

Federal Court



Cour fédérale

Date: 20180309

Docket: T-942-17

Citation: 2018 FC 283

Vancouver, British Columbia, March 9, 2018

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

BALRAJ DHESI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Balraj Dhesi seeks judicial review of a decision made by the Acting Director General, Aviation Security on behalf of the Minister of Transport [Minister] to deny his application for a transportation security clearance. The Minister concluded that Mr. Dhesi's history of uttering threats, disrespecting authority and associating with an individual who was involved with gangs and guns raised serious concerns regarding Mr. Dhesi's judgment, trustworthiness and reliability.

[2] For the reasons that follow, I find that the Minister's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The application for judicial review is therefore dismissed.

II. Background

[3] Mr. Dhési began working for Air Canada as a station attendant at Vancouver International Airport on April 30, 2015. He was required to apply for a security clearance from Transport Canada as a condition of his employment.

[4] On June 9, 2016, Transport Canada received a Law Enforcement Record Check Report [LERC Report] from the Royal Canadian Mounted Police. The LERC Report identified four incidents involving Mr. Dhési that raised concerns regarding his suitability for a security clearance:

- (a) On October 11, 2014, Delta police responded to reports of six youths who were allegedly drinking and smoking marijuana in a park. Officers attended and found the youths, one of whom was Mr. Dhési, drinking beer, but there was no evidence of drugs.
- (b) On August 6, 2015, Delta police conducted a traffic stop of a vehicle occupied by three individuals, one of whom was Mr. Dhési. Another occupant of the vehicle had an extensive history of gang involvement, firearms trafficking and street checks. However, there was nothing suspicious about the interaction on that day.

- (c) In August 2015, an open source search revealed that Mr. Dhesi was Facebook “friends” with the individual involved with gangs and firearms trafficking.
- (d) On October 16, 2015, Vancouver police helped staff at the Pacific National Exhibition [PNE] remove Mr. Dhesi, who was intoxicated, from the premises. Mr. Dhesi used threatening language, specifically “Do you know who I am” and “Do you know what you’re in for?”

[5] On July 14, 2016, the Minister sent a letter to Mr. Dhesi informing him of the information contained in the LERC Report and concerns regarding his suitability for a security clearance. Mr. Dhesi was given an opportunity to provide additional information regarding the incidents, and any other information or explanation he considered relevant.

[6] Mr. Dhesi responded to Transport Canada’s letter on July 28, 2016. He said that he regretted his mistakes and apologized for them. With respect to the incident on October 11, 2014, he said that he had been the “designated driver” for the youths who were drinking, but he understood that drinking in public parks is illegal. With respect to the incident on August 6, 2015, he said that the individual who was involved with gangs and guns was “a friend of a friend” with whom he did not have a close relationship. He said that the individual invited him to be a Facebook “friend” and he accepted without knowing anything of his criminal history. With respect to the incident on October 16, 2015, Mr. Dhesi said he had been drinking while also taking medication, his threatening words did not mean anything, and he was embarrassed by his behaviour and willing to apologize to PNE staff.

[7] Mr. Dhési also said that he had learned from his mistakes, he had a strong work ethic and an excellent attendance record, and he had successfully passed all drug tests administered by Air Canada. Mr. Dhési praised his “family values” and emphasized his volunteer work with a youth soccer camp. He expressed a willingness to provide character references, although none were included with his response.

[8] On November 9, 2016, the Transportation Security Clearance Program Advisory Body [Advisory Body] recommended that Mr. Dhési’s application for a security clearance be refused due to a reasonable belief, based on a balance of probabilities, that he 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. The Advisory Body concluded that Mr. Dhési’s written submissions were insufficient to dispel the concerns.

[9] According to the Summary of Discussion, the Advisory Body acknowledged that a Facebook friendship did not necessarily indicate a close association between Mr. Dhési and the individual involved with gangs and firearms trafficking; however it did indicate something more than a “friend of a friend”, as initially suggested by Mr. Dhési. The Advisory Body noted that airports may become vulnerable if those who hold security clearances have associations with individuals involved in serious criminal activity. The Advisory Body observed that if Mr. Dhési were truly remorseful for his behaviour at the PNE, he would have already apologized to staff rather than merely offering to do so. The Advisory Body acknowledged that Mr. Dhési did not have a criminal record. However, because the most recent incident occurred less than six months

after Mr. Dhesi applied for a security clearance, the Advisory Body questioned whether there had been enough time for him to demonstrate a change in his behaviour and associations.

III. Decision under Review

[10] On May 25, 2017, the Minister refused Mr. Dhesi's security clearance for the following

reasons:

... The information regarding the applicant's involvement in criminal activity related to threats, disrespect for authority, as well as his association to an individual involved in criminal activities related to gangs and firearms raised serious concerns regarding his judgment, trustworthiness, and reliability. I note the incident in August 2015, in which the applicant was a passenger in a vehicle with an individual who was identified as having an extensive history of gang associations, firearms trafficking and street checks. Although the applicant stated in his submission that this individual was simply a friend of a friend, the courts have ruled that the Minister is entitled to err on the side of public safety and that access to a restricted area is a privilege, not a right. I note this incident occurred very recently, four (4) months after the applicant signed his Transportation Security Clearance application. I note the vulnerability to airport security that is created by security clearance holders having associations to individuals who are involved in serious criminal activities. I also note the incident in October 2015, in which the applicant made veiled threats to harm staff at the Pacific National Exhibition, which led me to further question his judgment, trustworthiness and reliability. An in-depth review of the information on file led me 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. I considered the statement provided by the applicant regarding his recent associations; however, the information presented was not sufficient to address my concerns.

I therefore concur with the Advisory Body's recommendation and refuse to grant Mr. Dhesi's transportation security clearance.

IV. Issues

[11] This application for judicial review raises the following issues:

A. Was the Minister's decision reasonable?

B. Were the Minister's reasons adequate?

C. Was the Minister's decision procedurally fair?

V. Analysis

[12] A decision to refuse a transportation security clearance is subject to review by this Court against the standard of reasonableness (*Clue v Canada (AG)*, 2011 FC 323 at para 14 [*Clue*]).

The decision is highly discretionary. The Court will intervene only if the decision falls outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[13] Questions of procedural fairness are subject to review by this Court against the standard of correctness (*Clue* at para 14).

[14] Mr. Dhesi initially submitted affidavits to supplement the information that was before the Minister when he refused the security clearance. However, his counsel conceded that the new evidence is not admissible in this application for judicial review (*Henri v Canada (AG)*, 2014 FC 1141 at para 21; *Christie v Canada (Transport)*, 2015 FC 210 at para 20 [*Christie*]).

A. *Was the Minister's decision reasonable?*

[15] Mr. Dhési says that the evidence before the Minister was insufficient to support the conclusion that he 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. Mr. Dhési notes that he does not have a criminal record, and says that there is nothing in his personal or employment history that could provide a basis for this finding. He disputes that the incidents described in the LERC Report raise serious concerns regarding his judgment, trustworthiness and reliability.

[16] Under Transport Canada's Transportation Security Clearance Program Policy [the TSCP Policy], the standard of proof required to support the Minister's decision is a reasonable belief, based on a balance of probabilities, that an individual may be prone or induced to commit an act that may unlawfully interfere with civil aviation (*Christie* at para 23). The Minister is not required to believe on a balance of probabilities that an individual will in fact commit an act that will unlawfully interfere with civil aviation. In other words, the TSCP Policy is forward-looking and the Minister is therefore required to make a prediction (*MacDonnell v Canada (AG)*, 2013 FC 719 at para 29).

[17] The Minister is entitled to rely on any factor that he may consider relevant in exercising his discretion to grant or deny an application for a security clearance (*Fontaine v Canada (Transport)*, 2007 FC 1160 at para 78 [*Fontaine*]). Transport Canada is not required to conduct an independent investigation or verification of a LERC Report, and may rely on a wide range of law enforcement information in determining whether to grant or refuse an applicant's security

clearance (*Fontaine* at paras 75, 81). The absence of a criminal record is not determinative (*Thep-Outhainthany v Canada (AG)*, 2013 FC 59 at para 20).

[18] Where there is any doubt regarding an applicant's suitability for a security clearance, it is appropriate for the Minister to err on the side of caution given the potential for grave consequences (*Sargeant v Canada (AG)*, 2016 FC 893 at paras 28, 34 [*Sargeant*]). The threshold is low, and indeed a single instance of questionable conduct may be sufficient to justify a negative security clearance determination (*Sargeant* at para 34). There is a broad range of acceptable and defensible decisions (*Sidhu v Canada (Citizenship and Immigration)*, 2016 FC 34 at para 16 [*Sidhu*]).

[19] The incidents disclosed in the LERC Report reveal more than one instance of questionable conduct. Most troubling are the threats uttered by Mr. Dhesi to PNE staff: "Do you know who I am?" and "Do you know what you're in for?". His choice of words cannot be dismissed as the meaningless ramblings of an intoxicated man. They carried a clear implication of menace, rendered more ominous by Mr. Dhesi's past association, however tenuous, with an individual involved with gangs and guns. The fact that the incident occurred after Mr. Dhesi had already commenced employment with Air Canada and applied for a security clearance increases the gravity of the incident. I am therefore satisfied that there was a reasonable basis for the Minister's concern regarding Mr. Dhesi's judgment, trustworthiness and reliability.

B. *Were the Minister's reasons sufficient?*

[20] Mr. Dhesi complains that the Minister did not specify whether he believed Mr. Dhesi was personally prone to commit an act that may unlawfully interfere with civil aviation, or that he might be induced to do so by others. Citing the decision of Justice Henry Brown in *Britz v Canada (AG)*, 2016 FC 1286 [*Britz*], he says that an applicant may be prone, induced, or both prone and induced (at para 40), and the Minister's use of the word "or" was an equivocal finding that rendered the decision unintelligible.

[21] The words "prone or induced" are found in the TSCP Policy. In *Ng v Canada (AG)*, 2017 FC 376, Justice Peter Annis concluded that the analysis found in *Britz* is not good law, because "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" (at para 32). I agree with Justice Annis that the preponderance of this Court's jurisprudence confirms it is open to the Minister to find that an applicant may be either prone or induced to commit an act that may unlawfully interfere with civil aviation, and it is not necessary for the Minister to specify which of the two considerations underlies the decision (see, for example, *Sargeant* at para 34; *Sylvester v Canada (AG)*, 2013 FC 904 at para 19; *Varadi v Canada (AG)*, 2017 FC 155 at para 38).

[22] Mr. Dhesi also takes issue with the Minister's broad declaration: "I considered the statement provided by the applicant regarding his recent associations; however, the information presented was not sufficient to address my concerns". Mr. Dhesi relies on the decision of Justice

Sean Harrington in *Ho v Canada (AG)*, 2013 FC 865 [*Ho*] at paragraph 28 for the proposition that a simple statement that an applicant's explanation is insufficient is itself insufficient and opaque. He says that the Minister does not appear to have fully considered the explanations offered in his letter of July 28, 2016. Nor is there any indication in the Summary of Discussion that the Advisory Body considered his strong work ethic, his excellent attendance record, the results of drug tests administered by Air Canada, that he was the "designated driver" for the group of youths who were drinking in a public park on October 11, 2014, or that he was taking medication when he uttered the intoxicated threats on October 16, 2015.

[23] The applicant in *Ho* provided a very detailed explanation that addressed the precise concerns identified by the Minister. I am not persuaded that Mr. Dhesi's explanations rose to the same level. I note that *Ho* has often been distinguished in subsequent decisions of this Court for similar reasons (see, for example, *Doan v Canada (AG)*, 2016 FC 138 at para 27; *Wu v Canada (AG)*, 2016 FC 722 at para 65; *Bonnick v Canada (AG)*, 2016 FC 1187 at paras 28-31).

[24] Furthermore, a decision-maker is not obliged to mention every piece of evidence submitted by an applicant (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). Rather, decision-makers are presumed to have considered all the evidence before them (*Quan v Canada (AG)*, 2016 FC 1181 at para 27). According to the Summary of Discussion, the Advisory Body did consider many aspects of Mr. Dhesi's written submission, including his assertion that the individual involved with gangs and guns was no more than a "friend of a friend" (a questionable claim), whether he had learned from his mistakes (it was too early to say), and his offer to apologize to PNE staff (which he hadn't

done). Mr. Dhesi is essentially asking the Court to re-weigh the evidence, but that is not the purpose of judicial review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61).

C. *Was the Minister's decision procedurally fair?*

[25] Mr. Dhesi says that he was unaware the Minister might be concerned about his judgment, trustworthiness and reliability. This was not explicitly mentioned in the letter of July 14, 2016, nor do those precise words appear in the TSCP Policy. He therefore argues that he was not informed of the case to be met, or given a reasonable opportunity to respond.

[26] In my view, an individual's judgment, trustworthiness and reliability are inevitably implicated in an examination of a person's suitability to hold a security clearance. There can be no serious question that the Minister is permitted to consider these factors (*Mangat v Canada (AG)*, 2016 FC 907 at para 30; *Sargeant* at para 29; *Sidhu* at para 19).

[27] The Minister is not obliged to inform an applicant of each and every particular ground upon which he may be denied a security clearance (*Sattar v Canada (Transport)*, 2016 FC 469 at paras 22, 24, 31). The onus is on the applicant to sufficiently address any and all concerns (*Sargeant* at para 32). Neither the Advisory Body nor the Director General were required to give Mr. Dhesi a second opportunity to respond (*Salmon v Canada (AG)*, 2014 FC 1098 at para 60).

[28] I am therefore satisfied that Mr. Dhesi was given sufficient notice of the case to be met, and a reasonable opportunity to respond. The Minister's decision was procedurally fair.

VI. Conclusion

[29] Mr. Dhesi is a young man of 22. It might perhaps be said that the incidents which caused him to be denied a security clearance, particularly when viewed in isolation, were not exceptionally grave, yet the consequences for his employment are very serious. He says that he had hoped to pursue a long-term career with Air Canada. It is possible that these lapses of judgment were out of character, and that Mr. Dhesi has genuinely learned from his mistakes.

[30] However, the Minister is entrusted with the weighty responsibility of ensuring the safety and security of the travelling public. Where there is any doubt regarding an applicant's suitability for a security clearance, the Minister is justified in erring on the side of caution. I am satisfied that the incidents disclosed in the LERC Report, the most recent of which occurred after Mr. Dhesi had commenced employment with Air Canada and applied for a security clearance, bring the Minister's decision within a range of possible, acceptable outcomes.

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

JUDGMENT

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

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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