. His letter suggested that the matter was ultimately resolved amicably as the judge “was able to bring balance to the situation”.

[19] Mr. Agosti also stated that in the years since his last infraction, he has reformed. He now practices yoga, eats healthily, and has a strong community of friends in Vancouver. He also claims to have received therapy for the trauma he experienced as a result of the death of his friend in the plane crash. Mr. Agosti also stated that he has worked as a volunteer with an at-risk youth foundation, and that he has undertaken efforts to build a charitable giving foundation. He also submitted his *curriculum vitae*, personal references and a letter he had submitted to a company in the United States.

III. The Decision Under Review

[20] After reviewing Mr. Agosti’s submissions, the Advisory Body recommended that the Minister refuse his application for a Transportation Security Clearance. The Advisory Body found that Mr. Agosti’s response to the four incidents to be “dismissive” and that he “lacked any personal accountability and minimized each situation”. The Advisory Body further found that

Mr. Agosti “has a propensity toward violence”. As a consequence, the Advisory Body concluded that, it had “reason to believe, on a balance of probabilities, that he 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”.

[21] On October 13, 2015, a Minister’s delegate made the final decision to refuse Mr. Agosti’s application for a Transportation Security Clearance. Referring to Mr. Agosti’s involvement in the four incidents discussed earlier, the Minister’s delegate stated that these incidents led her to believe that he has a “propensity toward violence”, and that he had failed to demonstrate that he took any personal accountability for the incidents. A review of his file further led the Minister’s delegate to conclude that Mr. Agosti was “known or suspected to be involved in activities directed toward the use of acts of serious violence against persons or property”, and that the information provided by Mr. Agosti was not sufficient to address her concerns. As a result Mr. Agosti’s application for a Transportation Security Clearance was refused.

[22] Mr. Agosti subsequently sought an internal reconsideration of this decision, which I understand to have been refused. However, this application for judicial review only relates to the October 13, 2015 decision of the Minister’s delegate, with the result that there is nothing in the certified tribunal record relating to Mr. Agosti’s reconsideration request.

IV. The Issues

[23] I understand Mr. Agosti’s principal argument to be that he was treated unfairly in the application process as Transport Canada provided him with poor advice, and failed to properly explain how he should best respond to the concerns arising out of the four incidents in his past. Mr. Agosti submits that he did not understand what he needed to do to address Transport

Canada's concerns, as this was not properly explained to him. He further submits that based on telephone discussions with Transport Canada employees, he was led to believe that he could provide additional information supporting his application, and that this additional information would result in a reconsideration of the decision to refuse his application.

V. Analysis

[24] Mr. Agosti's argument raises a question of procedural fairness. Where an issue of procedural fairness arises, the Court's task is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 43, [2009] 1 S.C.R. 339.

[25] Although it is true that judicial review is ordinarily to be conducted on the basis of the record that was before the decision-maker whose decision is being reviewed, the record can be supplemented where, as here, it is alleged that there has been a breach of procedural fairness: *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 218 at para. 30, [2003] 1 F.C. 331.

[26] However, despite having been provided with three extensions of time, Mr. Agosti did not file an affidavit in support of his application. He did, however, include the material that he provided to Transport Canada in support of his reconsideration request as part of his memorandum of fact and law.

[27] At the hearing, Mr. Agosti also attempted to provide evidence regarding the events that followed the refusal of his application through his oral submissions. Mr. Agosti also provided a narrative of his version of events relating to the four incidents that gave rise to Transport

Canada's concerns, explaining how he had since turned his life around. Mr. Agosti also discussed his efforts to respond to Transport Canada's procedural fairness letter, and his alleged reliance on what he claims he was told by various Transport Canada employees.

[28] Counsel for the respondent objected to Mr. Agosti's submissions on the basis that Mr. Agosti was essentially giving evidence with respect to matters that were not in the record. I advised the parties that while I would allow Mr. Agosti to complete his submissions, I was mindful of the distinction between evidence and argument, and that I would not be relying on any evidence that had not been included in the record.

[29] At the conclusion of Mr. Agosti's submissions, and as a result of discussions with counsel for the respondent, it was agreed that although it would be somewhat irregular, Mr. Agosti would be offered one last chance to provide an affidavit in support of his application for judicial review. Consequently, with the consent of the parties, the hearing was adjourned *sine die*, and Mr. Agosti was given 45 days to serve and file an affidavit or affidavits in support of his application for judicial review. The importance of, and need for an affidavit was explained to Mr. Agosti, and I further advised him that much of the information that he was relying upon in support of his procedural fairness argument was not properly before me.

[30] My October 27, 2016 Order further provided that in the event that Mr. Agosti did not file an affidavit within the allotted time, I would decide his application for judicial review based upon the written submissions, and Mr. Agosti's oral submissions (to the extent that Mr. Agosti's written and oral submissions did not constitute unsworn evidence). The respondent was content to have the matter proceed on this basis.

[31] Despite being provided with this exceptional indulgence, Mr. Agosti did not file an affidavit within the time period provided for in my October 27, 2016 Order. Consequently, there is no evidence properly before me regarding what Mr. Agosti may have been told in his various conversations with Transport Canada employees. Nor is any information relating to Mr. Agosti's reconsideration request properly before me. Furthermore, the information that Mr. Agosti says that he would have provided to Transport Canada, had he properly understood what was required of him, is also not part of the evidence in this case.

[32] Insofar as Mr. Agosti's procedural fairness argument is concerned, the jurisprudence has established that the level of procedural fairness owed to individuals seeking an initial Transportation Security Clearance is minimal: *Pouliot v. Canada (Transport)*, 2012 FC 347 at para. 9, [2012] F.C.J. No. 427; *Motta v. Canada (Attorney General)* (2000), 180 F.T.R. 292 at para. 13, [2000] F.C.J. No. 27 (T.D.). This is because individuals have no right to a Transportation Security Clearance, and they can thus have no legitimate expectation that they will be issued such a Clearance.

[33] The duty of procedural fairness will be satisfied if an applicant for a Transportation Security Clearance is informed of the facts alleged against him, and is afforded the opportunity to make representations about those facts and his suitability to receive a security clearance: *Pouliot*, above at para. 11.

[34] It is apparent from the material that is in the record that Mr. Agosti was made aware of the nature of Transport Canada's concerns regarding his suitability for a Transportation Security Clearance. Indeed, the February 6, 2015 letter to Mr. Agosti clearly identifies the information that Transport Canada had received with respect to the four incidents discussed earlier. This

letter also expressly states that this information had raised concerns on the part of Transport Canada as to his suitability for a Transportation Security Clearance. The nature of the Advisory Body process was also explained to Mr. Agosti in this letter, and he was referred to the Transport Canada website for further information in this regard.

[35] In addition, the February 6, 2015 letter encouraged Mr. Agosti “to provide additional information, outlining the circumstances surrounding the above noted criminal charges and incidents, as well as to provide any other relevant information or explanation, including extenuating circumstances”. He was further advised that any information that he provided would be carefully considered in making a decision with respect to his Transportation Security Clearance.

[36] In light of this, I am satisfied that the requirements of procedural fairness have been met in this case, and that Mr. Agosti was not treated unfairly in the Transportation Security Clearance process.

[37] The substantive conclusions reached by a Minister’s delegate in relation to an application for a Transportation Security Clearance are to be reviewed on the reasonableness standard: *Lorenzen v. Canada (Transport)*, 2014 FC 273 at para. 12, [2014] F.C.J. No. 299; *Brown v. Canada (Attorney General)*, 2014 FC 1081 at para. 41, [2014] F.C.J. No. 1327.

[38] While Mr. Agosti has not expressly taken issue with the reasonableness of the decision to refuse his application for a Transportation Security Clearance, I would, in any event, note that the decision under review clearly explains why the Minister’s delegate came to the conclusion that he had demonstrated a “propensity toward violence”. The finding that Mr. Agosti had failed

to take personal responsibility for the incidents in question is also supported by evidence in the record, as is the finding that he was “known or suspected to be involved in activities directed toward the use of acts of serious violence against persons or property”.

[39] The conclusion that Mr. Agosti’s past actions justified the refusal of his application for a Transportation Security Clearance was, moreover, one that was justified, transparent and intelligible, and it falls within the range of possible acceptable outcomes which are defensible in light of the facts and the law. It is therefore reasonable: see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190 and *Khosa*, above at para. 59.

VI. Conclusion

[40] As the Federal Court of Appeal observed in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2014] F.C.J. No. 227, risk assessments “are forward-looking and predictive”, and are not matters of “exactitude and scientific calculation but rather matters of nuance and judgment”: at para. 94. The jurisprudence has further established that it is open to Minister’s delegates to err on the side of caution, by giving priority to public safety over the interests of individuals in pursuing employment in the aviation industry: *Wu v. Canada (Attorney General)*, 2016 FC 722; *Brown*, above at para. 71.

[41] I understand that the decision to refuse Mr. Agosti’s application for a Transportation Security Clearance will have significant negative consequences for his dream of a career in Canadian aviation. I have nevertheless not been persuaded that he was treated unfairly in the application process, nor have I been persuaded that the decision to deny him a Transportation Security Clearance was unreasonable. Consequently, Mr. Agosti’s application for judicial review is dismissed, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed,
with costs.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1979-15

STYLE OF CAUSE: GEOFFREY AGOSTI v MINISTER OF TRANSPORT

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: OCTOBER 26, 2016

JUDGMENT AND REASONS: MACTAVISH J.

DATED: DECEMBER 23, 2016

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