

Federal Court



Cour fédérale

Date: 20110317

Docket: T-1308-10

Citation: 2011 FC 323

Ottawa, Ontario, March 17, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

RAYMOND ANTHONY CLUE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Raymond Anthony Clue challenging a decision by the Director, Security Screening Programs, Transport Canada (Director) acting on the advice of the Transportation Security Clearance Advisory Body (Advisory Body), to cancel Mr. Clue's airport Transportation Security Clearance (TSC) thereby precluding his continued employment as a baggage handler at the Pearson International Airport in Toronto. Mr. Clue contends that the decision was perverse and capricious and therefore unreasonable in law.

Background

[2] Mr. Clue is a 28-year-old naturalized Canadian citizen who was born in Jamaica. He came to Canada in 2002 at the age of 19 and he has lived here since that time.

[3] Mr. Clue was issued a TSC by the Minister of Transport on October 20, 2003 and that clearance was renewed on October 10, 2007. In October 2009 Mr. Clue purchased a stolen Air Canada parking pass and, in the result, he was charged with possession of stolen property by the Peel Regional Police. On November 26, 2009 Mr. Clue's TSC was suspended subject to a review of two matters of concern:

- (a) the then pending criminal prosecution; and
- (b) an incident on June 6, 2009 involving Mr. Clue's alleged placing of a gym bag containing a loaded handgun onboard an aircraft bound for Jamaica.

[4] On December 2, 2009 the Crown withdrew the outstanding criminal charge against Mr. Clue. Nevertheless, the review of his TSC continued and on March 5, 2010 the Director, on the advice of the Advisory Body, revoked Mr. Clue's TSC on the ground that he "may be prone or induced to commit an act that may unlawfully interfere with civil aviation".

[5] Mr. Clue sought to have the Director's decision judicially reviewed and on June 15, 2010 Justice Roger Hughes of this Court, with the consent of the parties, remitted the matter back to the Director for reconsideration on the merits.

[6] By letter dated May 31, 2010 the Advisory Body advised Mr. Clue of his right to submit information in addition to the materials he had provided in the first instance, but nothing further was submitted on his behalf beyond an affidavit filed in his first application for judicial review.

[7] On June 22, 2010 the Advisory Body met to consider Mr. Clue's case and it again recommended to the Director that Mr. Clue's TSC be revoked. The minutes of the Advisory Body discussion indicate that it took the following key points into consideration:

- The Advisory Body noted the severity of the incident as described in the YYZ Intel Report.
- The Advisory Body noted that the police report states he indicated that even if he know[s] who was involved (in the incident involving the duffle bag) he would not divulge their identity to police (see paragraph 11(d) or YYZ Intel Report).
- The Advisory Body further noted paragraphs 12-20 of the applicant's affidavit, and that he does not explain or deny his involvement in the incident involvement the gun and the duffle bag.
- The Advisory Body members noted the applicant's submissions, including his affidavit, do not contain any information that would mitigate their concerns.

The above-noted Intelligence Report considered by the Advisory Body contains an outline of an investigation into Mr. Clue's behaviour carried out by the Airport Intelligence Unit. In that report the incident involving the handgun is described as follows:

In one of these investigations, subject **CLUE** was observed on Saturday June 6, 2009, placing a 'gym bag' onto one of the containers # 43121 bound for Air Transat flight # TS784 to Montego Bay, Jamaica. This event was investigated and the bag was found to contain a fully loaded (16) round clip Smith & Wesson 9mm handgun and 2 bags containing hollow point ammunition. Names of

all employees (RAIC's) working the flight were obtained by members of CBSA.

Subject **CLUE** was the key suspect for this event but due to other employees also having access to the bag and aircraft after it was placed on the aircraft, along with protection of the confidential source, **CLUE** was not charged for this event.

[Footnotes omitted]

[8] The report then characterized Mr. Clue's attitude when he was confronted with the handgun allegation in the following way:

11. YYZ Intelligence Unit investigators interviewed subject **CLUE** in relation to the events surrounding him being identified as the person placing the gym bag containing the firearm on an aircraft in June 2009, and he stated the following:
 - a. He did not immediately deny his involvement; he did however attempt to ascertain who had been speaking to the police about the event.
 - b. He appeared afraid to discuss any involvement he had with this event.
 - c. He continued to deny the accusations and continued to divert the discussion of what had occurred at the aircraft in relation to the firearm and was more concerned about which one of his co-workers would have said he was responsible for putting the gym bag on the aircraft.
 - d. He stated that even if he knew who was involved he would '*NOT*' divulge their identity to police.

[Footnotes omitted]

[9] Although in an affidavit submitted to the Advisory Body Mr. Clue did dispute some of the remarks attributed to him during his interview with the Airport Intelligence Unit, he did not deny

that he had repeatedly asked for the identity of the informant and that he was “forced to express my displeasure at them, for impugning my good name without any bases [sic]”.

[10] On June 22, 2010 the Advisory Body unanimously recommended to the Director that Mr. Clue’s TSC be permanently revoked on the following basis:

The Advisory Body was unanimous in its recommendation to cancel the transportation security clearance. A further review of the entire contents of the file, including police reports about his involvement in criminal activities at the airport and the applicant’s affidavit led the members of this Advisory Body to believe that on a balance of probabilities this individual may be prone or induced to commit an act that may unlawfully interfere with civil aviation. The applicant’s affidavit and previous submissions did not provide sufficient information that would compel this Advisory Body to recommend re-instating his clearance.

[11] The above recommendation was accepted by the Director on July 13, 2010 and communicated to Mr. Clue by letter of July 20, 2010. It is from this decision that this application for judicial review arises.

Issues

[12] Was there a breach of procedural fairness in the process that was followed leading up to the impugned decision?

[13] Did the evidence that was relied upon reasonably support the impugned decision?

Analysis

Standard of Review

[14] In at least four previous cases before this Court, the standard of review for assessing an administrative decision to cancel or withhold an airport security clearance has been found to be patent unreasonableness: see *Fontaine v Canada (Transport)*, 2007 FC 1160, 313 FTR 309; *Rivet v Canada (Attorney General)*, 2007 FC 1175, 325 FTR 178; *Lavoie v Canada (Attorney General)*, 2007 FC 435 and *Singh v Canada (Attorney General)*, 2006 FC 802. In each of those decisions, the Court recognized the discretionary and specialized nature of the decision under review and the legislative purpose served¹. Of course, since *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 the patent unreasonableness standard has been subsumed into a single standard of reasonableness and this is the standard to be applied here. On this issue of procedural fairness the standard of review is, of course, correctness: see *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392.

The Legislative Scheme

[15] The decision taken by the Director to cancel Mr. Clue's TSC was made in accordance with the provisions of s 4.8 of the *Aeronautics Act*, RS, 1985, c A-2, and the Transportation Security Clearance Program (Clearance Program). Ultimately, the decision was made under Article I.4 of the Program which prevents access to a restricted area of a listed airport (e.g. Pearson) where the

¹ In *Singh*, above, Justice Konrad W. von Finckenstein noted the importance of preventing the uncontrolled entry of undesirable people into restricted areas of Canadian airports. To this I would add the need to prevent the movement of dangerous contraband onto airport property.

Minister, represented by the Director, reasonably believes, on a balance of probabilities, that an individual may be prone or induced to commit an act that may unlawfully interfere with civil aviation.

[16] The Clearance Program also describes the process to be followed in the case of a refusal, cancellation or suspension of a TSC including the affected person's right to be given notice of the allegations and a right to make submissions. Initially, the matter is referred to the Advisory Body which in turn makes a recommendation to the Director.

Was There a Breach of Procedural Fairness in the Process That Was Followed Leading up to the Impugned Decision?

[17] In this case the procedures designated by the Clearance Program were followed. Mr. Clue was advised of the allegations and invited to respond. Neither the Director nor the investigator were under any obligation to disclose the identity of an informant and Mr. Clue has offered no rationale for how the absence of that information might have limited his ability to respond to the allegations against him. For the purposes of an administrative process like this one, Mr. Clue was provided with disclosure sufficient to respond and he did so. He was also represented by counsel. It was open to Mr. Clue to seek additional particulars of the allegations against him but there is nothing in the record to indicate that he made such a request. Finally, the reasons given by the Director are adequate to support the decision to revoke Mr. Clue's TSC. I can identify no breach of the duty of fairness in the process that was followed in rendering this decision.

Did the Evidence That Was Relied Upon Reasonably Support the Impugned Decision?

[18] A key aspect of the decision to revoke Mr. Clue's TSC was a concern that, when confronted by airport authorities, he was largely uncooperative and exhibited an attitude that was belligerent if not obstructionist. Although Mr. Clue attempted to excuse his conduct, his explanations were obviously not accepted by the Director.

[19] It goes without saying that the security of Canadian airports rests in large measure on the vigilance of airport employees, including their willingness to report suspicious or criminal behaviour without equivocation or reservation. It was not unreasonable for the Director to consider that Mr. Clue's apparent unwillingness to acknowledge such a responsibility was incriminatory in the face of evidence that he had placed a loaded handgun on an aircraft.

[20] Mr. Clue's complaint that the allegations against him could not be relied upon by the Director because they had not been proven against him in a criminal proceeding is without merit. The decision not to prosecute Mr. Clue for the handgun incident is explained in the record as a lack of evidence sufficient to meet a criminal standard of proof. For purposes of revocation of a TSC the standard of proof is much lower and requires only a reasonable belief, on a balance of probabilities, that a person may be prone or induced to commit and act (or to assist such an act) that may unlawfully interfere with civil aviation. This provision involves an assessment of a person's character or propensities ("prone or induced to") and it does not require evidence of the actual commission of an unlawful act: see *Fontaine*, above, at para 78, 81 and 83. What the Director is called upon to do is to examine a person's behaviour to determine if, on balance, it supports a reasonable belief that a person may in the future be inclined to act unlawfully in the context of

aeronautical safety. The Director's negative assessment of an employee's attitude towards airport security concerns may, as it did in this case, provide an evidentiary basis for the revocation of a TSC. Here the decision was also supported by evidence that Mr. Clue had been directly involved in the loading of a bag containing a handgun on an aircraft and, taken together, this was sufficient to support a reasonable belief that he may be prone to commit or to assist with an act that may unlawfully interfere with civil aviation.

[21] It is not the role of the Court on judicial review to reweigh the evidence or to substitute its views for those of the responsible decision-maker. There was, in this case, a rational evidentiary basis for the Director's decision and this application is accordingly dismissed.

[22] The Respondent is entitled to costs in the agreed amount of \$750.00 inclusive of disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed with costs payable by the Applicant to the Respondent in the amount of \$750.00 inclusive of disbursements.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1308-10

STYLE OF CAUSE: CLUE v AGC

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: February 9, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** BARNES J.

DATED: March 17, 2011

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