

Federal Court



Cour fédérale

Date: 20190304

Docket: T-142-18

Citation: 2019 FC 257

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 4, 2019

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

RÉGINALD DORÉLAS

Applicant

and

TRANSPORT CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Réginald Dorélas is seeking judicial review of a decision rendered on December 12, 2017, by the Director General, Aviation Security (Director General), on behalf of Canada's Minister of Transport (the Minister), pursuant to the discretionary powers granted to the Minister under section 4.8 of the *Aeronautics Act*, RSC (1985), c A-2 [the Act], to cancel his

transportation security clearance (clearance) in connection with his employment at Pierre Elliot Trudeau International Airport.

[2] For the reasons below, the application for judicial review will be dismissed.

II. Background

[3] Mr. Dorélas has worked as a customer service agent for Air Canada since 1999. He received his first clearance in 2010, valid for a five-year period. On March 2, 2015, Mr. Dorélas applied for a renewal of his clearance, and his new security clearance was granted to him that month, again valid for a five-year period.

[4] However, on November 16, 2015, the Royal Canadian Mounted Police (RCMP) provided Transport Canada with a law enforcement record check report that listed two incidents in which Mr. Dorélas had allegedly been involved: (1) in August 2012, a complaint of identity theft was filed with the Châteauguay police, with the victim alleging that Mr. Dorélas and somebody very close to him with a criminal history of fraud had used his personal data to rent a house; and (2) in March 2013, another complaint was filed alleging that Mr. Dorélas had taken out a \$25,000 loan in the complainant's name from a branch of the National Bank in Laval, and then had written himself a certified cheque for \$9,800 from the loan account and deposited it in a Bank of Montreal ATM.

[5] In a letter dated January 19, 2016, Transport Canada informed Mr. Dorélas that his clearance was being reviewed because of the adverse information raised in the RCMP report.

Transport Canada related the events described in the report and informed Mr. Dorélas that the Transportation Security Clearance Advisory Body (Advisory Body) would be convened, when necessary, to prepare a recommendation for the Minister of Transport on whether to grant or withdraw clearance. In the letter, Transport Canada encouraged Mr. Dorélas to provide additional information or an explanation regarding the incidents and the association, including any mitigating circumstances.

[6] Mr. Dorélas replied in an undated letter. With respect to the event of August 2012, he essentially explained that in December 2012, while seeking accommodations for his family, he had met somebody advertising a house to sublet in Ville Saint-Laurent. This person shared Mr. Dorélas' passion for music and the latter had, in April 2013, sold him some professional audio equipment. Mr. Dorélas did not specify the amounts involved in this sale entered into with the sublessor.

[7] With regard to the allegation of March 2013, Mr. Dorélas denied having taken a \$25,000 loan from the National Bank, using his own identity or any other. He stated that he had sold professional audio equipment to a buyer who had paid with a certified cheque and that he had deposited the cheque without any difficulties.

[8] On May 17, 2016, the Advisory Body recommended deferring its decision pending the receipt of additional information from the RCMP.

[9] In a letter dated June 9, 2016, the RCMP sent a supplementary law enforcement record check report to Transport Canada. The report not only contained further information about the above-cited incidents of August 2012 and March 2013, but also described six additional incidents:

1. In March 2012, the owner of a house in Ville Saint-Laurent filed a complaint against Mr. Dorélas and somebody very close to him, lessees of his house, for identity theft. The latter two had allegedly produced a fake lease for the purpose of fraudulently obtaining social insurance benefits, imitating the signature of the owner of the rented house. Moreover, Mr. Dorélas did not include the address of this residence in his application for security clearance in 2015.
2. On April 9, 2012, a property owner filed a complaint against Mr. Dorélas and somebody very close to him for fraud. Mr. Dorélas and the person associated with him had allegedly produced a fake lease, imitating the owner's signature.
3. In July 2014, a car rental agency filed a complaint of car theft because Mr. Dorélas had allegedly failed to return a rented car and pay the rental fees. A bailiff eventually recovered the car and the complaint was withdrawn.
4. In May 2015, an employee of a financial institution filed a complaint against Mr. Dorélas for cheque fraud. Mr. Dorélas had allegedly opened a bank account, deposited a false \$4,100 cheque in the account and then withdrawn the money from an ATM.
5. In July 2015, a car rental agency filed a complaint with the police for theft, because Mr. Dorélas had allegedly failed to return a rented vehicle. The vehicle was found abandoned and damaged.
6. In August 2015, the police received a complaint regarding a domestic dispute involving a couple with two children in a vehicle. The police stated that they were satisfied that it had been nothing but a non-violent verbal domestic conflict. The police report also notes that Mr. Dorélas had declared in his clearance application that he was single.

[10] In a letter dated August 23, 2016, Transport Canada informed Mr. Dorélas that his clearance was still under review following the receipt of the additional adverse information. Transport Canada related the incidents and encouraged Mr. Dorélas to reply.

[11] In an undated letter, Mr. Dorélas replied and provided the following explanations:

1. With regard to the allegations of March and April 2012, Mr. Dorélas denied having modified any leases. He stated that he had never applied for social

assistance, that only his housemate had any connections with Emploi-Québec and that he had no interest in engaging in such conduct.

2. In connection with the allegations of August 2012 and March 2013, Mr. Dorélas offered the same explanations as in his first letter of reply.
3. In connection with the complaint of theft of a rented vehicle in July 2014, Mr. Dorélas denied having stolen it and simply stated that the car had not been returned on the designated date because he had needed it and had been too busy.
4. In connection with the cheque fraud in May 2015, Mr. Dorélas stated that he had received the \$4,100 cheque for the sale of equipment. He stated that he had applied for an increase to the credit limit of the chequing account to meet his needs.
5. In connection with the complaint of vehicle theft in July 2015, Mr. Dorélas stated that he had simply returned the car to the garage after opening hours. Mr. Dorélas admitted that the car had been damaged, but explained that the person responsible for the damage had agreed to compensate the rental agency. Mr. Dorélas had paid the balance owing.
6. In connection with the domestic dispute of August 2015, the applicant admitted that it had occurred but provided no explanation. Finally, the applicant stated that he was still single, as his relationship was ambiguous.

[12] On May 10, 2017, the Advisory Body recommended that Mr. Dorélas' clearance be cancelled in light of the information revealed by the RCMP reports.

[13] On December 4, 2017, the Director General rendered her decision and confirmed that she agreed with the Advisory Board's recommendation to cancel Mr. Dorélas' clearance. On December 12, 2017, Transport Canada informed the head of support services and airport security of Aéroports de Montréal of the cancellation of Mr. Dorélas' clearance.

[14] In a letter dated December 12, 2017, the Director General informed Mr. Dorélas, on behalf of the Minister, that his clearance had been cancelled. The Director General repeated the wording of her decision of December 4, stating that the information about Mr. Dorélas' involvement in incidents of fraud and theft, as well as his close ties with another person involved, raised serious concerns about his judgment, honesty and reliability.

[15] After enumerating the incidents in question, the Director General concluded that an in-depth review of the information in the file showed that there was reason to believe, on a balance of probabilities, that Mr. Dorélas may be prone or induced to commit, assist in or abet an act that may unlawfully interfere with civil aviation. She noted that she had considered Mr. Dorélas' submissions, but that they did not contain sufficient information to assuage her concerns.

III. Positions of the parties

A. *Mr. Dorélas' position*

[16] At the hearing, the applicant admitted that the new evidence filed in support of his application for judicial review that had not been before the decision maker could not be admitted, and the Court confirmed that it would not consider it (*Henri v Canada (Attorney General)*, 2016 FCA 38 at para 39 [*Henri*]).

[17] Mr. Dorélas argues that the impugned decision (1) fails to respect a principle of natural justice and (2) is unreasonable because it is based on erroneous findings of fact.

[18] With respect to the first argument, Mr. Dorélas submits that the Advisory Body should have summoned him to an interview as provided for by the *Transportation Security Clearance Program*. The opportunity to make written submissions does not satisfy the higher degree of procedural fairness required by the situation, which involves terminating his employment after a 22-year career. At the hearing, Mr. Dorélas specified that the Minister could not rely solely on the uncorroborated allegations contained in the reports, that the incidents were essentially private

matters, that the Minister should have conducted further verifications to confirm or disprove the allegations against Mr. Dorélas and that he should not have relied on allegations based on hearsay and double hearsay. Mr. Dorélas also argues that the authorities were aware of the incidents but that they allowed about two years to pass before cancelling his security clearance, which demonstrates that his conduct is not problematic.

[19] With regard to the second argument, Mr. Dorélas submits that the decision is unreasonable, since the incidents in which he and his spouse were alleged to have been involved had no connection with his work or with civil aviation, and, in any event, he did not commit the alleged acts.

B. *Respondent's position*

[20] The respondent replies that there was no breach of procedural fairness and that the decision is reasonable.

[21] With respect to procedural fairness, the respondent submits that the applicable standard is correctness, that the duty of procedural fairness in this case is only slightly more than minimal and that the duty was satisfied because the applicant was informed of the adverse information before the decision maker and had an opportunity to present his point of view. As for being summoned to an interview, the respondent replies that the provisions raised are not applicable to an application for a renewal and that, in any case, the Director General was not bound by any such duty in the exercise of her discretionary power.

[22] The respondent submits that the Director General's decision is reviewable on a standard of reasonableness. The standard of proof required to uphold the decision is that of reasonable belief, on a balance of probabilities, that a person may be prone or induced to commit an act or to assist or abet another person to commit an act that may lawfully interfere with civil aviation, which does not require that the alleged acts be connected with aviation security.

IV. Analysis

[23] The Court must determine whether the Director General violated procedural fairness and whether her decision is reasonable.

[24] In recent decisions, the Federal Court of Appeal has stated that questions of procedural fairness should not be decided on the basis of a particular standard of review, noting that, regardless of the level of the deference owed to administrative tribunals with respect to their discretion to determine their own procedure, the fundamental issue remains whether the applicant knew the case to meet and had a full and fair chance to respond (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 32–56).

[25] The Director General's decision, however, is subject to review on a standard of reasonableness. This Court's role is to determine whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Therefore, it is possible for there to be more than one reasonable outcome, and the Court will not substitute its own view of a preferable outcome as

long as the outcome under review respects the principles of justification, transparency and intelligibility (*Sargeant v Canada (Attorney General)*, 2016 FC 893 at para 18 [*Sargeant*]).

A. *The Director General did not violate procedural fairness*

[26] Mr. Dorélas raised section II.39 of the *Transportation Security Clearance Program* to support his claim that he was entitled to an interview. However, the Court has confirmed that this section is applicable only to applications to obtain a security clearance and not to applications for renewal (*Varadi v Canada (Attorney General)*, 2017 FC 155 [*Varadi*]).

[27] Moreover, when the Minister cancels a security clearance, the requirements of judicial fairness are met if he (1) informs the individual in question of the claims made against him or her; (2) provides the individual with an opportunity to respond; and (3) takes the response into consideration (*Henri* at paras 21–22, 33, 35; *Del Vecchio v Canada (Attorney General)*, 2018 FCA 168 at para 5). It seems clear that these procedural guarantees were respected in this case. It should be recalled that a negative impact on a security clearance holder's livelihood does not in and of itself entitle the holder to an interview (*Henri* at para 35).

[28] The level of procedural fairness required in cases where an existing security clearance is being revoked is only slightly more than minimal and still resides at the lower end of the spectrum (*Varadi* at para 53; *Salmon v Canada (Attorney General)*, 2014 FC 1098 at para 46 [*Salmon*]). Notwithstanding the serious impact of revocation, such as the loss of employment, the nature of the decision and the statutory scheme militate towards reduced levels of procedural fairness (*Henri* at para 25).

[29] Mr. Dorélas could have provided more information, asked for explanations or requested access to documents during the decision-making process, but he did not do so. He simply raised this argument belatedly in the course of judicial review.

[30] Furthermore, the Court of Appeal has confirmed that, contrary to the applicant's argument, suspicion need not be formed on the basis of verifiable evidence (*Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha*, 2014 FCA 56 at para 75).

[31] The Court is satisfied that the Director General did not violate procedural fairness.

B. *The Director General's decision is reasonable*

[32] Mr. Dorélas argues that the Director General relied on erroneous findings of fact in cancelling his clearance. This argument must fail, as the applicant is essentially indirectly attacking the reliability of the information obtained by the RCMP, which is presumed to be sufficient for the purposes of the checking process (*MacDonnell v Canada (Attorney General)*, 2013 FC 719 at para 31; *Fontaine v Canada (Transport)*, 2007 FC 1160 at para 75). Mr. Dorélas did not raise any authorities rebutting this presumption.

[33] It is apparent from the reasons of the Director General in her letter dated December 12, 2016, that she did not consider Mr. Dorélas' reasons sufficient. Considering the seriousness of the allegations against him, I find that the Director General did not err in characterizing the applicant's evidence, namely his two letters, as insufficient to assuage her concerns.

[34] Mr. Dorélas also submits that the incidents in which he is alleged to have been involved have no connection with either his work or civil aviation. It is true that the offences are in all likelihood unconnected with civil aviation, but the test developed in the case law does not require a connection (*Salmon* at paras 82, 86). The policy is forward looking: it is enough for the Minister to believe that the applicant may unlawfully interfere with civil aviation (*Christie v Canada (Transport)*, 2015 FC 210 at para 25).

[35] Mr. Dorélas' concluding argument is that the Minister's failure to act amounted to a tacit acknowledgment of his good conduct. This claim is irrelevant, as the test is the Minister's belief that the applicant may unlawfully interfere with civil aviation. Finally, it should be recalled that the granting of security clearance is a privilege rather than a right and that a single case of conduct casting doubt on an individual's judgment, reliability and honesty could, in light of the low threshold, suffice to justify the revocation of a security clearance (*Sargeant* at paras 28, 34).

JUDGMENT in Docket T-142-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. Without costs.

“Martine St-Louis”

Judge

Certified true translation
This 24th day of April, 2019.

Francie Gow, BCL, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-142-18

STYLE OF CAUSE: RÉGINALD DORÉLAS v TRANSPORT CANADA

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: FEBRUARY 20, 2019

JUDGMENT AND REASONS: ST-LOUIS J.

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