Federal Court Cour fédérale

Date: 20150219

Docket: T-1285-14

Citation: 2015 FC 210

Ottawa, Ontario, February 19, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

STEFAN VANCE JONATHON CHRISTIE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 18(1) of the *Federal Courts Act*, RSC 1985, c F-7 of a decision of Transport Canada refusing the applicant's application for a transportation security clearance [the clearance] required to work at Lester B. Pearson International Airport [the airport].

[2] For the reasons that follow, the application is dismissed.

II. Background

[3] In December 2012, the applicant began working at the airport in a part-time position with Servisair. He began working for Air Canada in a part-time position in March 2013 and was working full-time by April 2013.

[4] He applied for the clearance on or about January 15, 2013 and officials at the Transportation Security Clearance Program [TSCP] requested a Law Enforcement Records Check from the Royal Canadian Mounted Police [the RCMP]. The RCMP responded on December 2, 2013 with a written report [the RCMP Report].

[5] The RCMP Report noted the following incidents involving the applicant, as well as criminal charges made against him:

- In January 2007, the police attended an apartment following reported gunshots, the applicant was one of seven people in the apartment, he was found in a bedroom wherein officers found a sawed-off .22 calibre rifle and two rounds of ammunition, and when he was searched, two additional rounds of ammunition and a quantity of cocaine were found on his person;

- In connection with the January 2007 incident, the applicant was charged with Unauthorized Possession of a Firearm, Possession of a Firearm Knowing its Possession is Unauthorized, Careless Storage of a Firearm, Possession of a Prohibited Firearm with Ammunition, and Possession of a Firearm Obtained by the Commission of an Offence [the Weapons Charges];

- In April 2007, the applicant and an "associate" were stopped in a traffic stop, the associate was arrested for Breach of Recognizance, and the applicant was allowed to continue on his way;

- On August 7, 2007, the police observed the applicant sitting in a vehicle in a commercial parking area and hiding something under the driver's seat and when the car was searched, a 0.4 gram piece of crack cocaine was found;

- In connection with the August 2007 incident, the applicant was charged with Possession of a Controlled Substance contrary to section 4(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [the Drug Charge] and a Breach of Recognizance (in relation to the Weapons Charges);

- The Weapons Charges were withdrawn on November 11, 2008;

- The Breach of Recognizance charge was withdrawn on November 27, 2008; and

- The Drug Charge was withdrawn on January 29, 2009.

[6] The RCMP Report also indicated that there were four individuals, identified only as Subjects A, B, C and D [the Subjects], that had been present with the applicant during the incidents described above. The Subjects all had previous criminal convictions relating to violence, drugs, or weapons.

[7] In a letter dated January 2, 2014, the Chief of the Security Screen Program [SSP] advised the applicant that the SSP had received adverse information regarding his suitability to obtain the

clearance and that his application as being referred to the Transportation Security Clearance Advisory Body [the Advisory Body]. The letter detailed the incidents and charges described in the RCMP Report, directed the applicant to consult the *Transportation Security Clearance Program Policy* [the Policy], and encouraged him to provide any additional information or explanation, including any extenuating circumstances.

[8] On February 10, 2014, Transport Canada received submissions from the applicant's then-counsel, including a letter from counsel on the applicant's behalf, a letter from the applicant, character references written by his fiancée and sister, and family photos. The letter from counsel indicated the following:

- The applicant has not associated with the Subjects since the date of his arrest;
- The applicant now consciously avoids associating with anyone known to him to have a criminal record;
- The applicant has not been charged with any other criminal offences since 2007 and has had no involvement with the criminal justice system since the charges were withdrawn in November 2008;
- All of the charges laid against the applicant were ultimately withdrawn;
- The applicant submits that the police were mistaken regarding the January 2007 arrest because he was not a resident of the apartment attended by police – he was present to DJ a party, he was not familiar with all the attendees, and he was never in possession of any ammunition or firearms;

- The applicant submits that he was not guilty of the charges associated with the August 2007 arrest and the "fact the charges were laid and then withdrawn is not indicative of a tendency to engage in criminal behaviour or to participate in acts of violence"; and

- Since 2008, the applicant has dedicated himself to his children and fiancée, who are dependent on his income, and has focused on getting an education and finding stable employment.

III. Impugned Decision

[9] The Advisory Board convened on March 11, 2014 to consider the application. The Advisory Board took note of the criminal charges laid against the applicant, the applicant's association with the Subjects, and the fact that the Subjects have, collectively, 20 criminal convictions related to violence, drugs and weapons. With respect to the January 2007 incident, the Advisory Board stated that it was unclear "why a DJ would be found in a bedroom and there were only seven…people in the apartment." The Advisory Board also noted that "cocaine is … serious, addictive, and not an entry-level drug." The Advisory Board found that his "past involvement with drugs and weapons, and his associations to individuals associated with criminal activity raise[d] concerns about his judgment, trustworthiness, and reliability." Finally, the Advisory Board considered the fact that seven years had passed since the last criminal charge but "questioned whether enough time had elapsed to demonstrate a change in the applicant's behaviours and associations." On this basis, it concluded that there was reason to believe, on a balance of probabilities, that the applicant may be prone or induced to commit an act or to assist or abet another person to commit an act that may unlawfully interfere with civil aviation. It

found that the applicant's submissions did not provide sufficient information to overcome those concerns.

[10] The Advisory Board made a recommendation that the Minister refuse the clearance. The final decision to refuse the clearance was made on April 18, 2014 by the Ministerial delegate, Ms. Brenda Hensler-Hobbs, the Acting Director General of Aviation Security. The decision was communicated to the applicant in a letter dated April 23, 2014, which essentially reiterated the factors considered by the Advisory Board and its concerns regarding the applicant's suitability for the clearance.

IV. Statutory Provisions

[11] The following provisions of the *Aeronautics Act*, RSC 1985, c A-2 [the Act] are applicable to this proceeding:

3. ... "security clearance" means a security clearance granted under section 4.8 to a person who is considered to be fit from a transportation security perspective; …	**3.** … « habilitation de sécurité » Habilitation accordée au titre de l'article 4.8 à toute personne jugée acceptable sur le plan de la sûreté des transports. …
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.

[12] The following provisions of the *Canadian Aviation Security Regulations, 2012*, SOR/2011-318 [the Regulations] are applicable to this proceeding:

3. … "restricted area identity card" means a restricted area pass issued by or under the authority of the operator of an aerodrome listed in Schedule 1 or 2. …	**3.** … « carte d'identité de zone réglementée » Laissez-passer de zone réglementée délivré par l'exploitant d'un aérodrome énuméré aux annexes 1 ou 2 ou sous son autorité. …
146. (1) The operator of an aerodrome must not issue a restricted area identity card to a person unless the person … (c) has a security clearance; …	**146.** (1) Il est interdit à l'exploitant d'un aérodrome de délivrer une carte d'identité de zone réglementée à une personne à moins qu'elle ne réponde aux conditions suivantes : … c) elle possède une habilitation de sécurité; …
165. A person must not enter or remain in a restricted area unless the person	**165**. Il est interdit à toute personne d'entrer ou de demeurer dans une zone réglementée à moins qu'elle ne soit, selon le cas :
(a) is a person to whom a restricted area identity card has been issued; or …	a) titulaire d'une carte d'identité de zone réglementée; …

[13] The following portions of the TSCP Policy are applicable to this proceeding:

> **Objective**
>
> **I.4**
>
> The objective of this Program is to prevent the uncontrolled entry into a restricted area of a listed airport by any individual who

1. is known or suspected to be involved in activities directed toward or in support of the threat or use of acts of serious violence against persons or property;

2. is known or suspected to be a member of an organization which is known or suspected to be involved in activities directed toward or in support of the threat or use of acts of serious violence against people or property;

3. is suspected of being closely associated with an individual who is known or suspected of

   - being involved in activities referred to in paragraph (1);

   - being a member of an organization referred to in paragraph (2); or

   - being a member of an organization referred to in subsection (5) hereunder.

4. 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.

5. is known or suspected to be or to have been a member of or a participant in activities of criminal organizations as defined in Sections 467.1 and 467.11 (1) of the Criminal Code of Canada;

6. is a member of a terrorist group as defined in Section 83.01 (1)(a) of the Criminal code of Canada.

Refusal/Cancellation/Suspension

I.5

Any person who is denied a clearance, or any person whose clearance is suspended or cancelled, shall be advised in writing of

1. the refusal, cancellation or suspension; and

2. the reason or reasons for the refusal, cancellation or suspension unless the information is exempted under the Privacy Act; and

3. the right to redress.

The Advisory Body

I.8

An Advisory Body shall review applicant's information and make recommendations to the Minister concerning the granting, refusal, cancellation or suspension of clearances.

Cancellation or Refusal

II.35

1. The Advisory Body may recommend to the Minister the cancellation or refusal of a security clearance to any individual if the Advisory Body has determined that the individual's presence in the restricted area of a listed airport would be inconsistent with the aim and objective of this Program.

2. In making the determination referred to in subsection (1), the Advisory Body may consider any factor that is relevant, including whether the individual:

    a. has been convicted or otherwise found guilty in Canada or elsewhere of an offence including, but not limited to:

        i. any indictable offence punishable by imprisonment for more then 10 years,

        ii. trafficking, possession for the purpose of trafficking or exporting or importing under the Controlled Drugs and Substances Act,

        iii. any offences contained in Part VII of the Criminal Code - Disorderly Houses, Gaming and Betting,

        iv. any contravention of a provision set out in section 160 of the Customs Act,

        v. any offences under the Security Of Information Act; or

vi. any offences under Part III of the Immigration and Refugee Protection Act;

b. is likely to become involved in activities directed toward or in support of the threat or use of acts of serious violence against property or persons.

Redress

II.45

When a security clearance is cancelled or an application for a security clearance is refused an application for review may be directed to the Federal Court of Canada - Trial Division within thirty (30) days of the receipt of the notice of cancellation or refusal.

V. Issues

[14] The following issues arise in this application:

1. Is the applicant's new evidence admissible?; and
2. Did the Ministerial delegate err in refusing to grant the clearance?

VI. Standard of Review

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] held that a standard of review analysis does not need to be conducted in every case. Where the standard of review for a particular question has been well-settled by past jurisprudence, a reviewing court may adopt that standard of review without further analysis.

[16] Section 4.8 of the Act gives the Minister discretion to determine whether to grant or to refuse to grant a security clearance, including the involvement of the Advisory Board. This is a discretionary finding of fact and is reviewable on the reasonableness standard (*Sylvester v Canada (Attorney General)*, 2013 FC 904 at para 10 [*Sylvester*]; *Clue v Canada (Attorney*

General), 2011 FC 323 at para 14 [*Clue*]; *Russo v Canada (Minister of Transport, Infrastructure and Communities)*, 2011 FC 764 at para 20; *Fradette v Canada (Attorney General)*, 2010 FC 884 at para 17).

[17] The standard of review for questions of procedural fairness in the context of transportation security clearances has previously been held to be correctness (*Sylvester* at para 11, citing *Clue*). The level of fairness in such cases is "limited to the right to know the facts alleged against [the applicant] and the right to make representations about those facts" (*Sylvester* at para 11, citing *Poulot v* Canada, 2012 FC 347 and *Rivet v Canada (Attorney General)*, 2007 FC 1175 at para 25).

VII. Analysis

A. Preliminary Matters

[18] The respondent submits that the proper responding party in this application is the Attorney General of Canada and requests an amendment to the style of cause. The style of cause is amended to state the Attorney General of Canada as the responding party in place of Transport Canada and the Minister of Transport.

B. Is the applicant's new evidence admissible?

[19] The respondent submits that an application for judicial review is not a trial *de novo* or an appeal, so the only admissible evidence that was not before the decision-maker is evidence that is relevant to a breach of procedural fairness or tendered as background information. The evidence included in the applicant's affidavits and the attachments thereto were not before the Ministerial

delegate when the decision was made to refuse the clearance. Therefore, the respondent submits that this evidence is not admissible and should be given no weight.

[20] I agree. In a judicial review, the court is generally limited to the evidentiary record that was before the administrative decision-maker. There are a few exceptions to that principle including, but not limited to, circumstances when new evidence is submitted in support of an alleged breach of procedural fairness, to provide general background information to assist the court in understanding issues relevant to the judicial review, or to demonstrate the complete absence of evidence before the decision-maker when it made a particular finding (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 18-29, 428 NR 297).

[21] In any event, I do not find that the additional evidence would have affected the Court's decision.

C. Did the Ministerial delegate err in refusing to grant the clearance?

[22] The applicant submits that the evidence does not support the Ministerial delegate's conclusion that he may be prone or induced to commit, assist in, or abet an act that may unlawfully interfere with civil aviation. He has not been convicted of any crime, all of the charges against him were withdrawn, and he has not associated with the Subjects since the incidents in 2007. He submits that he has turned his life around since those incidents and that he would never risk his employment, upon which the financial security and health of his family depend, for any unlawful activities or associations.

[23] The respondent submits that it is open to the Minister to "take any factor he considers relevant into account" in exercising the discretion granted by section 4.8 of the Act, citing *Fontaine v Canada (Transport, Safety and Security)*, 2007 FC 1160 at para 78 [*Fontaine*]. The respondent argues that the Federal Court has consistently held that the Minister is not limited to considering conduct that resulted in a criminal conviction, but may also consider conduct that result in some other charge outcome (*Lavoie v Canada (Attorney General)*, 2007 FC 435 at paras 26-28; *Clue* at para 20). The standard of proof required by the Policy is only that of a "reasonable belief." Further, the fact that the Policy requires the submission of a wide range of law enforcement information, revealing more than just convictions, is a strong indication of its relevance to security clearance decisions. Transport Canada is not required by the Policy or the Act to do an independent investigation or verification of the RCMP Report (*Fontaine* at para 81).

[24] The respondent further submits that it is reasonable for the Minister to consider past behaviour and personal associations, as this is indicative of whether an applicant may be prone or induced to commit, assist or abet an act that may unlawfully interfere with civil aviation. The Federal Court has also held that associations to individuals involved with drug crime and past involvement with drugs are of particular concern (*Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59; see also *Russo*).The Respondent submits that the applicant's past behaviour and associations bring his judgment, trustworthiness and reliability into question and that it was not unreasonable for the Minister to consider these things despite the time that has elapsed.

[25] While it may seem harsh to the applicant who has conducted himself appropriately since his involvement or association with criminal elements ending in 2007, the Minister is entitled to rely upon these events given the ministerial discretion to refuse to give security clearances based on the low threshold of whether a person *may* be prone or induced to unlawfully interfere with civil aviation. The Court cannot substitute its opinion for persons who are experienced in these matters. Similar decisions have been upheld by the Federal Court on numerous occasions in the past.

[26] I also find no error by the Advisory Body stating "you are associated with known criminals," suggesting that this conduct has continued to present times. It is clear from the remainder of the decision that all references to the applicant's association with criminals were in the past.

[27] Accordingly, I find that this decision falls within the range of reasonable acceptable outcomes based on the evidentiary record that was before the Advisory Body and the Ministerial delegate and is justified by transparent and intelligible reasons.

VIII. Conclusion

[28] The application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to state the Attorney General of Canada as the responding party in place of Transport Canada and the Minister of Transport
2. The application is dismissed.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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