

Federal Court



Cour fédérale

Date: 20120323

Docket: T-787-11

Citation: 2012 FC 347

Ottawa, Ontario, March 23, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

JASON ROBERT EDWARD POULIOT

Applicant

and

**MINISTER OF TRANSPORT,
INFRASTRUCTURE AND COMMUNITIES**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside an April 11, 2011 decision by Transport Canada (Safety and Security/Security Program Support) which denied him the transportation security clearance which would have allowed him to work as a cargo handler for Federal Express in a secure area of Toronto's Lester B. Pearson International Airport. For the reasons that follow the application is dismissed.

Facts

[2] The applicant, Jason Robert Edward Pouliot, is employed by Federal Express (FedEx). He sought promotion to the position of cargo handler at FedEx's operations at Toronto's Lester B. Pearson International Airport. This position required transportation security clearance from Transport Canada. Pouliot applied for that clearance pursuant to section 4.8 of the *Aeronautics Act*, RSC, 1985, c A-2 (*Aeronautics Act*).

[3] The application for security clearance involves a criminal records check. Through this check Transport Canada became aware of an incident involving the applicant that occurred on August 1, 2007. The applicant drove another individual, Leo Peralta (Peralta) to a CIBC branch in Toronto, Ontario. While the applicant remained in the parked car Peralta entered the bank and handed the teller a hold-up note which demanded cash and indicated he was armed. Peralta was given \$2000 in cash by the teller and then re-entered the car and the two drove off. The applicant was arrested and charged in connection to this incident. The charges were later withdrawn.

[4] On February 25, 2011, Transport Canada sent the applicant a letter indicating that the request for security clearance had been referred to the Advisory Board for consideration. The letter summarized the facts regarding the August 1, 2007 incident as found in the police report it had received. The letter referred the applicant to the Transport Canada Security Clearance Policy and provided the link to an online copy of the policy. The letter invited the applicant to respond and provide any additional information or extenuating circumstances in relation to that incident.

[5] The applicant responded stating that he was completely unaware that Peralta was going to rob the bank, that he did not participate in any way and that he never received any money from the robbery. The applicant expressed his regret for ever having trusted Peralta and emphasized his desire to continue his career with FedEx.

[6] The applicant was informed, by letter dated April 11, 2011, that the request for security clearance had been denied. The letter stated in part:

This is further to your application for a transportation security clearance at the Lester B. Pearson International Airport and our letter dated February 25, 2011, regarding the review of your application. Please be advised that the Minister of Transport, Infrastructure and Communities, has refused your clearance based on the information in your file and the following recommendation from the Advisory Body:

The Advisory Body was unanimous in its recommendation to refuse the applicant a transportation security clearance. An in-depth review of the file, including the police report detailing the incident that led to his recent criminal charge for Robbery, which was subsequently withdrawn, led the Advisory Body to suspect that he is closely associated to an individual who is known or suspected of being involved in acts of serious violence against persons or property. The Advisory Body also reasonably believed, 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. His written explanation did not provide sufficient information that would compel the Advisory Body to recommend issuing a clearance.

Standard of Review and Issue

[7] The only issue submitted before the Court in this case was whether the applicant was denied procedural fairness. Questions of procedural fairness are reviewable on a correctness standard of review: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[8] I agree with the respondent that the applicant was not denied procedural fairness and the application must be dismissed.

[9] The content of the duty of procedural fairness is largely informed by context, as outlined in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. Previous cases of this Court have found that the level of fairness owed in this context is minimal. Where what is at issue is a simple application for clearance or a permit made by a person who has no existing right to that clearance or permit, the requirements imposed by the duty to act fairly are minimal. The Minister must render a decision that was not based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before him: see *Motta v Canada (Attorney General)*, [2000] FCJ No 27 at para 13.

[10] In cases in which an existing security clearance was either being revoked or not renewed, the standard has been found to be slightly higher, but still on the lower end of the spectrum. In *Rivet v Canada (Attorney General)*, 2007 FC 1175 at para 25, the Court held:

With these factors in mind, I agree with the respondent that the duty of procedural fairness in this case is more than minimal but does not require a high level of procedural safeguards (see, for example, *DiMartino v. Minister of Transport*, 2005 FC 635, [2005] F.C.J. No. 876 (F.C.) (QL), at paragraph 20). Thus, the procedural safeguards available to the applicant in this case are limited to the right to know the facts alleged against him and the right to make representations about those facts. These procedural guarantees do not include the right to a hearing.

[11] Thus, as the respondent submits, even if Transport Canada were held to the higher of the two standards of fairness articulated in this context, that standard was clearly met: the applicant was

informed of the facts alleged against him (his involvement in the bank robbery) and was afforded the opportunity to make representations about those facts and his suitability to receive a security clearance.

[12] The applicant submits that he was owed more than this, specifically, that Transport Canada was obligated to inform him of the particular grounds upon which he may be denied security clearance. In particular, the applicant contends that he ought to have been advised that his susceptibility to influence by others and his continued association with Peralta were both in issue. A similar argument was put before Justice James Russell in *Russo v Canada (Transport)*, 2011 FC 764 and was rejected. Justice Russell stated at paragraph 56:

The Applicant appears to be suggesting that he should have been pre-warned of concerns that arose as part of the investigative process so that he could have been in a position to refute conclusions that were drawn only after the investigation took place and all of the information was assessed. This is not a procedural fairness issue in my view. The Applicant was fully aware of what a security check involved, and he was even told at the interview with the Security Advisors what the purpose of the process was and that there were concerns related to his criminal record. The Applicant gave a full and forthright account on the issue of his conviction for producing a Schedule II substance and his continued involvement with marijuana use.

[13] Similarly in this case, Transport Canada informed the applicant that it was concerned about granting security clearance in light of the August 1, 2007 incident and asked the applicant to present any information or explanation to convince Transport Canada to grant the clearance.

[14] The considerations of susceptibility to influence and his association with others are both indicated in the Transport Canada policy, although not in the February 25, 2011 letter. The letter

expressly invites the applicant to consult the policy. What the applicant seeks in this case is to require, as a component of procedural fairness, an opportunity to refute or respond to the conclusions reasonably arising from his conduct. To require that Transport Canada identify in advance, as an aspect of advising the applicant of the case he had to meet, which of the potential factors it might consider to be determinative of the security clearance review would be to impose a higher standard of fairness than is owed in this context and is unsupported by the jurisprudence cited above. It is sufficient that the applicant be put on notice of the range of factors, considerations and criteria that Transport Canada may consider in making its decision as to his suitability to obtain a security clearance. As a result, the application must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-787-11

STYLE OF CAUSE: JASON ROBERT EDWARD POULIOT v MINISTER
OF TRANSPORT, INFRASTRUCTURE AND
COMMUNITIES

PLACE OF HEARING: Toronto

DATE OF HEARING: February 28, 2012

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

DATED: March 23, 2012

APPEARANCES:

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