Federal Court  Cour fédérale

Date: 20211130

Docket: T-376-20

Citation: 2021 FC 1326

Ottawa, Ontario, November 30, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

CHASTITY MARIA JACKSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Chastity Jackson, seeks to overturn a decision by a Minister's Delegate at Transport Canada denying her a security clearance. The decision found that the Applicant had a pattern of involvement in incidents of criminal activity relating to fraud and that, although she had never been convicted of any criminal charge, the evidence raised sufficient doubts about her reliability to justify refusing her security clearance.

[2] The Applicant argues that the decision is unreasonable, largely because it relies on baseless and unsubstantiated statements from others rather than factual conclusions based on evidence. She denied the claims made against her and offered explanations which she believed to be sufficient. If Transport Canada required more information, or doubted her explanations, they should have explained that to her and given her a chance to respond. In addition, the Applicant claims that she was denied procedural fairness.

[3] For the reasons that follow, the application for judicial review is allowed. This is an example of a decision which may have been justifiable in light of some of the evidence before the decision-maker, but it is not justified because the reasoning set out in the written decision gives rise to serious concerns about whether appropriate distinctions were drawn in regard to portions of the evidence. The problems with the decision go to the heart of the analysis the decision-maker was required to undertake and therefore the decision cannot be upheld as reasonable.

II. Background

[4] In June 2017, the Applicant began to work for Air Canada at the Lester B. Pearson Airport. She was granted a temporary security pass, but a condition of her employment was that she obtain a security clearance. On June 26, 2017, the Applicant applied for a Transportation Security Clearance from Transport Canada.

[5] During the course of the initial security screening process, Transport Canada learned that the Applicant had an outstanding criminal charge for perjury. She was advised that her application could not be considered until the outstanding criminal charge was dealt with.

Transport Canada indicated that her application could be reconsidered upon receipt of a copy of the disposition of the charge.

[6] On August 17, 2017, the Applicant provided confirmation that her outstanding criminal charge had been withdrawn. As a result, her application for a security clearance was re-activated that same day.

[7] Pursuant to the Transportation Security Clearance Program Policy (TSCP Policy), the Transport Canada Security Screening Program received a Law Enforcement Records Check report (LERC Report) from the Royal Canadian Mounted Police (RCMP) Security Intelligence Background Section (SIBS) on July 26, 2018. The LERC Report detailed a series of incidents, including two that resulted in the laying of criminal charges, and three others for which no charges were laid. These events are summarized below:

a) **The landlord-tenant dispute:** in March 2014, the York Region Police Service received a complaint of fraud from a landlord, alleging that the Applicant had not paid rent owing relating to her occupancy of a house. The landlord commenced eviction proceedings against the Applicant and her immediate family member who was also an occupant in the house, and the landlord obtained a decision from the Landlord and Tenant Board directing the Applicant to pay $10,870.00 if she wished to continue her tenancy. If she wished to terminate the tenancy, she was to pay $4,223.00. No further police action was taken, in the absence of further information from the landlord.

b) **The hotel incident**: on July 16, 2015, the guest services manager of a hotel reported that the hotel was the victim of a fraud committed by the Applicant. She had reserved two hotel rooms, and paid a deposit using her debit card and cash. However, the Applicant

had overstayed her reservation by thirty-seven days. When the hotel requested payment, the Applicant stated that her insurance company would pay the bill. She provided a fraudulent email from her insurance company to the hotel, and later left without paying her bill. The hotel suffered a loss of $7,925.89. The Applicant was charged with fraud over $5,000 and use of a forged document. Both charges were withdrawn in December of 2016 “for reasons unknown to SIBS”.

c) **The credit card dispute**: in November 2015, the York Region Police Service responded to a complaint involving an allegation that the Applicant had wrongly used the complainant’s credit card and had failed to repay the amounts owing. It appears that the complainant and Applicant had agreed to enter into a business partnership and in connection with this the complainant provided her credit card to the Applicant to pay for business expenses. The complainant alleged that the Applicant had incurred expenses not related to the business and had failed to repay the debt. The police decided that this was a civil dispute rather than a criminal matter, and terminated the investigation.

d) **The wrong cheque to the landlord**: in December 2015, the York Region Police Service attended a residence in regard to a complaint of fraud. The complainant was a landlord who had received several cheques from the Applicant, who was neither named as the tenant or an occupant on the lease agreement. The complainant attempted to cash one of these cheques but discovered that the account was closed. When the police attended at the residence, the Applicant explained that she had mistakenly grabbed the wrong chequebook when she provided the cheque for the closed account. The police advised the complainant that this was a civil matter rather than a criminal incident, and “there were no grounds to pursue a fraud investigation and the investigation was ended”.

e) **The perjury charge**: on June 13, 2016, the Applicant gave sworn testimony in the Ontario Superior Court of Justice, stating that she was a licensed insurance broker. A subsequent investigation by the Ontario Provincial Police (OPP) found that she was not a licenced insurance broker and had never been one. The Applicant was charged with perjury, but the charge was withdrawn after she made a $500.00 charitable donation.

[8] Finally, the LERC Report noted that the Applicant was associated with an individual who had a criminal record for possession of a weapon and failure to comply with conditions.

[9] On October 1, 2018, Transport Canada informed the Applicant by letter of the adverse information contained in the LERC Report, and advised that her application for a security clearance would be reviewed by the Transportation Security Clearance Advisory Body (Advisory Body) in light of these concerns. The letter encouraged the Applicant to provide additional information in writing, "outlining the circumstances surrounding the above noted criminal charges, association and incidents, as well as to provide any other relevant information or explanation, including any extenuating circumstances…"

[10] On October 16, 2018, the Applicant provided further information in response to the allegations in the LERC Report:

a) **The landlord-tenant dispute:** the Applicant states she finds it "troubling" that the landlord reported this as fraud because it was nothing more than a civil dispute, and she stated the landlord "was clearly trying every avenue to make trouble". She says that the problem arose because the landlord promised certain amenities in the house which were not provided, and she notes that the problems were resolved with the assistance of a landlord and tenant mediator.

b) **The hotel incident**: the Applicant stated that the majority of the information in the report was untrue and the charges were withdrawn because of that. She says the fraud charges resulted from a miscommunication between the hotel manager and her friend who was the hotel owner.

c) **The credit card dispute:** the Applicant states that the information is untrue and she expressed surprise about it because nothing about the incident was ever brought to her attention until she received the letter from Transport Canada. She says that her business partner was upset because the venture did not succeed, but the Applicant claims that she delivered on her part of the deal and there was no fraud.

d) **The wrong cheque to the landlord:** the Applicant explains this incident as a simple mix-up: "we were in the process of moving [and] all the cheque books new and old had been together and in turn a wrong cheque was given by mistake…" She says that when the error was brought to her attention she immediately offered to replace the invalid cheque, but by then the landlord said she did not want to continue their tenancy.

e) **The perjury charge:** the Applicant maintains that everything she said in court was true; she said she was, in fact, a licenced insurance broker at that time. The police officer claimed she was licenced as an insurance agent, not a broker, but she claimed that these terms were interchangeable, "as far as I know".

[11] Finally, in regard to her association with the individual who had a criminal record, the Applicant indicated that this person was the father of her children, and that these charges occurred before they met. She said that he had received a criminal pardon in Canada and a waiver of his record in the United States in April 2013, and she provided a written statement by this individual, as well as employment records and evidence of the criminal pardon.

[12] The Advisory Body considered the LERC Report and the Applicant's submissions on May 22, 2019. The Record of Discussion of this meeting shows that the members reviewed the various incidents as well as the Applicant's explanations and further evidence. The Advisory Body accepted the Applicant's explanations regarding the wrong cheque to the landlord incident, as well as her evidence regarding her husband, and it did not give these matters further consideration.

[13] The Advisory Body recommended that the application for a security clearance be refused "based on a police report detailing the [Applicant's] involvement in criminal activities related to fraud, uttering a forged document and perjury". The Advisory Body also noted that they considered the Applicant' submissions, but found that they "did not provide sufficient information to dispel the Advisory Body's concerns".

[14] By letter dated February 18, 2020, the Minister's Delegate at Transport Canada, the Director General, Aviation Security (the Delegate), refused the Applicant's application for a security clearance, for reasons which reflect the Advisory Body's report almost verbatim (the Decision).

[15] The Decision notes at the outset that "[t]he information regarding [the Applicant's] suspected involvement in criminal activities related to fraud, uttering forged document, and perjury raised concerns regarding [the Applicant's] judgment, trustworthiness and reliability".

[16] In view of the fact that the Advisory Body had accepted the Applicant's narrative about the incident involving the wrong cheque to the landlord (incident (e) above), and stated that it "did not have a concern" with this specific matter, the Decision does not mention it.

[17] In regard to the other claims, the Decision summarizes the information in the LERC Report and discusses the Applicant's explanations. The essential elements of the Decision are set out below.

[18] **The landlord-tenant dispute**: "I note your involvement in a suspected incident of fraud on a rental residence". The Decision notes that the landlord had started eviction proceedings and obtained a judgment from the Landlord and Tenant Board for $10,870.00 if the Applicant wished to continue her tenancy. "The victim also made a fraud complaint to the police on March 17, 2014. You were not criminally charged in relation to this incident". Following a brief summary of the Applicant's response, the Decision continues:

> I acknowledge that this matter did not result in criminal charges, however, the incident let me to question your trustworthiness and reliability. I note you provided no supplementary evidence to support your claims that you resolved the issue. I also found it hard to believe that the homeowner involved the police in this incident simply to cause trouble for you. Consequently, I deferred to the concerning information provided in the police report.

[19] **The hotel incident**: "I also note your involvement in a second incident of criminal activities related to fraud on a hotel in June and July 2015". After describing the incident, the Decision notes that the Applicant was "charged with Fraud Over $5000 and Use a [sic] Forged Document, however, the charges were later withdrawn". The Decision then analyzes the Applicant's explanation:

> I considered your explanation that the facts [*sic*] how they were presented were untrue, and that there was a miscommunication with the guest services agent and the hotel owner. I was of the opinion that this explanation was lacking, as it does not address the concern that you allegedly forged a document and provided a fraudulent email address [*sic*]. Furthermore, you did not provide any documents supporting your explanation, and therefore, I again deferred to the information provided in the police report.

[20] **The credit card dispute**: “Additionally, I note the incident in November 2015, where a complainant stated to police that you were using their credit card and a line of credit, which were opened for business purposes, as your own personal checking account. Criminal charges were not pursued as police determined the activity was civil in nature”. Regarding the Applicant’s explanation, the Decision states:

> I acknowledge that you were not criminally charged in relation to this incident; however, the issues raised by the complainant led me to further question your trustworthiness and reliability. I also note that you do not address any of the specific accusations that were brought forward by the complainant, consequently, I again deferred to the information provided in the police report.

[21] **The perjury charge**: “I further note the incident on June 13, 2016, where you gave sworn testimony in a Superior Court trial matter. You had testified under oath that on three (3) separate occasions you were in fact a licensed Insurance Broker. Police were able to establish that you were not a licensed Insurance Broker nor had you ever been one”. Noting that the Applicant was charged with Perjury but that the charge was withdrawn after she made a charitable donation, the Decision states:

> I also considered your explanation regarding the above described incident. I note that you stated that you believed that the term agent and broker were interchangeable, and provided a copy of your license as an Insurance Agent. I found this explanation difficult to believe, as there are very basic differences between an insurance broker and an agent, and that someone working in this industry should know that these terms and licenses, are not interchangeable.

[22] The Decision then indicated that in light of the further information provided about the Applicant’s associate, the Delegate no longer had any concerns regarding her connection with this individual.

[23] The following passage sets out the key elements of the analysis supporting the Delegate's conclusion:

> …I continued to have a serious concern with your pattern of alleged involvement in multiple incidents of criminal activity related to fraud. I note that fraud requires a certain level of sophistication, as it is generally a deliberate, organized and premeditated act.
>
> I considered the fact that although you do not have a criminal record, the threshold for a conviction by the courts is beyond a reasonable doubt, however under the TSCP, the threshold is lower and based on a balance of probabilities.
>
> I also considered the fact that the above described incidents occurred between 2012 and 2016, and I am of the opinion that not enough time has elapsed to demonstrate a change in your behaviour.
>
> …
>
> Finally, I considered all of your written submissions, however, for the above described reasons, I found your explanations dismissive, lacked personal accountability, and minimized each situation. Consequently, your written submissions did not provide sufficient information to address all of my concerns.
>
> An in-depth review of the information on file led [the Delegate] 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. For these reasons, on behalf of the Minister of Transport, I have refused your transportation security clearance.

[24] The Applicant seeks judicial review of this Decision.

III. Issues and Standard of Review

[25] The Applicant raises two issues: (i) she was denied procedural fairness because the Decision is not based on credible evidence and the Decision does not show that the Minister

considered her submissions; and (ii) the Minister erred in denying her security clearance, based on irrelevant and non-factual information. She also asserts that the Decision did not comply with sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [the *Charter*].

[26] The standard of review that has been applied to an assessment of the substance of a decision to deny an application for a transportation security clearance is reasonableness (*Henri v Canada (Attorney General)*, 2016 FCA 38 at para 16 [*Henri*]). This continues to be the standard that applies following the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 16-17) (see *Ritchie v Canada (Attorney General)*, 2020 FC 342 [*Ritchie*] at para 15). None of the exceptions to the presumption of reasonableness as the standard of review apply here.

[27] In summary, under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2 [*Canada Post*]). The burden is on the applicant to satisfy the Court "that any shortcomings or flaws relied on… are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33).

[28] Questions of procedural fairness require an approach resembling the correctness standard of review that asks "whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54

[*Canadian Pacific*]; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107). As noted in *Canadian Pacific* at paragraph 56, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond", and at paragraph 54, "A reviewing court… asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed".

[29] In addition, the Respondent raised a preliminary issue concerning the admissibility of certain evidence filed by the Applicant, including portions of her supporting affidavit and some of the exhibits she provided.

IV. Preliminary Issue: Admissibility of New Evidence

[30] The Applicant filed a supporting affidavit in this application, providing further information and background relating to certain matters in the LERC Report. The Respondent submitted that paragraphs 3, 5-9, 11-15, and 17 of the affidavit, as well as a number of Exhibits, are inadmissible because they contain new evidence that was not before the Advisory Body or the Minister's Delegate when the decision was made.

[31] At the hearing, the Respondent narrowed its challenge once it was pointed out that several of the Exhibits had indeed been before the decision-maker or contained information that was referred to in the Decision. However, the Respondent continued to assert that certain of the Exhibits and the paragraphs of the affidavit were improper.

[32] At the hearing, the Applicant indicated she was content to proceed without reliance on the paragraphs in her affidavit, but she argued that Exhibit L merely provided general background information to assist the Court.

[33] I ruled at the hearing that most of the challenged Exhibits and the paragraphs of the affidavit would be excluded. I found that Exhibit L was background information from an objective source, and could be admitted subject to arguments as to its weight. These are the reasons for my ruling.

[34] It is now well accepted that judicial review on the merits is to proceed on the basis of the evidence that was before the original decision-maker, subject to specific and limited exceptions (*Association of Universities and Colleges of Canada v Canadian Copyright Licencing Agency (Access Copyright)*, 2012 FCA 22 [*Canadian Copyright*] at para 19). One of these exceptions is that new evidence can be filed to explain and support a claim of a breach of procedural fairness (*Canadian Copyright* at para 20), but none of the Applicant's new evidence fits into this category. As noted in *Henri* at paragraph 41, "[c]onsideration of facts that were not before the decision-maker would turn [the reviewing Court's] attention away from the decision under review and towards a de novo consideration of the merits. That is never the role of a judicial review…"

[35] I find that Exhibit E (a copy of a Criminal Subpoena), Exhibit F (a document that explains the difference between Insurance Agents and Insurance Brokers), as well as paragraphs 5, 7, 8, 9, 11, and 15 of the Applicant's affidavit, all contain new information which was not before the decision-maker. I accept that the Applicant's intention in filing some of this material was simply to provide useful background information to the Court. However, the above-noted

material goes beyond this and offers new or more extensive evidence and explanations about relevant matters in dispute. This information could have been placed before the Advisory Body and the Minister's Delegate. It is too late to introduce it at this stage.

[36] Exhibit L is a Life Insurance Agent Licence Guide prepared by the Financial Services Commission of Ontario, which provides general background information on the licensing of life insurance agents in Ontario. It is admissible as general background information from an objective source not related to the litigation, subject to consideration of its weight in the determination of the issues in dispute. As will become clear from the discussion below, I did not find this document to assist the Applicant in any meaningful way.

[37] I will therefore ignore paragraphs 5, 7, 8, 9, 11, and 15 in the Applicant's affidavit, as well as Exhibits E and F.

V. Analysis of the Merits

A. *Legislative and Policy Framework*

[38] The granting, refusal, or cancellation of airport security clearance is governed by the *Aeronautics Act*, RSC 1985, c A-2 [the *Act*] and the *Canadian Aviation Security Regulations, 2012*, SOR/2011-318. The key provisions in the *Act* provide:

Definitions	**Définitions**
3 (1) In this Act,	**3 (1)** Les définitions qui suivent s'appliquent à la présente loi.
…	[…]
security clearance means a security clearance granted under section 4.8 to a person who is	***habilitation de sécurité*** Habilitation accordée au titre de l'article 4.8 à toute personne jugée

considered to be fit from a transportation security perspective; (*habilitation de sécurité*)

…

Aviation security regulations

4.71 (1) The Governor in Council may make regulations respecting aviation security.

Contents of regulations

(2) Without limiting the generality of subsection (1), regulations may be made under that subsection

(a) respecting the safety of the public, passengers, crew members, aircraft and aerodromes and other aviation facilities;

(b) respecting restricted areas in aircraft or at aerodromes or other aviation facilities, including regulations respecting their identification, access to them and their administration or management;

…

(g) requiring any person or any class of persons to have a security clearance as a condition to conducting any activity specified in the regulations or to being

(i) the holder of a Canadian aviation document,

(ii) a crew member, or

(iii) the holder of a restricted area pass, within the meaning of section 1 of the Canadian Aviation Security Regulations;

acceptable sur le plan de la sûreté des transports. (*security clearance*)

[…]

Règlements sur la sûreté aérienne

4.71 (1) Le gouverneur en conseil peut, par règlement, régir la sûreté aérienne.

Teneur des règlements

(2) Les règlements visés au paragraphe (1) peuvent notamment :

a) régir la sécurité du public, des aéronefs et de leurs passagers et équipages ainsi que des aérodromes et autres installations aéronautiques;

b) régir les zones réglementées des aéronefs, aérodromes ou autres installations aéronautiques, y compris la délimitation et la gestion de ces zones, ainsi que l'accès à celles-ci;

[…]

g) exiger d'une personne ou catégorie de personnes une habilitation de sécurité comme condition pour exercer les activités précisées ou pour être :

(i) soit titulaire d'un document d'aviation canadien,

(ii) soit membre d'équipage d'un aéronef,

(iii) soit titulaire d'un laissez-passer de zone réglementée, au sens de l'article 1 du Règlement canadien sur la sûreté aérienne;

(h) respecting the making of applications for security clearances and the information to be provided by applicants;	**h)** régir les demandes d'habilitation de sécurité et les renseignements à fournir par les personnes qui les présentent;
…	[…]
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.

[39] The Minister's discretion to grant or refuse to grant a security clearance to any person or suspend or cancel a security clearance is exercised in accordance with the TSCP Policy. The purpose of the program is to prevent unlawful acts of interference with civil aviation by granting security clearances only to persons who meet the standards set out in the program.

[40] The provision most relevant here is section 1.4 of the TSCP Policy. It seeks to protect airport security by preventing uncontrolled entry into a restricted area of an airport by any individual whom:

> the Minister reasonably believes, on a balance of probabilities, may be prone or induced to commit an act that may unlawfully interfere with civil aviation; or assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

B. *Was the Applicant denied procedural fairness?*

[41] In *Henri*, the Federal Court of Appeal reviewed the law concerning the requirements of procedural fairness generally, and provided the following summary of what is required in relation to the grant or revocation of an airport security clearance:

> [27] … The decision is of great importance both to the individuals affected and to the public interest in safety and security. Parliament has entrusted the decision not to a court or a quasi-judicial tribunal

> but to the Minister's discretion. The Minister has elected to exercise this discretion with the assistance of an Advisory Body under a policy that ensures individuals are informed of claims made against them and that they have the opportunity to respond before a recommendation to the Minister, and then the Minister's decision, are rendered.

[42] A similar approach was adopted in *Haque v Canada (Attorney General)*, 2018 FC 651 at para 64 [*Haque*], in which Justice John Norris noted that the current policy approach provides applicants with a fair process in accordance with the jurisprudence.

[43] Applying this guidance to the case before me, I find that the Applicant was not denied procedural fairness. The Applicant was advised by letter of the substance of the incidents and allegations, and she provided her submissions regarding these. Both documents were before the decision-maker, and the Decision shows that they were taken into account. That is all that procedural fairness requires in these circumstances.

[44] The Applicant's arguments about the substance of the decision and the reasoning process go to the reasonableness of the decision, which I consider below.

C. *Were the Applicant's* Charter *rights violated?*

[45] The Applicant alleges that the Decision does not comply with section 7 and paragraph 11(d) of the *Charter* because it fails to respect the presumption of innocence, and that the process has caused her "serious, state-induced stress".

[46] It is not necessary to discuss this at any length, because the jurisprudence is clear that the security clearance process does not infringe section 7 or paragraph 11(d): *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at paras 121-122.

[47] This is a complete answer to the Applicant's submissions on this point.

D. *Was the decision reasonable?*

[48] As noted earlier, the *Vavilov* framework for analysis requires, in general, that a decision be assessed on two axes. First, did it take into consideration the relevant legal and factual context, which establish the "decision space" for the decision-maker? Simply put, a decision that applies the wrong law, or that fails to take any account of a vital fact or that misconstrues essential facts, is unreasonable. Second, a reasonable decision is one that follows a logical reasoning process and that explains why the result was reached given the facts and the law. Reasonableness is not a standard of perfection, but neither is it meant to "rubber stamp" decisions that do not offer any meaningful explanation to the person affected about why the result was reached. The Supreme Court of Canada summarizes this with a simple question: does the decision-maker's reasoning "add up" (*Vavilov* at para 104)?

[49] In examining the reasons, and the reasoning process, a reviewing court must be able to follow the logic of the analysis, to "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn" (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, cited with approval in *Vavilov* at para 97). *Vavilov* provided an important clarification of the approach (at para 87):

> [I]t is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[Emphasis in original.]

(1) General Principles

[50] The general legal principles that apply include the following:

- The Minister has a broad discretion to grant or refuse a security clearance (*Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59 at para 16 [*Thep-Outhainthany*]), because such clearances allow individuals access to restricted areas of airports, and such access "is a privilege, not a right" (*Thep-Outhainthany* at para 17);
- Under the TSCP Policy, the Minister must assess "whether it is more likely than not that an applicant for [a security clearance] is someone who might be prone or induced to commit an act that might unlawfully interfere with civil aviation, or assist or abet any person to commit an act that might unlawfully interfere with civil aviation" (*Haque* at para 53). The standard that applies is "balance of probabilities" (*Thep-Outhainthany* at para 24; *Haque* at para 51).
- This is necessarily a forward-looking assessment that takes into account future risk and is therefore necessarily inherently speculative (*MacDonnell v Canada (Attorney General)*, 2013 FC 719 at para 29; *Del Vecchio v Canada (Attorney General)*, 2017 FC 696 [*Del Vecchio*] at para 31);
- In assessing a security clearance application, the Minister is entitled to take into account any factor considered relevant, including evidence about a person's character or propensities, and this can include information in a LERC Report that did not lead to criminal charges, or to criminal charges that did not proceed to trial (*Thep-Outhainthany* at para 19; *Mangat v Canada (Attorney General)*, 2016 FC 907 [*Mangat*] at para 58).

(2) The Parties' Submissions

[51] The Applicant does not take issue with any of these general propositions. Her main argument is that the Minister's Decision is not based on a careful reading of the evidence. She notes that she has never been convicted for any of the offences listed in the LERC Report, and she argues that other instances cited in the Decision involved simple civil disputes or misunderstandings. The Applicant asserts that she answered these allegations in her submissions to the Advisory Body, and that the Delegate failed to give due consideration to those submissions.

[52] The Applicant points to several instances where her explanations appear to have been ignored. For example, she points to the Delegate's statement that the Applicant "believed that the term agent and broker were interchangeable" and that the Delegate "found this explanation difficult to believe, as there are very basic differences between an insurance broker and an agent, and that someone working in this industry should know that these terms, and licenses, are not interchangeable" (Respondent's Record, p 95).

[53] The Applicant claims that she never said that the licenses were interchangeable, but only that the terms were. She had provided her licence as proof that she was both an insurance agent and an insurance broker. She submitted that the license for both are the same; the only difference is the product being sold, because an agent only sells one insurance company's products while a broker sells several companies' products. In addition, the Applicant contends that it was unreasonable for the Decision to state that "someone working in [the insurance] industry should know that these terms, and licenses, are not interchangeable". The Applicant says that she explained the differences, and that there was no basis to question her response.

[54] The Applicant also argues that several of the incidents outlined in the LERC Report and relied on by the Minister's Delegate were not "facts" but rather simply uncorroborated third party complaints that had never been investigated. She denied any wrongdoing and explained her position on these incidents in her submissions, but the Minister's Delegate discounted her explanations and relied instead on unverified police reports that simply recounted what the complainants had said. She argues that this is unreasonable. Furthermore, the Applicant argues the Delegate's statement that the Applicant's explanations lacked personal accountability is unreasonable because, in effect, it amounts to expecting her to admit the truth of events that she says did not happen.

[55] Overall, the Applicant argues that she was entitled to a decision based on facts and evidence, but instead the Decision here is founded mainly on allegations in police reports that she has denied and for which she has provided adequate explanations. It is not reasonable for the Decision to discount her explanations and to give more weight to unverified information set out in police reports. Without any investigation or verification, she says these reports cannot form the basis for a conclusion that she is not trustworthy.

[56] The Respondent acknowledges that some of the incidents referred to in the LERC Report are based on uncorroborated information in police reports that the Applicant has simply denied. However, the Respondent points to certain incidents and details that the Applicant has not denied or which involved criminal charges. The Respondent argues the Delegate was entitled to look at the whole of the information available, including the very specific allegations recounted in the LERC Report, as against the generalized denials of the Applicant that did not address the details of the claims against her.

[57] The Respondent points to case-law that has found that the Minister is entitled to take into account any relevant factor, including information that did not lead to criminal charges or convictions (*Thep-Outhainthany* at para 19) and that the Minister can rely on the LERC Report without verifying or investigating any of the incidents recounted in the report (*Mangat* at para 54). The Respondent also submits that the Minister was not obligated to accept the Applicant's response to the allegations (*Lorenzen v Canada (Transport),* 2014 FC 273 at para 52).

[58] The Respondent contends that the Decision is reasonable in light of the scope of the discretion afforded to the Minister, the forward-looking nature of the inquiry, and the long-standing jurisprudence that the Minister is entitled to err on the side of pubic safety when considering an application for a security clearance (*Del Vecchio* at para 31).

(3) Discussion

[59] The following passage from the Decision captures the core of the Delegate's reasons for denying the security clearance. Having noted the Applicant's explanation about her association with an individual with a criminal history, the Delegate states "I no longer have concerns regarding your association with this individual". The Decision continues:

> However, I continue to have a serious concern with your pattern of alleged involvement in multiple incidents of criminal activity related to fraud. I note that fraud requires a certain level of sophistication, as it is generally a deliberate, organized and premeditated act.
>
> I consider the fact that although you do not have a criminal record, the threshold for a conviction by the courts is beyond a reasonable doubt, however under the [Transport Canada Security Policy], the threshold is lower and based on a balance of probabilities.
>
> I also considered the fact that the above-described incidents occurred between 2012 and 2016, and I am of the opinion that not

> enough time has elapsed to demonstrate a change in your behaviour.
>
> …
>
> Finally, I considered all of your written submissions, however, for the above described reasons, I found your explanations dismissive, lacked personal accountability, and minimized each situation. Consequently, your written submissions did not provide sufficient information to address all of my concerns.

[60] There is no doubt that the Delegate has "a great deal of discretion" to grant or to refuse to grant, or suspend or cancel a security clearance (*Henri* at para 24). It is also accepted that in assessing an application, the Delegate is entitled to rely on the LERC Report as well as the applicant's submissions and need not investigate any of the incidents further (*Mangat* at para 54). Further, there can be no question that the Delegate can consider information that casts doubt on an applicant's character or propensities, whether or not criminal charges or a criminal conviction occurred (*Thep-Outhainthany* at para 19).

[61] However, it is equally true that the Delegate must pay close attention to the information provided by the Advisory Body and any limitations inherent in it (see the discussion in *Haque*; see also *Ritchie*). In the instant case, the Delegate did not do this with sufficient rigour. Several of the conclusions drawn based on the LERC Report are either not supported or not explained. In this regard, I find that the analysis of Justice Norris in *Haque* to be particularly instructive, as I will explain following a discussion of the problems with the instant Decision.

[62] First, the Delegate refers to the Applicant's "pattern of alleged involvement of multiple incidents of criminal activity related to fraud". However, a careful reading of the LERC Report does not support such a conclusion.

[63] The Decision refers to four incidents, two of which it describes as involving fraud: (i) the landlord-tenant dispute and (ii) the hotel incident. It notes that the Applicant was not charged with any criminal offence in regard to the landlord-tenant incident, but mentions the reported finding of the Landlord and Tenant Board. The Decision also refers to the hotel incident, describing it as "a second incident of criminal activities relating to fraud" that resulted in two charges against the Applicant: (i) fraud over $5,000 and (ii) use of a forged document.

[64] It is not evident how this evidence supports a finding of a "pattern of alleged involvement of multiple incidents of criminal activity related to fraud". The Delegate points out that criminal charges were not pursued in regard to the credit card incident, "as police determined the activity was civil in nature". The same can be said for the landlord-tenant dispute. Thus, the only incident involving an allegation of criminal fraud is the hotel incident, but even a generous reading of the LERC Report does not sustain a conclusion that this amounted to a "pattern". It is also troubling that the Decision describes the hotel incident as "a second incident of criminal activities related to fraud" after acknowledging that no criminal charges were brought in respect of the first allegation.

[65] The second major problem with the Decision is its treatment of the perjury charge. The Applicant was charged with perjury because she had testified under oath on three separate occasions that she was in fact a licensed insurance broker. An OPP investigation found that she had never been licensed as an insurance broker. In answer to the information in the LERC Report, the Applicant submitted a document showing that she was licensed as an insurance agent. She said that she was, in fact, licensed as an insurance broker and she asserted that "everything I said on that day was the complete and total truth known to me". She stated that

"the words [insurance broker and insurance agent] are interchangeable as far as I know", and she explained that an insurance broker works for various insurance providers and are paid a commission, which is what she was doing at the time she was charged.

[66] The Advisory Body rejected this explanation, and the Delegate's Decision reflects their reasoning: "I found this explanation difficult to believe, as there are very basic differences between and insurance broker and an agent, and… someone working in this industry should know that these terms, and licenses, are not interchangeable".

[67] The difficulty with this statement is that it rests on assertions about the differences between the licenses for insurance agents and brokers, but does not explain the source of that knowledge. The Applicant, who was at a minimum a licensed insurance agent at some point, says that in her view, the licenses are the same and the only difference is the kind of services provided. The Advisory Body rejected this, as did the Delegate, but provided no support or explanation for their conclusion about the "very basic differences between an insurance broker and an agent". The Delegate's statement about the distinction between insurance agent and broker may well be entirely true, but that is beside the point. It is a disputed fact, and the Delegate had a responsibility to set out the factual basis for this conclusion in order to explain why she rejected the Applicant's explanation (*Vavilov* at paras 126, 127). The Respondent acknowledged that there is no information in the Certified Tribunal Record to support the Delegate's finding on this point. I find this aspect of the Decision to be lacking in transparency, because it does not permit the Applicant or a reviewing court to understand the basis for this conclusion (*Vavilov* at para 103).

[68] Overall, as noted earlier, I find that this case bears more similarity to the factual context in *Haque* than to many of the precedents the Respondent relies on. *Haque* also involved the denial of a security clearance based on information in a LERC Report. Justice Norris found the decision to be unreasonable because several of the key conclusions were based on findings that went "well beyond what the information before [the delegate] reasonably could support" (*Haque* at para 85).

[69] For example, in relation to an incident that resulted in a criminal charge against the applicant – a charge which was later withdrawn – the delegate had found that it "required a level of sophistication, as it was deliberate and premeditated" (*Haque* at para 82). Justice Norris said this:

> [84] First, in my view the finding that the incident "required a level of sophistication, as it was deliberate and premeditated" is unreasonable. It must be recalled that the charge of possession of property obtained by crime was withdrawn. There were no findings against the applicant in relation to that matter. In cases where a criminal charge has resulted in a finding of guilt, either admissions or conclusive findings of fact will have been made. Generally speaking, these can be relied upon in later proceedings. However, when a criminal charge has been withdrawn, it can be much more difficult for a decision-maker in a later proceeding to determine what happened that gave rise to the charge. The underlying facts and surrounding circumstances can be very much in dispute. A decision maker in a position like that of the Director General must therefore proceed with caution when considering withdrawn charges. The police synopsis that finds its way into a LERC Report might or might not be a complete and accurate account of what happened.

[70] These observations are particularly apt here, in light of the nature of the information set out in the LERC Report about several of the allegations, namely the clear indication that the police viewed them as civil disputes and did not conduct any investigation. The mere fact that a

civil claim is recounted in a police report, and then incorporated into a LERC Report, cannot transform the allegation into a matter of "criminal fraud".

[71] Furthermore, the fact that the Delegate in this case discounts the Applicant's explanations and instead "defers" to the information in the LERC Report is not adequately explained. If the Delegate thereby accepted the allegations and details as true, in the face of the Applicant's denials, that needed to be explained in more detail (*Vavilov* at para 127).

[72] Similar to the finding in *Haque*, the Delegate in the present case found that the Applicant had been involved in a "pattern of incidents of criminal activity relating to fraud". As I have explained above, this goes well beyond what the information placed before the Delegate could reasonably support.

[73] Finally, like Justice Norris found in *Haque* (at para 112), I find that all but one of the Delegate's assessments of the factors she relied upon in refusing the security clearance were tainted by reviewable errors. That exception is the Delegate's finding that the Applicant had not addressed the allegation of having used a fraudulent email (an email that the Applicant allegedly created herself) in regard to the hotel incident. The Applicant's submissions in response to the LERC Report attempted to explain the incident as a simple misunderstanding between her friend who owned the hotel and the manager who she was dealing with about payment. However, she did not address the claim that she had created and used a fraudulent email. That, in itself, might have been sufficient to warrant refusing her security clearance.

[74] In previous cases this Court has accepted that a single incident can be enough to justify a negative decision (*Tesluck v Canada (Attorney General)*, 2020 FC 1041 at para 25, citing

Dorélas v Canada (Transport), 2019 FC 257 at para 35, which in turn cites *Sargeant v Canada (Attorney General)*, 2016 FC 893 at para 34). For obvious reasons, fraud is the type of offence that casts doubt on an individual's character, integrity, and propensities (*Fradette v Canada (Attorney General)*, 2010 FC 884; *Salmon v Canada (Attorney General)*, 2014 FC 1098; *Byfield v Canada (Attorney General)*, 2018 FC 216; *Rivet v Canada (Attorney General)*, 2007 FC 1175; *Lavoie v Canada (Attorney General)*, 2007 FC 435).

[75] However, the Delegate did not seek to justify her Decision with reference to this sole incident. Instead, the Delegate found that the evidence established a "pattern" of involvement of incidents of "criminal fraud" and, for the reasons set out above, this finding is simply not supported in the evidence.

[76] The Delegate's concerns about the Applicant's trustworthiness and reliability are, in some respects, understandable. The LERC Report recounts a series of incidents, which, if believed, could reasonably cast doubt upon the Applicant's character and integrity. She has faced criminal charges related to two of these incidents, although the charges were withdrawn in both instances. It is fair to say that the Applicant's response to the allegations was less than fulsome, and that she did not provide evidence to support several of her explanations or explain why such information was not available to her.

[77] Despite this, it is also important to mention that several of the incidents included in the LERC Report amounted to civil disputes, and there was no independent investigation or verification of several of them, as acknowledged by the police.

[78] This is a case where the result may well be justifiable – given the incidents recounted in the LERC Report, and the Delegate's reasonable finding that the Applicant had failed to meet her onus to provide "any additional information that might eliminate the basis for any concerns regarding the applicant's suitability to be granted a security clearance" (*Randhawa v Canada (Transport)*, 2017 FC 556 at para 42, citing *Wu v Canada (Attorney General)*, 2016 FC 722 at para 46). The decision is not justified, however, because of the problematic findings at the heart of the decision.

[79] This is not merely a matter of semantics or the Delegate's particular choice of words. The reference to a "pattern" of incidents involving criminal fraud is the crux of the Delegate's explanation for denying the security clearance. It is impossible to know whether the appropriate distinctions were drawn between allegations of criminal fraud based on police investigation, and claims that the Applicant had committed civil wrongs in relation to these disputes where no investigation or verification appears to have occurred. Absent a clear explanation of this, and without any discussion of the fact that several of the incidents included in the LERC Report involved uncorroborated allegations relating to civil rather than criminal matters, it is not possible to follow the Delegate's reasoning. It is equally impossible to know how the result "is justified in relation to the facts and the law that constrain the decision maker" (*Vavilov* at para 85).

[80] Nothing in these reasons should be interpreted as questioning the wide discretion available to the Minister to grant or withhold a security clearance, or that the Minister or his delegate is entitled to err on the side of caution because of society's interest in protecting aviation security and the inherently forward-looking and predictive nature of the assessment.

[81] However, reasonableness review is not a rubber stamp; it "remains a robust form of review" and must be conducted with a particular focus on the reasons actually given for a decision, as opposed to those which the record might support (*Vavilov* at para 13). A key guiding principle is that decisions involving the exercise of public power must be "justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov* at para 95). The greater the consequences for the individual affected, the higher the obligation to explain the result and the reasoning (*Vavilov* at para 133).

[82] Here, while the Delegate was entitled to rely on the information set out in the LERC Report, her conclusion 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" was not based on a close and careful reading of that information. The Delegate in this case was required to consider and to clearly explain the different weight to be afforded to information based on: (i) criminal charges supported by an investigation; (ii) information derived from a police investigation even if no charges were laid; and (iii) civil disputes reported to police that are simply summarized in a police report but were never investigated. In addition, if there had been a finding of guilt in this case, either following a trial or guilty plea, that would have to be given appropriate weight as well (*Haque* at para 84).

[83] For the reasons set out earlier, I find that clarity to be lacking in relation to the core concerns that justified the Delegate's refusal of the security clearance. Indeed, I find that the Delegate's conclusion that the Applicant had been allegedly involved in a concerning pattern of incidents of criminal fraud goes well beyond the information set out in the LERC Report, and is not otherwise justified in the record.

VI. Conclusion

[84] For all of these reasons, I find the Decision to be unreasonable.

[85] In view of the fact that the Applicant submitted her original security clearance application in June 2017, and considering that the decision-making process would likely benefit from a more recent assessment by the authorities and more detailed information and submissions from the Applicant, I am not ordering that the application be reconsidered. Instead, I am simply setting aside the denial of the security clearance. With that, the Applicant is free to submit a new application for a security clearance should she wish to do so. I note that the Applicant expressed concern about the length of time it had taken to deal with her application, and would simply note that the Respondent should take steps to process any new application submitted without delay.

[86] The Applicant did not seek costs, and in the circumstances, I would not award costs to either party.

JUDGMENT in T-376-20

THIS COURT'S JUDGMENT is that:

1. The Decision dated February 18, 2020, refusing the Applicant's application for a transportation security clearance is unreasonable and is therefore set aside.

2. The Applicant shall be free to submit a new application for a transportation security clearance, supported by new evidence, if she wishes to do so.

3. No costs are awarded.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-376-20
STYLE OF CAUSE:	JACKSON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
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DATED:	NOVEMBER 30, 2021

APPEARANCES:

Chastity M. Jackson	FOR THE APPLICANT ON HER OWN BEHALF
Wendy Wright	FOR THE RESPONDENT

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