Federal Court  Cour fédérale

Date: 20170419

Docket: T-1277-16

Citation: 2017 FC 376

Ottawa, Ontario, April 19, 2017

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MILA KAH KATE NG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision by the Minister's Delegate, the Director General of Aviation Security for Transport Canada [the Minister] dated July 19, 2016 [the Decision], denying the Applicant's Security Clearance application [the Application].

[2] The application for judicial review is dismissed with costs.

I. Background

[3] In May 2014, the Applicant became employed as a Flight Attendant. At this time, she applied for a Restricted Area Identity Card [RAIC] which first requires that the Applicant obtain a security clearance pursuant to the Transportation Security Clearance Program [TSCP]. While her application was being processed, the Applicant held a temporary RAIC.

[4] Applicants for a security clearance under the TSCP are subject to a comprehensive background check. Where this background check raises concerns, the TSCP requires that an Advisory Body be convened to review the application and make a recommendation to the Minister.

[5] On September 1, 2015, the TSCP received the Applicant's Law Enforcement Records Check [LERC Report] from the Royal Canadian Mounted Police [RCMP]. The LERC Report described three drug-related incidents as well as her association with her former boyfriend:

> Stayed Trafficking Charges:
>
> - In April 2008, Vancouver Police observed a "hand to hand" transaction between a pedestrian and the driver of a vehicle in an area known by police to be frequented by several property crime criminals, drug users and addicts. Police initiated a vehicle stop of the suspected drug dealer's vehicle.
> - As officers approached the vehicle they witnessed the driver pass something to the passenger. Both driver and passenger were arrested for Possession for the Purpose of Trafficking.
> - The passenger was identified as the Applicant.

- On the passenger seat officers found loose flaps believed to contain heroin weighing 0.56 grams and 0.44 grams of rock cocaine. The driver claimed he had a heroin habit and that the drugs were his.

- While being processed at Vancouver Police jail, the driver was found to be in possession of several more pieces of rock cocaine (5.45 grams) and flaps of heroin (0.51 grams) which were found in a special compartment in his underwear.

- A search of the vehicle incident to arrest revealed a cell phone on the passenger seat along with a purse. Inside the purse were 2 wallets containing identification of both the driver and the Applicant. Both wallets had large sums of Canadian currency (the driver was in possession of $990.00, the Applicant of $260.00). The purse had two cellular phones which were locked, a practice which the LERC Report identifies as common in an attempt to prevent police from collecting further evidence.

- In the centre console was a used yogurt container about 3/4 full with change. The majority of the change was loonies and toonies. The LERC Report notes that the money was consistent with drug dealing as the majority of customers obtain money through property crime.

- The Applicant was charged with two counts of Possession for the Purpose of Trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*], but both charges were entered in a Stay of Proceedings.

b. Vehicle Loan:

- In February 2011, Delta Police pulled over a vehicle registered to the Applicant for an illegal u-turn. The lone occupant was identified as the Applicant's boyfriend. Officers detected the odour of burnt marijuana and the driver admitted to smoking marijuana prior to driving.

- Officers seized one gram of marijuana. A pipe and scale with residue were also seized.

- The Applicant, the vehicle's registered owner, was notified that the vehicle would be towed and the driver departed in a taxi.

c. Home Invasion:

- In June 2012, Coquitlam RCMP received a complaint of a home invasion that had just occurred.

- Upon arrival officers noticed that the front door was open and a glass pane was smashed next to the door. An injured male victim was in the doorway.

- Officers asked if there were any persons still inside the house, and the victim replied that his girlfriend was upstairs hiding in a closet. Officers found the Applicant hiding in a bedroom closet upstairs, frightened and couching in a defensive position.

- A search of the residence located a grow operation. A total of 80-100 plants were found, all approximately 4 feet tall. The home owner explained that it was a legal medical marijuana grow operation. Documentation provided to officers indicated an allowance for a total of 60 plants between two licensed growers residing at the residence.

- The Applicant provided an audio video recorded statement to police, in which she stated that while she was hiding in the bedroom closet she heard the suspects drag her boyfriend into the bedroom and beat him.

- She said the suspects repeatedly asked the victim where his girlfriend (the Applicant) was. She explained she could hear the suspects searching for her and they looked in the closet but did not see her.

- There was no explanation provided as to why the suspects were looking for the Applicant or how they knew she was at the residence as it was not her residence.

- The suspects were arrested a few blocks away and each charged with 2 counts of Robbery with a Firearm Contrary to s. 344(1)(a) of the *Criminal*

> *Code*, RSC 1985, c C-46 [*Criminal Code*], 2 counts of Assault Causing Bodily Harm Contrary to s. 267(b) of the *Criminal Code*.

[6] On September 24, 2015, the Applicant received a letter from Transport Canada outlining adverse information raising concerns regarding her application [the 2015 Notification]. This letter set out in detail, almost verbatim, the information contained in the LERC Report. The 2015 Notification encouraged the Applicant to respond to these concerns.

[7] On December 1, 2015, after two extensions, the Applicant provided her response to the 2015 Notification. She provided the following documents: a notarized explanation of the three incidents; a letter from Crown Counsel relating to the home invasion incident; and a number of character reference letters. The Applicant's statement addressed the issues raised in the 2015 Notification as follows:

> Subject "A":
>
> - The Applicant identified Subject A as her former boyfriend and the person involved in the Stayed Trafficking Charges and the Vehicle Loan incidents.
> - The Applicant explained that she was young at the time of the 2008 trafficking charges (18 years old) and believed her boyfriend's lies that it was a misunderstanding.
> - She said she tried to leave the relationship multiple times, but her boyfriend manipulated her into staying through threats to herself and her family, and physical violence. She said that she was "finally free from his tyranny" in 2010, when he was incarcerated for possession for the purpose of trafficking.

- When he was released in 2011, he contacted the Applicant to ask for her help by loaning her vehicle to him. She agreed.

- She said that after the Vehicle Loan incident she told her former boyfriend that she could no longer lend him her vehicle because she felt he was not telling her the truth.

- In response, the Applicant said he assaulted her and began to threaten her and her family again, so she cut off ties to him.

b. Stayed Trafficking Charges:

- The Applicant said that she had fallen asleep in the car on the way home from dinner and was woken by a police officer asking her to step out of the car.

c. Vehicle Loan:

- The Applicant said she lent her former boyfriend her vehicle when he was released from prison to help him get his life on track.

- After the incident, she said she cut off ties with him.

d. Home Invasion:

- The Applicant said that the burglars were not looking for her, but rather were looking for anyone in the house so they "could detain them, and gain control of the situation".

- She said that the investigation relating to the medical marijuana was separate from the break and enter investigation.

- She said that, upon investigation, the police found the marijuana operation to be legal.

- The Applicant concluded that "[t]his is all information which is easy to obtain if your investigating officer is willing to give the matter it's [*sic*] proper due diligence."

- She did not provide any supporting evidence for her claim.

[8] In his letter relating to the home invasion incident, the Crown Counsel, who had been assigned to the home invasion case, explains:

> The evidence was unclear as to how the two suspects came to target the residence. As noted in your letter there was another victim who resided in a separate unit who was first attacked by the suspects. This victim was uncooperative with the prosecution. Ms. Ng and her boyfriend Andrew St. Clair testified at the trial. I did not call Ms. Ng as a witness as it was clear to me that she remained shaken from the incident and could not provide any additional evidence beyond what Mr. St. Clair could testify to. Specifically, she could not provide any evidence assisting in the identification of the suspects.
>
> In terms of why the suspects were looking for Ms. Ng, based on all the evidence I reviewed I did not see any connection between her and the perpetrators. I took that part of her statement to be a reflection of the circumstances she found herself in while hiding in a closet, the realization that the suspects knew that there was another person in the residence, and their desire to ensure that the police were not called (which Ms. Ng attempted to do).

[9] On April 12, 2016, pursuant to section I.8 of the Transportation Security Clearance Program policy [the Policy], the Advisory Board recommended that the Minister refuse the Application as described in its Summary of Discussion contained in the LERC Report, the summary of which is as follows:

> The Advisory Body recommends refusing the applicant's transportation security clearance based on a police report detailing the applicant's involvement in multiple incidents related to drug trafficking. The Advisory Body also noted the applicant's very close association to an individual with a serious criminal record. An in-depth review of the information on file led the Advisory Body to reasonably believe, on a balance of probabilities, that 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. Furthermore, the applicant's submission did not

> provide sufficient information to dispel the Advisory Body's concerns.

[10] On July 19, 2016, the Minister's Delegate issued a Decision refusing the Applicant's clearance on the following grounds:

> The information regarding your two (2) stayed charges for Possession for the Purpose of Trafficking and your involvement in multiple incidents related to drug trafficking, along with your very close association to individuals involved in drug trafficking raised concerns regarding your judgment, trustworthiness and reliability. I note your involvement in three (3) incidents related to illegal drug activities, one (1) of which involved rock cocaine and heroin, which are not considered entry-level drugs, leading me to believe that these incidents are related to an historical pattern of involvement in illegal drugs. I also note the incident in June 2012, in which the RCMP received a complaint of a home invasion in which you admitted to being one (1) of the targets. When police searched the residence, a total of 80-100 marijuana plants were found, more than double the permitted quantity, leading me to believe these plants were grown for the purpose of trafficking and not simply for personal use. I note you stated that fewer plants were found than permitted to be grown, however you provided no evidence to support this claim. As a result, I defer to the police report. I further note the vulnerability to airport security that is created by security clearance holders having association to individuals involved in serious criminal activities related to drugs. Furthermore, I found your submission to be dismissive, lack personal accountability and found the discrepancies between the Law Enforcement Record Check and your submission to be significant, leading me to question your credibility. An in-depth review of the information on file led me to reasonably believe, on a balance of probabilities, that you 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. I considered the statement you provided; however, the information presented was not sufficient to address my concerns. For these reasons, on behalf of the Minister of Transport, I have refused your security clearance.

II. Relevant Legislation

[11] The relevant provisions of the *Aeronautics Act*, RSC 1985, c A-2 [*Aeronautics Act*] as well as relevant provisions of the Policy are provided in the annex.

III. Issues

[12] The Applicant submits the Decision was unreasonable and procedurally unfair for the following reasons:

1) The Decision was unintelligible in that it does not permit the Applicant or the Court to determine the basis for the cancellation of the Applicant's Security Clearance.

2) The Minister's credibility and fact determination analysis was manifestly flawed.

   a) The Minister erred in finding that the Applicant lacked credibility and in rejecting her evidence regarding the home invasion incident.

   b) The Minister erred in finding that the Applicant had a historical pattern of involvement with illegal drugs without proper or any evidence to support this conclusion.

3) The Applicant was denied procedural fairness as the Minister applied her own knowledge about entry-level drugs as a substitute for expert evidence and did so without notice.

IV. Standard of Review

[13] The parties agree that the standard of review for the Minister's decision of the Minister's Delegate under section 4.8 of the *Aeronautics Act* is reasonableness and that the standard of

review with respect to whether there was a breach of procedural fairness is correctness (*Lorenzen v Canada (Transport)*, 2014 FC 273 at para 12).

V. Analysis

A. *The Minister's Reasons Were Intelligible*

(1) Introduction

[14] At the hearing, the Applicant provided the Court with the case of *Britz v Canada (Attorney General)*, 2016 FC 1286 [*Britz*]. The Applicant submitted that, for the same reasons as in *Britz*, the Decision was not intelligible.

[15] *Britz* concerns the application of the same Policy as in the present case. In that case, however, the Court determined that the applicant was only at risk of being "induced" to commit unlawful acts. The Minister's delegate found the applicant was residing with a partner who had a history of associations with the Hells Angels motorcycle gang, but that she had no criminal record, nor was there evidence of any unlawful behaviour to support a conclusion that she would be "prone" to commit unlawful acts.

[16] The facts in *Britz* provided the basis for the Court to conclude that the reasons were unintelligible. It found that the Minister made what was described as an "unreasonable 'either/or' decision" by borrowing from the Policy's language and finding that 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" [emphasis added]. The decision was said to be

unintelligible because it did not permit the applicant or the Court to determine the basis for the cancellation of the applicant's security clearance.

[17] The Court explained at paragraph 40 of *Britz* that the Minister had to choose between one of three findings:

> [40] Accordingly, as I read it, the Policy's wording describes three different findings which the Minister may make. First, an individual may be found to be an individual who may be prone to commit or assist or abet an unlawful act. Secondly, an individual may be found to be an individual who may be induced to commit or assist or abet an unlawful act. Third, an individual may be found to be an individual who both may be prone and induced to commit or assist or abet an unlawful act.

[18] The Court interpreted the terms "prone" and "induced" to have different meanings based on the presumption of consistent expression, their differing dictionary definitions, and the qualitative difference between each analysis (*Britz* at paras 44-48). I do not disagree with this. I also understand proneness relates to character: *viz*. "This provision involves an assessment of a person's character or propensities ('prone or induced to')" (*Clue v Canada (Attorney General)*, 2011 FC 323 at para 20) [*Clue*] [emphasis added].

[19] The Court went on to find that it was unreasonable for the Minister to deny the application without identifying which of these three possible findings had led to that result. The Court's reasoning in support of this conclusion from paragraphs 54 to 56 of *Britz* is as follows:

> [54] What the Minister acting reasonably may not do is to find disjunctively, as the Minister did here, that the Applicant may

> either be prone to or induced to commit unlawful activities without actually deciding the basis for his Decision to cancel.
>
> [55] Here, the Minister did not decide one way i.e., prone, or the other i.e., induced. In addition, the Minister did not find that the Applicant may be both prone and induced. In my respectful view, in failing to decide on one of the three possible bases for cancellation allowed by the Policy in this respect, the Minister failed his duty to decide in accordance with law. The Minister had no authority to cancel the Applicant's clearance without deciding the basis for that cancellation.
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> [56] Essentially, the Minister's disjunctive finding is an equivocation, not a decision. No reasons for this equivocal finding are provided. In my respectful view, the Minister was obliged to do more than make equivocal 'maybe this or maybe that' findings as done here.
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> [Emphasis added]

[20] The Court also found at paragraphs 61 of *Britz* and following that even absent the above intelligibility concern, it would still have set aside the decision on the basis of the lack of transparency in the reasons. It concluded that the Minister failed to duly consider the submissions of the applicant contesting the finding that her partner had associations with members of the Hells Angels.

[21] The Court's decision in *Britz* is summarized at paragraph 74 as follows:

> [74] The only reasonable basis on which the Minister might have made a Decision to cancel on the facts of this case would be if the Minister had concluded that the Husband's dealing with the Hells Angels put the Applicant's employment in such jeopardy that the Applicant fell into the "may be … induced" category. I stress this option could only arise if, contrary to my finding above, a disjunctive 'either/or' finding is reasonably permitted. The Court is presented with three difficulties in allowing the decision to stand on this basis. First, that is not what the Minister decided. The

> Decision did not conclude that the Applicant may be induced. Instead, the Minister made a disjunctive 'either/or' finding that the Applicant may be either prone or induced. Second, a disjunctive finding is per se unreasonable for the reasons set out above. And finally, to reach the result that the Applicant may be induced by her Husband, the Minister must, of necessity, have rejected each of the eight responses plus the two reference letters provided. While I may, in some circumstances, supply reasons and 'connect the dots,' that would entail writing reasons for why the Minister rejected virtually all the Applicant's responses while knowing only the end result. I am unable to write the reasons the Minister did not write for that conclusion.
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> [Emphasis added]

(2) Distinguishing *Sargeant v Canada (Attorney General)*

[22] The Court in *Britz* was careful to distinguish its facts from those in the matter of *Sargeant v Canada (Attorney General)*, 2016 FC 893 [*Sargeant*]. In that case, while the Minister used the same language to find that the applicant may be "prone or induced", there were facts in the reasons to support findings under both headings. I think it important however, to state that no attempt was made in *Sargeant* to link specific evidence to either of the two conclusory findings, both of which were upheld. The Court in *Britz* distinguishes the decision at paragraph 49 as follows:

> [49] The Minister in *Sargeant* made the same disjunctive finding as made in the case at bar. However, unlike the case at bar, the Minister in *Sargeant* not only had grounds to find the applicant may personally be prone i.e., inclined to unlawful activity (he admitted to have acted unlawfully before), but in addition, the Minister also had grounds to conclude that the applicant might be induced into unlawful activity (as in fact the applicant had been before). Therefore, the Minister's finding was reasonable.

[23] In the present matter, the Minister borrowed the same language from the Policy as in *Britz* in finding that "the Applicant may be prone or induced to commit" an unlawful act. It is argued that the Minister erred by making the same unreasonable disjunctive finding as in *Britz*. However, the Respondent relies upon the foregoing passage to distinguish *Britz*, as there is evidence in the present case that supports a reasonable belief that the Applicant is both prone to and at risk of being induced to commit an unlawful act.

[24] Normally, I would apply a distinction already made in a case being pleaded before me. However, I feel compelled to express my respectful disagreement with the "either/or" ruling in *Britz*. I do so for a number of reasons, not the least of which is that I do not see how the distinction may be made between the *Britz* and *Sargeant* decisions, unless as a corollary to *Britz,* the Minister is required not only to identify the finding relied upon, but also to describe the evidence that supports each finding. Second, I find that *Britz* effectively "judicializes" the Minister's decision-making process by requiring unnecessary distinctions between the findings underlying rejection in a manner contrary to the principles in *Dunsmuir v New Brunswick, 2008 SCC 9* [*Dunsmuir*]. Third, there are also a number of practical concerns with its application, both to the facts in *Britz* and to comparable situations, if the Minister's decision were to be set aside on the grounds of the "either/or" ruling.

[25] In regard to this last point, it is perhaps also important to note that, in my opinion, the Court's reasons pertaining to the unintelligibility of a disjunctive "either/or" finding in *Britz* were *obiter dictum*. By that, I mean that the comments on the intelligibility of the Decision were unnecessary, inasmuch as the decision would have otherwise been set aside for lack of

reasonableness. There was no evidence in regard to proneness, while the Court found that the Minister had committed a reviewable error regarding inducibility by rejecting the Applicant's eight responses to the fairness letter and two reference letters without providing reasons.

(3) The Facts in *Britz* and *Sargeant* Cannot Be Reconciled

[26] I have already stressed the importance I attach to the fact that the reasons in *Sargeant* make no attempt to link specific evidence or factual conclusions to each of the two conclusory findings for rejection. Thus, in both *Sargeant* and *Britz*, the Minister did not specifically describe which evidence supported which findings. This effectively means that the exercise of relating the specific evidence to the specific finding is left to the applicant, and is not something that the Minister is required to describe.

[27] As such, I find that if it was reasonable to leave this exercise of linking the facts or evidence in the reasons to the conclusory findings for rejection in *Sargeant*, it was equally reasonable for the applicant in *Britz* to understand that the evidence in question related only to the inducement finding, such that the fact that both findings were mentioned in the Decision did not render the decision unintelligible. This demonstrates, at a minimum, that the Court's difficulty in *Britz* was not that the applicant did not understand the reasons for the rejection. Rather, the essence of the Court's conclusion was that no decision was made when one of the factors had no evidence to support it on the theory that the evidence could apply to either factor. The Court arrived at this decision despite finding that the facts in *Britz* could only relate to the inducement factor.

[28] In my respectful view on the Court's own finding, the applicant must therefore, have understood that the security risk raised a concern in the Minister's mind about her being influenced by her relationship with someone thought to have links with organized crime. The issue was whether that conclusion was reasonable. The sole fact that the finding of "proneness" was mentioned in the Decision could not, in my respectful opinion, have misled the Applicant as to the substance of the Minister's decision for the cancellation of her security clearance.

[29] In my view, *Britz* and *Sargeant* can only be reconciled in terms of an intelligibility requirement if the Policy was interpreted to impose a duty on the Minster to specifically link the evidence in the decision to each factor, or only one factor if those were the underlying facts. The *Sargeant* decision implicitly confirms that this is not necessary, so long as the reasons contain evidence that supports either one of the factors cited in the reasons.

[30] Accordingly, if *Britz* is correct in imposing this duty on the Minister in formulating the reasons for the decision, then *Sargeant* cannot stand and the Minister will have a duty to treat the facts specific to each head of rejection separately. If such is the Minister's duty, it seems equally incompatible that the Advisory Body's fairness letter would not also be required to make the same distinction, lest the applicant be similarly confused as to what evidence applies to which risk factor. As such, I find that, if the intelligibility finding in *Britz* is to stand, it also imposes a duty on the Minister to outline which evidence supports which finding in the fairness letter.

[31] Moreover, once the Minister starts to distinguish between the factors in the reasons, it will be necessary to do the same thing in the advice of the Advisory Board, which in turn will lead it to separate the evidence under separate factors. This practice will then extend to the fairness letter provided to the applicant. This in turn will raise the issue of the adequacy of the notice of the case the applicant has to meet as an aspect of the duty to act fairly. It is not unreasonable to concluded that *Britz* will lead the Minister, on a practical basis for the sake of avoiding new challenges, to apply its reasoning at all steps of the decision-making process, without being limited to circumstances where both factors are referred to in the decision letter alone, but the underlying facts only point to one of them.

> (4) The requirement for the specific identification of factors that relate to the facts sustaining them for the Minister's reasons to be intelligible should be rejected as inconsistent with the deference owed the Minister's broad discretionary authority and the applicable principles of judicial review.

[32] My concern with *Britz* is that it imposes on the Minister an analytical structure of reasoning based on the Policy that is inconsistent with the jurisprudence that supports a highly deferential approach in all respects to the Minister's broad discretionary decision-making authority including that of the intelligibility of the Minister's reasons.

[33] A summary of the Federal Court's jurisprudence on this issue was set out at paragraphs 26 to 29 of *Sargeant*, as cited with approval at paragraph 35 of *Britz*:

> [26] In security clearance cases, this Court has stated three important principles.

> [27] First, section 4.8 of the Act confers on the Minister a broad discretion to grant, suspend or cancel a security clearance, which empowers him to take into account any relevant factor (*Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59 (CanLII), at para 19, 425 FTR 247 [*Thep-Outhainthany*]; *Brown v Canada (Attorney General)*, 2014 FC 1081 (CanLII), at para 62 [*Brown*].
>
> [28] Second, aviation safety being an issue of substantial importance and access to restricted areas being a privilege, not a right, the Minister, in exercising his discretion under section 4.8, is entitled to err on the side of public safety which means that in balancing the interests of the individual affected and public safety, the interests of the public take precedence (*Thep-Outhainthany v Canada*, at para 17; *Fontaine v Canada (Transport)*, 2007 FC 1160 (CanLII), at paras 53, 59, 313 FTR 309 [*Fontaine*]; *Clue v Canada (Attorney General)*, 2011 FC 323 (CanLII), at paragraph 14). *Rivet v Canada (Attorney General)*, 2007 FC 1175 (CanLII), at para 15, 325 FTR 178).
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> [29] Third, in such matters the focus is on the propensity of airport employees to engage in conduct that could affect aviation safety which requires a broad and forward-looking perspective. In other words, the Minister "is not required to believe on a balance of probabilities that an individual "will" commit an act that "will" unlawfully 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"" (*MacDonnell v Canada (Attorney General)*, 2013 FC 719 (CanLII), at para 29, 435 FTR 202 [*MacDonnell*]; *Brown*, at para 70). As such, the denial or cancellation of a security clearance "requires only a reasonable belief, on a balance of probabilities, that a person may be prone to or induced to commit an act that may interfere with civil aviation" (*Thep-Outhainthany*, above at para 20). Any conduct which causes to question a person's judgment, reliability and trustworthiness is therefore sufficient ground to refuse or cancel a security clearance (*Brown*, at para 78; *Mitchell v Canada (Attorney General)*, 2015 FC 1117 (CanLII), at paras 35, 38 [*Mitchell*]).
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> [Emphasis added]

[34] I find that, contrary to the broad discretion described above, the Court in *Britz* has interpreted the Policy as though it were a statutory enactment, as opposed to a mere guideline. The context of the statutory language of section 4.8 of the *Aeronautics Act* is expressed about

as broadly as it could be without making it a form of unreviewable discretion. It provides that "[t]he Minister may, for the purposes of this Act, grant or refuse to grant a security clearance to any person". It is equally significant that the Policy is not statutorily supported by a Regulation. There is no Regulation providing direction as to how the Minister's discretion is to be exercised, or even a Regulation requiring a policy to be adopted for the same purpose. This reflects the policy reasons underlying section 4.8 of the *Aeronautics Act* as described at paragraph 28 of *Sargeant*: "aviation safety being an issue of substantial importance and access to restricted areas being a privilege, not a right, the Minister, in exercising his discretion under section 4.8, is entitled to err on the side of public safety which means that in balancing the interests of the individual affected and public safety, the interests of the public take precedence".

[35] Moreover, with specific reference to the notion of deference applied to the reasons of the decision-maker, the Supreme Court in *Dunsmuir* instructed reviewing courts to start from the position of seeking to supplement the decisions-maker's reasons, before seeking to subvert them: *viz*. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 at para 12 [*Newfoundland*] of the decision:

> [12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court

> must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.] (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)
>
> [Emphasis added]

[36] In my view, a flexible and deferential application of the Policy is more consistent with the *Dunsmuir* principles on interpreting reasons and with the Federal Courts' jurisprudence. A contextual and purposive interpretation of the supporting legislation and the Policy would, I conclude, favour adopting a liberal construction of intelligibility in these types of cases that focuses on the explanation provided and the affected applicant's understanding, as opposed to expressing concerns from a citation of factors from the Policy whether the Minister logically or imperfectly made any decision at all. This is in line with the view "that Dunsmuir seeks to "avoid an unduly formalistic approach to judicial review" (Newfoundland at para 18, citing Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221; aff'd 2011 SCC 57, [2011] 3 S.C.R. 572 at para 164).

[37] As long as the Decision sufficiently advises the affected individual of the facts giving rise to the finding of the person's inclination of risk to aviation safety and presents a logical association with at least one of the grounds for rejection, the reasons should be found to be sufficiently intelligible. It is the Court's duty for the same reasons to judge whether the reasons

"allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" [*Newfoundland*, at para 16].

[38] The fact that there is no evidence to support a conclusion on one factor has no bearing on the conclusion that all the evidence in the reasons in *Britz* relates to the risk of the inducibility of the applicant. It is clear from the reasons in *Britz* that the risk stems from the applicant being perceived as having associations with an illegal gang. If the applicant can relate the different evidence in *Sargeant* to the different factors without being told, so too can the applicant and the reviewing Court in *Britz*.

[39] Nor do I believe that any argument can be sustained that it is "preferable" for a decision maker to indicate under which of the three findings outlined in *Britz* the security clearance is rejected so as to "contribute to the clarity" of the decision-making process and to enhance the Applicant's ability to understand it. Ultimately, what is being determined is whether a judicial-like duty is to be imposed on the Minister in rendering reasons for a decision, such that it would constitute a reviewable error not to provide such clarity. In judicial review on this issue, there is no preferred procedure, only reasonable or unreasonable ones. Moreover, administrative practices soon become judicially enforceable ones, if regularly followed over time as raising an expectation interest.

[40] In this regard, I also respectfully conclude that it is somewhat a misnomer to describe the Minister's decision as a disjunctive "either/or" finding. The dictionaries indicate that the

"either/or" phraseology refers to an unavoidable choice between two options. This means that both options are available, but choosing one eliminates the possibility of the other, e.g. on today's luncheon special you may have either soup or a salad, but not both. Because the Court's criticism in *Britz* was that that no decision had been made, reference to the either/or terminology appears to implicitly express a conclusion that a finding on one factor would exclude the other when used together.

[41] However, proneness and inducibility are expressed as alternatives in the Policy. I think the better interpretation of the Decision in accordance with the direction in *Dunsmuir* is that the Minister made a decision that both factors apply. This was the case in *Sargeant* where the same disjunctive formulation as in the Policy was used. Thus, where there are two alternative grounds for rejection, the security clearance will not be given if either one is reasonably sustained. This is also consistent with the Court's reasoning in *Clue*, which found that the decision involves examining "a person's behaviour to determine if, on balance, it supports a reasonable belief that a person may in the future be inclined to act unlawfully in the context of aeronautical safety." (at para 20, with my emphasis). *Britz*, adds requirements not found in this test, which this Court has always applied.

[42] In essence, a contextual and deferential approach to reviewing the decision would recognize that when the only evidence in the reasons relates to the factor of inducement, the decision is sufficiently intelligible to the applicant for her to realize that this was the factor used by the Minister to reject her clearance. In other words, there was a decision, and it was adequately intelligible for the applicant to understand the factor being relied upon by the

Minister for her rejection because of the risk that was perceived of her having associations through her partner with a gang that is notoriously contemptuous of the law.

(5) Practical Considerations Impeding the Application of *Britz*

[43] I would respectfully submit that there are also a variety of practical reasons why the reasoning in *Britz* should be rejected. First, I do not believe the Minister's decision could have been set aside, had the Court not found that the determination that the Applicant was at risk of being induced to commit an unlawful act was unreasonable due to the lack of transparency of the reasons in failing to address her counterarguments. It is well established that judicial review should not be granted where, "had the tribunal applied the right test, it would have come to the same conclusion" (*Appulonappar v Canada (Citizenship and Immigration)*, 2016 FC 914 at para 26). Had the Court in *Britz* sent the decision back to the Minister for a redetermination solely on the basis of the unintelligibility of the decision (if it had concluded that the decision concerning the risk of inducement was transparent), the Minister's redetermination would have been upheld by merely striking the reference to "prone" in the original decision, and rendering the same decision on the inducement factor, as that which was set aside.

[44] A second practical consequence is the problem of distinguishing the situation where there is "no evidence" of a particular risk factor, as opposed to the situation where there is insufficient evidence to sustain the factor. Both are, in reality, a situation of "insufficient evidence" capable of sustaining the factor. If the applicant can determine that the evidence supporting proneness is insufficient to sustain the allegation of risk to aviation safety based on a factor, he or she should equally be able to determine that no evidence is even more

insufficient to the point of being non-existent. It is in essence all a matter of degree. Both are evidentiary decisions not "falling within a range of possible, acceptable outcomes which are defensible in respect of the facts" [emphasis added]. The inadequacy of the reasons is with respect to the facts sustaining the decision concerning one of the factors, not the intelligibility of the reasons. The fact that there is no evidence to support a conclusion on one factor has no bearing on the conclusion that all the evidence in the reasons relates to the risk of the inducibility of the applicant, which may or may not be sufficient to sustain the factor.

[45] My third concern with *Britz* is that I do not necessarily find it useful to distinguish between whether some conduct supports a finding of proneness or inducibility, as there are situations where the conduct implies both a risk of proneness and inducibility. This would seem to apply to evidence showing that the applicant was closely associated with, i.e. resides with, someone who has a history of unlawful activity. Such evidence could raise concerns of proneness, and not just that of inducibility to be involved in unlawful activity. I understand proneness relates to character: *viz*. "This provision involves an assessment of a person's character or propensities ('prone or induced to')" [emphasis added] (*Clue* at para 20). I think a persuasive argument can be made that character is largely formed by a person's environment, and is often reflected in the company the person keeps.

[46] Taking a hypothetical example, if it can be demonstrated that an applicant accepts to live with a spouse who is known to have links, say, with organized crime, then there is risk evidence of turning a blind eye to such conduct in order to maintain the relationship, and thereby implicitly accepting to live with it. This is why it is said that a person's character is

reflected in the company the person keeps. The applicant has thereby demonstrated his or her weakness of character and could be said to be "prone" to rationalize the next step, being his or her own unlawful behaviour, if required to maintain the relationship. It is thus the weakness of the person's character that makes the individual "prone" to being induced. Living with a person of unsavory character is simply evidence of that proneness. In this example, the two risk factors are inseparable.

[47] For the above reasons, I respectfully conclude that the "either/or" ruling in *Britz* is not good law and will not to apply it in this matter.

B. *Was the Decision reasonable?*

(1) The Standard of Proof

[48] The parties agree on the standard of proof that needs to be met for the Minister to deny a security clearance pursuant to section I.4 of the Policy. This standard is set out in *Clue* at para 20:

> For purposes of revocation of a TSC the standard of proof is much lower and requires only a reasonable belief, on a balance of probabilities, that a person may be prone or induced to commit and act (or to assist such an act) that may unlawfully interfere with civil aviation. This provision involves an assessment of a person's character or propensities ("prone or induced to") and it does not require evidence of the actual commission of an unlawful act: see *Fontaine*, above, at para 78, 81 and 83. What the Director is called upon to do is to examine a person's behaviour to determine if, on balance, it supports a reasonable belief that a person may in the future be inclined to act unlawfully in the context of aeronautical safety.
>
> [Emphasis in the original]

[49] The Court in *Britz* succinctly summarized the law on the cancellation of security clearances at paragraph 34 as follows:

> [34] It is established that the Advisory Body and the Minister have specialized expertise and that the Minister's decisions are entitled to a high degree of deference: *Lavoie v Canada (Attorney General)*, 2007 FC 435 (CanLII) at para 17; *Fontaine v Transport Canada Safety and Security*, 2007 FC 1160 (CanLII) [*Fontaine*]. The Minister is entitled to err on the side of public safety: *Brown v Canada (Attorney General)*, 2014 FC 1081 (CanLII) at para 71; *Yee Tam v Canada (Transport)*, 2016 FC 105 (CanLII) at para 16. Further, access to restricted areas in Canadian airports is a privilege, not a right: *Fontaine*, above at para 78; *Clue*, above at para 20. As noted already, the Applicant has the onus of establishing his or her entitlement to a Security Clearance.

[50] With respect to the nature, assessment and treatment of evidence necessary to support a reasonable belief that the Applicant may be prone or induced to commit a prohibited act, I find that Justice Stratas provided guidance on the issue of determining risk at paragraphs 94 and 97 of *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56, even though this case was based on the standard of "reasonable grounds to suspect" arising in the context of the *Marine Transportation Security Regulations*, SOR/2004-144, as opposed to the standard of "reasonable belief" in the, Policy:

> [94] However, assessments of risk and whether reasonable grounds for suspicion exist are standards that involve the sensitive consideration of facts and careful fact-finding, tasks that normally entail a broad range of acceptable and defensible decision-making. Assessments of risk are forward-looking and predictive. By nature, these are matters not of exactitude and scientific calculation but rather matters of nuance and judgment.
>
> [97] While fanciful musings, speculations or hunches do not meet the standard of "reasonable grounds to suspect," the "totality of the

> circumstances" and inferences drawn therefrom, including information supplied by others, apparent circumstances and associations among individuals can. To satisfy the "reasonable grounds to suspect" standard, verifiable and reliable proof connecting an individual to an incident – proof of the sort required to secure a conviction or even a search warrant – is not necessary. See e.g. *Mann, supra; R. v. Kang Brown*, 2008 SCC 18 (CanLII), [2008] 1 S.C.R. 456; *R. v. Monney*, 1999 CanLII 678 (SCC), [1999] 1 S.C.R. 652. Instead, "objectively discernable facts" will suffice: *Mann*, at paragraph 43.
>
> [Emphasis added]

(2) The Decision was reasonable as falling within a range of possible, acceptable outcomes based on the facts and law

[51] The Minister's delegate had before her evidence that the Applicant: 1) had been charged with two counts of possession for the purpose of trafficking in highly compromising circumstances; 2) had a close association with a person convicted of several drug-related charges; 3) had been threatened by this person; 4) had nevertheless lent her car to this person, who was later found with drugs in her car; and 5) was involved and personally at serious risk in a violent home invasion associated with drugs.

[52] Apart from the charges against the Applicant, this Court has confirmed repeatedly that bare associations with drug traffickers provide sufficient grounds to reasonably refuse or cancel a clearance (*Singh Kailley v Canada (Transport)*, 2016 FC 52 at para 37.

[53] I conclude that the evidence relied upon by the decision-maker reasonably sustains a conclusion that the Applicant may be a risk to civil aviation, even were I to conclude that one of the foregoing findings was not sufficiently supported, which is not the case.

(3) Credibility and Sufficiency of Evidence Analysis

(a) *The Minister did not err in finding that the Applicant lacked credibility and in rejecting the Applicant's evidence regarding the home invasion incident*

[54] The Applicant submits that the Minister erred by drawing a negative credibility finding on the basis that the Applicant provided a different version of events than that contained in the LERC Report. She contends that this effectively made the Applicant's response futile. In *Scott v British Columbia*, 2013 BCCA 554 at para 32, a case pertaining to a refusal to provide a police officer with a breath sample, the adjudicator's assessment of credibility was found to be manifestly flawed "because she afforded a presumption of reliability to the officer's report and required the respondent to refute the statements in the report." The Applicant claims that the Decision's acceptance of the LERC Report was not the product of a transparent reasoning process and that it even went beyond affording a "presumption of reliability" to the LERC Report. Instead, it made the evidence presented in the LERC Report uncontradictable.

[55] I find that the Applicant is asking the Court to reweigh the evidence without justification. It is well-established, as reiterated in *Henri v Canada (Attorney General)*, 2014 FC 1141 at para 40 [*Henri*] (affirmed in 2016 FCA 38), that the reliability of the information obtained from the RCMP for the purposes of the verification process for security clearances is sufficient, even if,

in such a context, it constitutes hearsay. Further, the onus is on the person who holds the security clearance to address the Minister's concerns, such that the Minister is not required to cross-check information obtained from the RCMP (*Henri* at para 45).

[56] In any event, there is a reasonable tendency to accept a version of events furnished by an independent professional police force against a contradictory version of a self-interested witness, particularly when a credibility assessment of this contradictory version is not possible in the context of an administrative procedure. In this case, the Minister questioned the Applicant's credibility at least in part due to finding her submissions to be dismissive and lacking personal accountability. I also agree that there is a basis to conclude that there were discrepancies between the explanation of the events by the Applicant which are not reasonable and touch on her credibility, as discussed below.

[57] The Applicant takes issue with many aspects of the Minister's assessment of the 2012 home invasion incident. First, she challenges the conclusion that the attackers were specifically targeting her and claims they were only trying to find her to gain control of the situation. It is noted that she describes the attackers as "burglars" despite her documented fears for her own safety and the associated violence exceeding any basis to consider that theft was the sole purpose of the break in. The event is described in the 2015 Notification as follows:

> Upon arrival, officers noticed the front door was open and the glass pane was smashed next to the door. A male was in the doorway, later identified as a victim, who appeared to be bleeding from his head and the blood was running down his body. The victim stated he had been hit on the head with a gun. He had also been kicked when on the ground that sustained a cut to the right side from a knife being held to his neck. He required stitches on the back of his

> head from a large laceration caused by from what he believed was being repeatedly hit with a gun. Several other lacerations were sustained that required stitches. He also suffered several other bruises and scrapes to his face and body from being kicked and stomped on.

[58] The Applicant also challenges the initial responding officer's claim that 80 to 100 marijuana plants were found in the residence by relying on information from a separate investigation by the Coquitlam RCMP which found the permits to be in order and the plant count to be below the allowable limit.

[59] Given the Applicant's previous history of involvement in illegal drug-related events, the reason the attackers were looking for her would make little difference. The circumstances of the event are, once again, consistent with an unfavourable impression of the company that the Applicant kept. Second, as the Decision pointed out, there is no explanation why the Applicant did not take steps to procure and submit the mitigating police investigation report into the marijuana plants. It was her onus to do so since, as previously stated, the Minister is not required to cross-check information obtained from the RCMP (*Henri* at para 45).

[60] Third, the Applicant submits that the Minister did not mention or consider the letter from the Crown Counsel prosecuting the incident, evidence which contradicted the finding that she was a "target" of the home invasion. The prosecutor qualified the Applicant's statement to police as follows:

> I took that part of her statement to be a reflection of the circumstances she found herself in while hiding in a closet, the realization that the suspects knew that there was another person in

> the residence, and their desire to ensure that the police were not called (which Ms. Ng attempted to do).

[61] She contends that, given the importance of this contradictory evidence, it was unreasonable for the Minister to fail to mention it (*Cepeda-Gutierrez v Canada (Minister of Citizenship & Immigration)* (1998), 157 FTR 35 at paras 15-17).

[62] I do not find the "opinion" of the Crown Counsel to be supported by any evidence other than the Applicant's statement. I agree with the Respondent's submission that a decision-maker can rely on its own interpretation of the evidence and need not consider the Crown Counsel's opinion on this matter. In any case, this statement is not sufficient to contradict the Minister's belief that the Applicant was involved in a violent home invasion associated with drugs where she was personally at serious risk. Two individuals had already been seriously assaulted. She had a previous history of involvement with drug issues and had been in a relationship with a convicted trafficker. Taking into consideration the persons involved in the attack, the violence associated with the home invasion and her admitted fear for her own safety during the incident; the belief that she was a "target" of the invasion, perhaps collaterally but still a target, was not unreasonable given the deference owed to the decision-maker.

(4) Was the Decision made on the basis of erroneous findings of fact?

[63] The Applicant takes issue with the assumptions underlying the Minister's reasoning in the following passage:

> I note your involvement in three (3) incidents related to illegal drug activities, one (1) of which involved rock cocaine and heroin, which are not considered entry-level drugs, leading me to believe that these incidents are related to [a] historical pattern of involvement in illegal drugs.
>
> [Emphasis added]

[64] The Applicant submits that the Minister erred in basing the Decision on the finding that cocaine and heroin were not entry-level drugs. She argues that there was no evidence on the record before the decision-maker suggesting that cocaine and heroin were not entry-level drugs or any definition or expert evidence supporting the conclusion that they were not "entry-level drugs". On the other hand, the Applicant provided no case law, doctrine, or other literature introduced in court proceedings, indicating what was, or was not, an "entry-level drug".

[65] I reject this submission on a number of grounds. Firstly, the Applicant's involvement with rock cocaine and heroin, in addition to the other incidents, is the basis for the conclusion that the Applicant had an historical pattern of involvement with illegal drugs, not the fact that these were not entry-level drugs. Secondly, the Advisory Body, as a specialized body dealing regularly and specifically with the subject matter in question, ought to be able to rely upon its specialized knowledge and expertise in reaching such conclusions. Moreover, the Respondent argued, and I agree, that the meaning of "entry-level drugs" and the fact that heroin and rock cocaine are not entry-level drugs is not the "subject of dispute among reasonable persons" (*R v* Williams, [1998] 1 SCR 1128 at para 54; Brown, Donald J.M. Q.C., John M Evans and Christine E. Deacon, *Judicial Review of Administrative Action in Canada*, at 10:8100, Volume 3 (Carswell)).

C. *Was the Applicant denied procedural fairness?*

[66] The Court also rejects the Applicant's submission that she was not afforded a sufficient level of procedural fairness. The Applicant relies upon some of the case law that recognizes that where a decision revokes an existing RAIC, a higher level of procedural fairness is engaged (*Meyler v Canada (Attorney General)*, 2015 FC 357 at para 26). The Applicant had been issued a temporary RAIC and was exercising her employment on this basis. As such the Applicant submits that the Decision is analogous to one revoking an existing RAIC (*Kaczor v Canada (Transport)*, 2015 FC 698 at para 12 [*Kaczor*]).

[67] Either way, the case law recognizes that even where this "higher level" of procedural fairness exists, applicants are only entitled to be advised of concerns with respect to their application and to be provided an opportunity to respond to these concerns (*Kaczor* at para 12). This obligation was met in these circumstances.

VI. Conclusion

[68] The application is dismissed with costs fixed at $500, the minimum figure normally awarded in these cases, given the absence of submissions on costs from the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed with costs to the Respondent in the all in amount of $500.

"Peter Annis"
Judge

ANNEX

Aeronautics Act, RSC 1985, c A-2 [*Aeronautics Act*]

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.

Transportation Security Clearance Program Policy

Aim	*Objet*
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.	**I.1** 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 The objective of this Program is to prevent the uncontrolled entry into a restricted area of a listed airport by any individual who	**I.4** 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:
[…]	[…]
4. the Minister reasonably believes, on a balance of probabilities, may be prone or induced to	**4.** qui, selon le ministre et les probabilités, est sujette ou peut être incitée à:

commit an act that may unlawfully interfere with civil aviation; or	commettre un acte d'intervention illicite pour l'aviation civile; ou
assist or abet any person to commit an act that may unlawfully interfere with civil aviation.	aider ou à inciter toute autre personne à commettre un acte d'intervention illicite pour l'aviation civile.

FEDERAL COURT

SOLICITORS OF RECORD

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