Federal Court of Appeal | Cour d'appel fédérale

Date: 20190715

Docket: A-250-18

Citation: 2019 FCA 205

CORAM: **GAUTHIER J.A.**
WEBB J.A.
RIVOALEN J.A.

BETWEEN:

RODRIGO RAMOS

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on May 21, 2019.

Judgment delivered at Ottawa, Ontario, on July 15, 2019.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: WEBB J.A.
RIVOALEN J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20190715

Docket: A-250-18

Citation: 2019 FCA 205

CORAM: **GAUTHIER J.A.**
WEBB J.A.
RIVOALEN J.A.

BETWEEN:

RODRIGO RAMOS

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Mr. Ramos appeals the decision of the Federal Court (*per* Annis J.) (2018 FC 696) dismissing his application for judicial review of the Minister of Transport's delegate's refusal to reconsider the decision to cancel his transportation security clearance on October 6, 2017.

[2] Mr. Ramos also challenges the Federal Court's dismissal of his oral motion made at the end of the hearing of his application to amend his application for judicial review to include a further refusal to reconsider the cancellation communicated on October 17, 2017.

[3] Although I have much sympathy for Mr. Ramos' plight, I cannot accept his submissions. For the reasons that follow, I believe that the appeal should be dismissed without costs.

I. BACKGROUND

[4] I will describe the factual background in some detail for the benefit of Mr. Ramos. He insisted that the facts were crucial here. He may rest assured that I duly considered them.

[5] At the relevant time, Mr. Ramos had been a cleaner and a manager (also referred to as a custodial associate) at the Toronto Pearson International Airport since 2004. To do his work, he had to obtain a security clearance and renew it every five years. He had no problem doing so in 2004, 2009, and 2014.

[6] In July 2015, Mr. Ramos was charged with respect to two incidents of inappropriate touching and sexual assault on an exchange student who was living in his home through a homestay program. He was arrested in August 2015. There is no dispute that the incidents occurred; he admitted to most of the facts related by the high school exchange student. In August 2016, the charge was withdrawn by the Crown in exchange for Mr. Ramos agreeing to enter into a $500 peace bond. This means that Mr. Ramos has no criminal record.

[7] On October 17, 2016, Transport Canada wrote to Mr. Ramos to inform him that the allegations of sexual assault raised "concerns as to his suitability to retain a security clearance" and that the said clearance would be reviewed because of the events which were described in full detail in the said letter. This included the fact that the charge resulted in a peace bond. The letter concludes by stating that:

> The Transportation Security Clearance Advisory Body convenes when required to formulate a recommendation to the Minister of Transport concerning the granting, refusal or cancellation of clearances. Please consult the *Transportation Security Clearance Program Policy*, which is available on our website at http://www.tc.gc.ca/eng/aviationsecurity/tscp-menu.htm. The various grounds, on which the Advisory Body may make a recommendation, can be found in section 1.4 of the Policy.
>
> Transport Canada would encourage you to provide additional information, outlining the circumstances surrounding the above noted criminal charge and incidents, as well as to provide any other relevant information or explanation, including any extenuating circumstances, within 20 days of the receipt of this letter…
>
> Should you wish to discuss this matter further, please do not hesitate to contact Leslie Mott at (613) 949-0232.

[8] Although the affidavit of Mr. Ramos is silent on the matter, it appears from the certified record that he left a message for Mrs. Mott sometime before October 28, 2016, which she returned on that date, leaving a message to call her back. Mr. Ramos did not return her call and there is no evidence that he consulted with anybody else, including his employer or the criminal lawyer who had defended him and who Mr. Ramos consulted a year later to obtain help in respect of this matter. Rather, Mr. Ramos apparently sent on October 25, 2016 a fresh application for a security clearance, which was not received by Transport Canada until more than a year later. This document does not include any information or explanation in respect of the events and concerns expressed in the October 17, 2016 letter. In fact, Mr. Ramos used a standard

form that contained the same type of information that he had submitted in his earlier applications, rather than any additional information or explanation of extenuating circumstances concerning the events in question (see para. 2 above).

[9] The Minister, who has the authority under section 4.8 of the *Aeronautics Act*, R.S.C., 1985, c. A-2, [*Aeronautics Act*] to grant, refuse, suspend or cancel a security clearance at his discretion, set out a process to deal with such decisions in accordance with the policy referred to in the October 17, 2016 letter (the TSCP Policy), which is meant to ensure the prevention of unlawful acts of interference with civil aviation.

[10] In accordance with such process, an Advisory Body, chaired by the Director of Security Screening Programs and composed of individuals chosen based on their familiarity with the aim and objective of the Security Clearance Program (in this case, four members, see Appeal Book, Tab 9, p. 199) reviewed all the materials relating to Mr. Ramos. After noting, among other things, that i) as a "custodial associate", Mr. Ramos' position requires a high level of integrity and trust, that ii) the incidents which occurred involved the use of his position of trust to take advantage of the complainant, and that iii) Mr. Ramos had offered no explanation or information in respect of the concerns raised in the letter of October 17, 2016, the Advisory Body concluded that it should recommend the cancellation of his security clearance. This conclusion was based on the fact that the Advisory Body "reasonably believed, on a balance of probabilities, that the applicant may be prone or induced to commit an act or assist and abate any person to commit an act that may unlawfully interfere with civil aviation" (Record of Discussion of the Advisory

Body, Appeal Book, Tab 9, p. 203). This is one of the bases provided for under subsection 1.4(4) of the TSCP Policy, a provision specifically referred to in the October 17, 2016 letter.

[11] On June 28, 2017, when it made its recommendation, the Advisory Body had before it a copy of Mr. Ramos' 2004, 2009 and 2014 applications, as well as the details of the peace bond issued in exchange for the withdrawal of the criminal charge. This recommendation was reviewed and accepted by Mrs. Wendy Nixon, the Assistant Director General, Aviation Security and the Minister's delegate in that instance. She issued her decision to cancel Mr. Ramos' security clearance on September 29, 2017. In her letter, she included a notice that her decision could be reviewed by the Federal Court within 30 days and a phone number to obtain further information.

[12] Although Mr. Ramos received the said letter on October 5, 2017, he became aware of the decision as soon as he attempted to use his cancelled clearance pass on September 30, 2017. On October 2, 2017, he called to advise that he had sent a response to the October 17, 2016 letter, and was told that such response had never been received. He was encouraged by Mrs. Stéphanie Séguin, who responded to his call, to read the decision carefully to understand his recourse options, and was informed that he was free to send the document he had sent a year ago, but that there was no guarantee that his file would be reviewed once more.

[13] After receiving the copy of the fresh application sent by Mr. Ramos in October 2016, Mrs. Séguin sent him an email confirming that he had until October 6, 2017 to provide his "submissions". She noted that she was not herself a decision maker, and that the authorized

person would have to determine if the submissions demonstrated a “material change in circumstances” that may warrant a reconsideration of the decision to cancel. Mr. Ramos called her the next day to seek further clarification. Then, on October 5, 2017, he sent her another message asking whether she required any further information about “him”.

[14] Although Mr. Ramos never asked for an extension of time to provide further submissions or to consult a lawyer, he did take steps albeit late by consulting his criminal lawyer, who directed him to the lawyer who became his counsel after meeting with him on October 10, 2017. On October 13, 2017, his counsel wrote a lengthy letter to Mrs. Nixon seeking reconsideration of her cancellation decision. The main focus of the letter was the economic impact of the decision on Mr. Ramos and the lack of correlation between his behaviour (the incidents) and the security of civil aviation. There was no reference to any steps taken by Mr. Ramos after September 29, 2017. There was no reference at that time to Mr. Ramos’ remorse and the letter did not include a copy of the psychological report on which Mr. Ramos later sought to rely in his application for judicial review.

[15] During this time, having received no further submission from Mr. Ramos, Pauline Mahon, the Assistant Director, Security Screening Programs, wrote to Mr. Ramos on October 6, 2017, to advise that his request for reconsideration was refused. The letter refers to the fact that Mr. Ramos had been duly advised of the concerns with respect to his suitability to retain his clearance on October 17, 2016, and that the new application, which was allegedly sent in 2016 but not received, contained the same information as the applications which were already on file and considered during the review process. Mrs. Mahon also referred to section II.36 of the TSCP

Policy, which provides that a new application (like the one allegedly filed by Mr. Ramos on October 25, 2016) may only be submitted if a period of five years has elapsed since the cancellation or a change has occurred in the circumstances that led to the refusal or cancellation. Once again, Mr. Ramos was advised that he could seek judicial review of this decision.

[16] Despite the fact that Mr. Ramos had received the October 6, 2017 refusal letter, his counsel continued to correspond with other officials in Mrs. Nixon's department. In response to his October 13, 2017 letter and various emails thereafter, Mr. Ramos' counsel was advised on October 17, 2017 that a refusal of his client's own request had already been issued on October 6, 2017. The email also advised Mr. Ramos' counsel that to answer any further questions, the usual consent letter from his client would be required.

[17] On October 25, 2017, Mr. Ramos filed a Notice of Application for judicial review of the decision of Mrs. Nixon dated September 29, 2017. The Notice of Application was later amended on consent of the respondent to reflect that, in fact, the decision under review was the refusal to reconsider issued by Mrs. Mahon on October 6, 2017.

[18] On November 7, 2017, Mr. Ramos was advised that he was being placed on temporary layoff by his employer until he dealt with his security clearance. Apparently, there was no available work that did not require such a clearance.

[19] As mentioned, the Federal Court dismissed Mr. Ramos' application, holding that the decision was both procedurally fair and reasonable. The Federal Court held that it could not

consider documents that were not before the decision maker on or before October 6, 2017. It also dismissed the request for amendment to change the refusal decision under review from that of October 6, 2017 to the one made on October 17, 2017. It noted that this request was made at the eleventh hour and that to allow it would change the very nature of the summary proceedings before the Court. It was also not satisfied that a judicial review of the October 17, 2017 decision (refusal to consider Mr. Ramos' counsel's request to reconsider) would have any chance of success.

II. ISSUES AND STANDARD OF REVIEW

[20] The issues in this appeal are:

1. Did the Federal Court err in refusing to grant Mr. Ramos' proposed amendment?

2. Was there a breach of procedural fairness?

3. Was the said refusal to reconsider dated October 6, 2017 reasonable?

[21] The standards of review with respect to the first question are those set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. More particularly, when reviewing a discretionary decision of the Federal Court on a motion to amend, in the absence of an extricable error of law, this Court may only intervene if Mr. Ramos identifies an overriding and palpable error.

[22] With respect to the other two questions, our Court must determine whether the Federal Court identified the proper standard(s) of review and applied them correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 46-47(*Agraira)*). It is not disputed that if a breach of procedural fairness occurred, the reviewing Court must intervene; historically, this was referred to as a review on the standard of correctness *(Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2018] F.C.J. No. 382 at paras. 54-55; *Demitor v. Westcoast Energy Inc. (Spectra Energy Transmission)*, 2019 FCA 114 at para. 26). The merits of the Minister's delegate's refusal to reconsider are to be reviewed on the standard of reasonableness.

[23] Given that this Court effectively stands in the shoes of the Federal Court to answer those questions, our focus is on the administrative decision itself. It is not particularly useful to try to identify errors in the Federal Court's reasoning.

[24] The Federal Court clearly identified the standard of reasonableness as the standard applicable to the merits of the decision before it. However, it did not expressly state on what basis it reviewed the procedural fairness issue. As mentioned, this was not a disputed issue; still, the Federal Court should have mentioned it to enable this Court to properly apply the approach in *Agraira*. Be that as it may, I will review this issue afresh as is required.

III. ANALYSIS

1. *Did the Federal Court err in refusing the proposed amendment?*

[25] First, Mr. Ramos submits that in his view, no amendment was necessary for the Federal Court to properly consider the correspondence from his counsel between October 13, 2017 and October 17, 2017 seeking reconsideration of the cancellation decision. He argues that it is only out of an abundance of caution that he sought an amendment at the end of his reply submissions before the Federal Court. However, Mr. Ramos does not explain on what basis this evidence, which was not before Mrs. Mahon, the Minister's delegate in this case, could be considered. Despite Mr. Ramos' submissions, there is no doubt in my view that his application only referred to Mrs. Mahon's decision of October 6, 2017 and that any evidence on or after that date was not properly before the Federal Court.

[26] Second, Mr. Ramos argues that, in any event, the Federal Court erred by refusing to amend his Notice of Application. However, he does not elaborate as to why this is so in his memorandum of fact and law, except to say that the Federal Court erred by considering the merits of the October 17, 2017 decision, which he now seeks to review, because in doing so, the Federal Court added reasons that were not clearly spelled out in the said decision (an email that simply referred to the fact that her refusal to reconsider had already been made on October 6, 2017). Mr. Ramos submits that this process improperly "boot strapped" the October 17, 2017 decision because the arguments put forth by his counsel were never in fact considered (memorandum of fact and law at para. 47).

[27] It is important to note here that Mr. Ramos never sought leave to file new evidence after it was made abundantly clear, from the certified records filed pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106, that the said correspondence, as well as the psychologist's

report that Mr. Ramos also sought to add for the very first time before the Federal Court, were never before the decision maker who issued the decision of September 29, 2017 (first certified record filed) or the refusal to reconsider dated October 6, 2017 (supplementary certified record filed in December 2017 after Mr. Ramos' first amendment to his Notice of Application).

[28] This is particularly surprising, considering that Mr. Ramos had to turn his mind to which decision he intended to contest when he first sought to amend his Notice of Application in November 2017. Mr. Ramos could have sought leave pursuant to Rule 301 to contest more than one decision; instead, he made it clear, in my view, that he was contesting Mrs. Mahon's decision of October 6, 2017.

[29] Also, the respondent had argued in its own written and oral representations before the Federal Court that correspondence dated October 6, 2017 or after was not relevant because it was not before the decision maker (Transcript of Proceedings before the Honourable Justice Annis, pp. 75, 108). There is no explanation as to why Mr. Ramos waited until the very end of the hearing before the Federal Court to seek an amendment, when he knew that he did not have leave to file evidence that was not before Mrs. Mahon.

[30] To examine the amendment sought, the parties and the Federal Court assumed that there was a reviewable decision made on October 17, 2017, as was argued by Mr. Ramos when he requested such amendment. Thus, the Federal Court considered the factors relevant to such a motion, including the timing of the motion, its impact on the overall procedure, the fact that Mr. Ramos had already amended his Notice of Application to change the decision he sought to

review, as well as the eventual chances of success of an amended application. It is clear that the Federal Court discussed this last point in some detail in its reasons because both parties had provided fulsome submissions after the hearing with respect to such merits. I have not been persuaded that the Federal Court made an error in doing so that would justify our intervention.

[31] The fact that the principle of *"functus officio"* does not apply as strictly to administrative decision makers does not mean that they have to issue significant reasons in respect of all requests for reconsideration they receive from a party where there is more than one such request. It may depending on the circumstances be enough to simply say no to a party seeking to obtain reconsideration for the second time within days of the initial refusal to reconsider. This is especially so given that the decision maker is presumed to have considered the material before him or her. It will be for the reviewing Court to determine on the basis of the record whether such further refusal was reasonable.

[32] In his correspondence, Mr. Ramos' counsel raised no circumstances that could support a reconsideration of the decision to cancel. He basically argued that the decision to cancel was unreasonable for a variety of reasons including its impact on Mr. Ramos' family and the nature of his transgression. All of these circumstances could have been raised in reply to the October 17, 2016 letter. As will be explained, there was no breach of procedural fairness in the process leading to the cancellation decision that could justify a reconsideration, nor did Mr. Ramos, or his counsel, raise any other grounds, identified in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 [*Chandler*], which could justify a reconsideration. If the email dated October 17, 2017 is indeed a reviewable decision as opposed to a courtesy letter, I agree with the

ultimate conclusion of the Federal Court that the chances of success of a re-amended application were very limited indeed.

[33] Also, this Court has cautioned that the "nearer the end of the trial a motion to amend is made, the more difficult it will be for the applicant to get through both the hurdles of injustice to the other party and interests of justice" (*Canderel Ltd. v. Canada* (C.A.), [1994] 1 F.C. 3 at para. 13). As found by the Federal Court, applications for judicial review are meant to proceed expeditiously because they are summary proceedings. This second amendment, if granted, was the equivalent of starting a new application. The decision maker would have had to file a new certified record pursuant to Rule 317. The parties would have had to file supplementary records and a new hearing would have to have been held. This more than 18 months after the time to seek judicial review of whatever decision was made according to the parties on October 17, 2017 had expired. In the particular circumstances, in my view, this was sufficient to conclude that it was not in the interests of justice that leave to amend be granted.

2. *Was there a breach of procedural fairness?*

[34] Mr. Ramos raised different issues relating to the process followed to reach the September 29, 2017 cancellation decision, as well as the decision made on October 6, 2017. They may both be relevant but for different reasons.

[35] First, I understand from my review of the record that when Mrs. Séguin was contacted by Mr. Ramos, the only issue raised by him was that he had filed a reply to the October 17, 2016 letter that may not have been considered. Obviously, this could constitute a breach of procedural

fairness in the process leading to the cancellation. From her communications with Mr. Ramos, Mrs. Séguin was finally able to ascertain that the only information provided by Mr. Ramos was in fact a new application, and that he had not filed any other information in response to the concerns detailed in the said letter.

[36] Obviously, a breach of procedural fairness before the issuance of the cancellation decision on September 29, 2017 could be relevant as a basis for the request to reconsider. However, it would not constitute a breach of procedural fairness tainting the process leading to the refusal to reconsider currently under review. That said, I will still deal with the argument presented in respect of the September 29, 2017 decision in this section, instead of under the next one dealing with the merits of the October 6, 2017 decision, simply because it is convenient to do so now, as the same legal principles apply in assessing this argument and the alleged breach of fairness in the process leading to the October 6, 2017 decision.

[37] The main thesis put forth by Mr. Ramos is that the content of the duty of fairness varies according to the personal characteristics of the individual involved. Because Mr. Ramos did not have a lawyer to advise him when he received the October 17, 2016 letter, it was the duty of the Minister to do more than it actually did to help him before cancelling his security clearance.

[38] There is no doubt that the content of the duty of fairness is variable and depends on the context. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R.817 at paras. 21-22, 174 D.L.R. (4th) 193, the Supreme Court of Canada established the factors to be considered according to the context of each case. In *Henri v. Canada (Attorney General)*, 2016

FCA 38, our Court reviewed in detail how these factors apply in the context of an individual who may have a security clearance under the *Act* revoked (at paras. 27-28):

> [27] Although I frame the analysis somewhat differently, I find that the level of procedural fairness set out by the Federal Court is reflective of these factors [the *Baker* factors] in the context of this case. 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.
>
> [28] Specifically, the Federal Court's determination that procedural fairness requires that an individual who may have his security clearance under the Act revoked is informed of the facts alleged and is afforded with the opportunity to respond, is consistent with the *Baker* factors and with the goal of ensuring a fair and open procedure.

[39] The details contained in the letter of October 17, 2016 were amply sufficient to meet this duty, and on a thorough examination of the record including the affidavits of Mr. Ramos, I am satisfied that Mr. Ramos ought to have known the case against him. He had to be aware that the Minister had concerns “regarding his suitability to retain his security clearance” because of the incidents described therein. Also the wording used in the October 17, 2016 letter to describe what a person like Mr. Ramos has to do to participate in the process is standard. It has been used repeatedly and has been held by this Court and the Federal Court to be clear and sufficient to provide a fair and meaningful opportunity to participate in the process when sufficient details of the incident(s) raising the concerns are set out.

[40] Nevertheless, Mr. Ramos says that he did not have a meaningful opportunity to respond because he in fact believed that filing a new application was a proper response. He submits that

procedural fairness must be determined using a standard that is purely subjective; that is, what a particular individual actually understood or did. I cannot agree. One must look at what a reasonably diligent person in the same circumstances would have understood or done. A fair and meaningful opportunity means that a person was given all the necessary information to enable a reasonable person to participate in the process. Whether one did not in fact properly use such an opportunity because one failed to act as a reasonably diligent person is not relevant.

[41] Mr. Ramos' counsel argues that Mr. Ramos may not have understood the word "extenuating circumstances" and, later on, Mrs. Séguin's reference to "submissions". First, Mr. Ramos does not say this in his affidavit. Rather, his counsel asked this Court to infer it from his behaviour. Second, nowadays, it is relatively easy for anyone to use one's phone or any internet connection to ascertain the meaning of any word. Third, and more importantly, the letter of October 17, 2016 asks first and foremost for "information or explanations" about the incidents described therein and the concerns raised with respect to Mr. Ramos' suitability to retain his security clearance. Moreover, the letter gives the name (Mrs. Mott) and telephone number of a person who could explain the process. Mr. Ramos had this information, but did not return Mrs. Mott's call when she tried to reach him. As already mentioned, there is no evidence that Mr. Ramos took any steps whatsoever to properly inform himself as to what information or explanation could be useful to alleviate the concerns set out in the letter. How could it be unfair to conclude that he had the obligation to at least take the steps that he actually took a year later by contacting his criminal lawyer to seek some help? Mr. Ramos ought to have known that a potential cancellation would have an impact on his job and his family. Such a decision almost invariably does whether one is a pilot (*Mitchell v. Canada (Attorney General)*, 2016 FCA 241)

or a custodial associate. Any reasonable self-represented person would have taken this letter seriously and would have at least returned Mrs. Mott's call. If he felt pressed by time, he could have sought an extension when speaking with her.

[42] Hence, I can only conclude, like Mrs. Mahon did on October 6, 2017, that Mr. Ramos was provided with an opportunity to make submissions when he received the letter of October 17, 2016, but that he failed to provide any information or explanation that was not already before the Advisory Body and the Minister's delegate, which might justify reconsideration of the recommendation to cancel his security clearance.

[43] Turning now to the process leading to the decision under review, Mr. Ramos also submits that before refusing to reconsider the cancellation decision, Mrs. Séguin should have done more to explain what else he could say when she realized that Mr. Ramos sought a reconsideration simply on the basis of his 2016 application. Mr. Ramos relies on his alleged misunderstanding of what was clearly explained to him and was also expressly stated in the TSCP Policy, and again there is nothing in his affidavits about such a misunderstanding. According to his counsel's argument, his inability to understand the word "submissions" and what more he could say about himself to convince the decision maker to reinstate his security pass should have been clear to Mrs. Séguin, and that this, in itself, created an additional duty on the Minister. Again I cannot agree.

[44] Mrs. Séguin explained the process on three distinct occasions. As soon as she became aware that Mr. Ramos' response to the October 17, 2016 letter may have been lost, she

encouraged him to send her a copy. She did say that there was no guarantee that this would bring about reconsideration of the decision. She did mention that his submissions had to deal with material change in the circumstances. There was no duty on the Minister to do more, especially when one considers that Mrs. Séguin could not and did not have any idea if Mr. Ramos had anything more to say. Administrative staff do not have to act as counsel for individuals involved in their own administrative processes. They do not have to investigate or determine whether, as a matter of fact, there were any circumstances that could support reconsideration. They need only provide the information available to them as to the process itself.

[45] The concerns raised, the incidents, the applicable policy, and the remedies available were all set out in the October 17, 2016 letter that Mr. Ramos acknowledged to have received. What could be relevant to a potential reconsideration was also disclosed. This is not a case where the decision maker was relying on extrinsic evidence or on concerns that Mr. Ramos did not know about. Only Mr. Ramos knew if there were any special circumstances or information that he could be put forth to support his request for reconsideration. There is no evidence as to what exactly he did not understand about the process itself as opposed to what more he could say to obtain what he wanted – a security pass.

[46] Like every other person involved in an administrative process, Mr. Ramos had to act diligently. He had to seek independent legal advice to formulate his submissions if he needed it. He actually knew in this case that he needed help because he did contact his criminal lawyer in October 2017 (the exact date he did so is not included in his affidavit). He knew that time was of the essence as he told Mrs. Séguin that he needed a decision before October 13, 2017, a deadline

fixed by his employer. He did not ask for an extension of the time to send his submissions, even if he knew that he was to meet with a lawyer on October 10, 2017 – that is, after the October 6, 2017 deadline to provide additional submissions. It is not even clear that he advised the lawyer that he had already requested reconsideration of the cancellation decision, and the deadline to file submissions in that respect had already expired. This may explain why Mrs. Séguin was not copied on the letter sent to Mrs. Nixon on October 13, 2017 and why no reference is made in the said letter to Mr. Ramos' exchange with Mrs. Séguin.

[47] Based on the foregoing, like the Federal Court, I cannot conclude that the Minister breached his duty to act fairly before refusing to reconsider the decision to cancel Mr. Ramos' security clearance on October 6, 2017.

3. *Was the refusal to reconsider dated October 6, 2017 reasonable?*

[48] Mr. Ramos submitted little by way of argument to support his position that the only decision under review – the October 6, 2017 decision – was unreasonable. I have already dealt with and rejected the submissions that the Minister's delegate breached her duty to act fairly. Mr. Ramos also said, but mostly in respect of the October 17, 2017 decision that is not before us, that the Minister's delegate fettered her discretion because she relied entirely on the TSCP Policy to reach her decision, and that her decision was unreasonable as a result. I cannot agree.

[49] As mentioned, Mr. Ramos' request for "reconsideration" was based on the fact that the decision maker had not considered his response to the October 17, 2016 letter that is his new

application. He did not raise any other grounds or provide any information on which the decision to cancel should be reconsidered.

[50] Still, Mr. Ramos argues that he was entitled to reconsideration. This argument that the decision maker fettered her discretion presupposes that the Minister had the power to reconsider his decision and had effectively any discretion to exercise in the circumstances raised by Mr. Ramos.

[51] As already mentioned, there was nothing in the decision to cancel that could indicate or give any legitimate expectation to Mr. Ramos that the said decision would be reconsidered, should he later have something to reply to the October 17, 2016 letter. There is nothing in the TSCP Policy that expressly provides for a reconsideration of the cancellation decision other than when one files a new application pursuant to Part II-36 of the TSCP Policy.

[52] Mr. Ramos relies on the Supreme Court decision in *Chandler* and on the decision of the Federal Court in *Chopra v. Canada (Attorney General)* 2013 FC 644 at para. 64 [*Chopra*], where the four grounds on which *Chandler* envisages the possibility for an administrative decision maker to reconsider one's decision at common law are summarized as follows:

> 1) they may always reopen a proceeding if there was a denial of natural justice which vitiates or nullifies it;
>
> 2) "there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation" (the new evidence ground);
>
> 3) jurisdictional error; and

> 4) failure to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose.

[53] The legislator may limit or expand this power. Thus, to determine whether a particular administrative decision maker has the power to reconsider his or her decision and on what basis is a matter of statutory interpretation which requires more than simply looking at the wording of section 4.8 of the *Aeronautics Act*, which does not expressly deal with this issue. One would have to perform an interpretation of the text, context or purpose ((*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27). Neither party did so, and neither party argued that in this case, the power to reconsider would include more grounds than those set out in *Chandler*. In light of my ultimate conclusion, I am prepared to assume, without deciding it, that the Minister had the power to reconsider on the grounds set out in *Chopra* and on which Mr. Ramos particularly insisted.

[54] As Mr. Ramos raised no other grounds before us, I understand that the only one that could apply here is the alleged breach of procedural fairness in the process leading to the decision to cancel on September 29, 2017. There was no such breach of procedural fairness and Mrs. Mahon properly indicated in her decision that Mr. Ramos had received all the relevant information with respect to the Minister's concerns with his suitability before the decision to cancel was made. In these circumstances, there could be no fettering of discretion since there was no discretion to exercise at all. As mentioned in *Chandler*, usually the power to reconsider does not extend to simply changing one's mind based on additional submissions or because one made an error within his or her jurisdiction (*Chandler* at para. 76).

[55] In fact, by examining the possible application of Part II-36 of the TSCP Policy to Mr. Ramos' new application, which he allegedly submitted after receipt of the October 17, 2016 letter but which the Minister did not receive until October 2017, Mrs. Mahon was as a matter of fact expanding on the grounds on which Mr. Ramos could normally seek a reconsideration. Mrs. Mahon was entitled to consider whether Mr. Ramos' request was a proper request under Part II-36 of the TSCP Policy because he had decided to file a new application as is provided in such policy. In so doing, she properly examined whether Mr. Ramos' application raised circumstances that could justify a new decision as per the TSCP Policy. She made no reviewable error in concluding as she did, for there was no change in the circumstances that led to the cancellation and a period of five years had not elapsed since the cancellation. The decision was reasonable.

IV. CONCLUSION

[56] In light of the foregoing, there are no grounds for this Court to intervene. The appeal will be dismissed without costs as the Minister confirmed at the hearing that he was not seeking any costs.

"Johanne Gauthier"
J.A

"I agree
Wyman W.Webb J.A."

"I agree
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE ANNIS, DATED JULY 6, 2018, NO. T-1628-17

DOCKET:	A-250-18
STYLE OF CAUSE:	RODRIGO RAMOS v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 21, 2019
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	WEBB J.A. RIVOALEN J.A.
DATED:	JULY 15, 2019

APPEARANCES:

Osborne G. Barnwell	FOR THE APPELLANT
Jacob Pollice	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Osborne G. Barnwell Barrister & Solicitor Toronto, Ontario	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT