

Federal Court



Cour fédérale

Date: 20160108

Docket: T-2257-14

Citation: 2016 FC 34

Ottawa, Ontario, January 8, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SHAMSHINDER SINGH SIDHU

Applicant

and

CANADA (MINISTER OF TRANSPORT)

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Shamshinder Singh Sidhu has brought an application for judicial review pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision of the Director General, Marine Transportation and Security, made on behalf of the Minister of Transport [Minister], to cancel his security clearance.

[2] For the reasons that follow, I have concluded that the Minister's decision was both reasonable and procedurally fair. The application for judicial review is dismissed.

II. Background

[3] Mr. Sidhu is a casual longshore worker at the Port of Metro Vancouver. In 2008, he was granted a marine transportation security clearance which permitted him to work in restricted areas of the port. Mr. Sidhu's security clearance was renewed by Transport Canada in 2013, and was expected to remain valid until March 4, 2018.

[4] On April 9, 2014, Transport Canada received a Law Enforcement Record Check [LERC] report from the Royal Canadian Mounted Police [RCMP]. The LERC report contained the following information concerning Mr. Sidhu: (i) he had no known criminal convictions; (ii) in May 2008, he was seen at a bar shaking hands with a member of the Hells Angels, a well-known criminal organization; (iii) in July 2008, he was arrested for aggravated assault after he left the scene of a fight, but he was never charged; (iv) in April 2011, he was identified as a passenger in a car registered to an associate of the Hells Angels; (v) in May 2011, he was arrested, but not charged, with threatening to "shoot up" a bar in Surrey, and he displayed violent behaviour towards the police while he was in custody; (vi) in July 2011, he was arrested for mischief after he broke a window, and he had "violent outbursts" while in custody leading the police to suspect that he may have consumed drugs; (vii) he was with Subject A during one of the incidents, and he was with Subject B during another incident – Subject A had been convicted for possession of a restricted firearm, and Subject B had been convicted of 19 offences including robbery, sexual assault, and criminal harassment.

[5] By letter dated April 15, 2014, Transport Canada informed Mr. Sidhu of its concerns regarding his suitability for a security clearance arising from the incidents described in the LERC report. Transport Canada invited Mr. Sidhu to provide information and submissions in response.

[6] Mr. Sidhu responded to Transport Canada by letter dated April 24, 2014. He explained that he was not affiliated with members of the Hells Angels, and that he shook hands with one of their members in May 2008, only because they had met on a previous occasion and he did not want to appear rude. With respect to the incident in July 2008, Mr. Sidhu said that he was trying to help his cousin who was being beaten by ten men at a gas station. He said that he was roughly handled by the police, even though he had not attempted to flee and had not resisted arrest. Mr. Sidhu said that he could not recall being stopped while a passenger in a car in April 2011. He said that the incident in May 2011 resulted from a misunderstanding between his friend and the bar manager, and that he was outside calling his wife when threats were allegedly uttered. Finally, he said that he had accidentally fallen into the window in July 2011. He admitted to being intoxicated, and said that this was because he was suffering from emotional trauma. He insisted that he did not take drugs, and that he had never threatened the police while he was in custody. He noted that he had apologized and paid for the damage he caused to the window.

[7] On July 22, 2014, Transport Canada's Security Clearance Advisory Body [Advisory Body] recommended to the Minister that Mr. Sidhu's security clearance be cancelled. The Advisory Body based its decision on the RCMP's LERC report, which confirmed five encounters with law enforcement between 2008 and 2011 involving threats of violence, his association with members of the Hells Angels, and his links to individuals involved in criminal

activity. The Advisory Body found that the information provided by Mr. Sidhu in his written submissions was not sufficient to dispel its concerns regarding his judgment, trustworthiness and reliability.

[8] In a decision dated September 26, 2014, the Minister accepted the Advisory Body's recommendation and cancelled Mr. Sidhu's security clearance. Mr. Sidhu was informed of the Minister's decision by letter dated September 29, 2014.

III. Issues

[9] The issues raised in this application for judicial review are whether the Minister's decision was reasonable and whether it was procedurally fair.

IV. Legislative Provisions

[10] Section 509 of the *Marine Transportation Security Regulations*, SOR/2004-144

[Regulations] lists the grounds upon which the Minister may cancel a security clearance:

509 The Minister may grant a transportation security clearance if, in the opinion of the Minister, the information provided by the applicant and that resulting from the checks and verifications is verifiable and reliable and is sufficient for the Minister to determine, by an evaluation of the following factors, to what extent the applicant poses a risk to the security of marine transportation:

509 Le ministre peut accorder une habilitation de sécurité en matière de transport si, de l'avis du ministre, les renseignements fournis par le demandeur et ceux obtenus par les vérifications sont vérifiables et fiables et s'ils sont suffisants pour lui permettre d'établir, par une évaluation des facteurs ci-après, dans quelle mesure le demandeur pose un risque pour la sûreté du transport maritime:

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| <p>(a) the relevance of any criminal convictions to the security of marine transportation, including a consideration of the type, circumstances and seriousness of the offence, the number and frequency of convictions, the length of time between offences, the date of the last offence and the sentence or disposition;</p> | <p>a) la pertinence de toute condamnation criminelle du demandeur par rapport à la sûreté du transport maritime, y compris la prise en compte du type, de la gravité et des circonstances de l'infraction, le nombre et la fréquence des condamnations, le temps écoulé entre les infractions, la date de la dernière infraction et la peine ou la décision;</p> |
| <p>(b) whether it is known or there are reasonable grounds to suspect that the applicant</p> | <p>b) s'il est connu ou qu'il y a des motifs raisonnables de soupçonner que le demandeur :</p> |
| <p>(i) is or has been involved in, or contributes or has contributed to, activities directed toward or in support of the misuse of the transportation infrastructure to commit criminal offences or the use of acts of violence against persons or property, taking into account the relevance of those activities to the security of marine transportation,</p> | <p>(i) participe ou contribue, ou a participé ou a contribué, à des activités visant ou soutenant une utilisation malveillante de l'infrastructure de transport afin de commettre des crimes ou l'exécution d'actes de violence contre des personnes ou des biens et la pertinence de ces activités, compte tenu de la pertinence de ces facteurs par rapport à la sûreté du transport maritime,</p> |
| <p>(ii) is or has been a member of a terrorist group within the meaning of subsection 83.01(1) of the <i>Criminal Code</i>, or is or has been involved in, or contributes or has contributed to, the activities of such a group,</p> | <p>(ii) est ou a été membre d'un groupe terroriste au sens du paragraphe 83.01(1) du <i>Code criminel</i>, ou participe ou contribue, ou a participé ou a contribué, à des activités d'un tel groupe,</p> |
| <p>(iii) is or has been a member of a criminal organization as defined in subsection 467.1(1) of the <i>Criminal Code</i>, or participates or has participated in, or contributes or has contributed to, the activities of such a group as referred to in subsection 467.11(1) of the</p> | <p>(iii) est ou a été membre d'une organisation criminelle au sens du paragraphe 467.1(1) du <i>Code criminel</i> ou participe ou contribue, ou a participé ou a contribué, aux activités d'un tel groupe tel qu'il est mentionné au paragraphe 467.11(1) du <i>Code criminel</i>,</p> |

Criminal Code taking into account the relevance of these factors to the security of marine transportation,

(iv) is or has been a member of an organization that is known to be involved in or to contribute to – or in respect of which there are reasonable grounds to suspect involvement in or contribution to – activities directed toward or in support of the threat of or the use of, acts of violence against persons or property, or is or has been involved in, or is contributing to or has contributed to, the activities of such a group, taking into account the relevance of those factors to the security of marine transportation, or

(v) is or has been associated with an individual who is known to be involved in or to contribute to – or in respect of whom there are reasonable grounds to suspect involvement in or contribution to – activities referred to in subparagraph (i), or is a member of an organization or group referred to in any of subparagraphs (ii) to (iv), taking into account the relevance of those factors to the security of marine transportation;

(c) whether there are reasonable grounds to suspect that the applicant is in a position in which there is a risk that they be suborned to commit an act or to assist or abet any person to commit an

compte tenu de la pertinence de ces facteurs par rapport à la sûreté du transport maritime,

(iv) est ou a été un membre d'une organisation qui est connue pour sa participation ou sa contribution – ou à l'égard de laquelle il y a des motifs raisonnables de soupçonner sa participation ou sa contribution – à des activités qui visent ou favorisent la menace ou l'exécution d'actes de violence contre des personnes ou des biens, ou participe ou contribue, ou a participé ou a contribué, aux activités d'une telle organisation, compte tenu de la pertinence de ces facteurs par rapport à la sûreté du transport maritime,

(v) est ou a été associé à un individu qui est connu pour sa participation ou sa contribution – ou à l'égard duquel il y a des motifs raisonnables de soupçonner sa participation ou sa contribution – à des activités visées au sous-alinéa (i), ou est membre d'un groupe ou d'une organisation visés à l'un des sous-alinéas (ii) à (iv), compte tenu de la pertinence de ces facteurs par rapport à la sûreté du transport maritime;

c) s'il y a des motifs raisonnables de soupçonner que le demandeur est dans une position où il risque d'être suborné afin de commettre un acte ou d'aider ou d'encourager toute personne à

act that might constitute a risk to marine transportation security;	commettre un acte qui pourrait poser un risque pour la sûreté du transport maritime;
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V. Analysis

[11] The Minister's decision to cancel Mr. Sidhu's security clearance is subject to review by this Court against the standard of reasonableness (*Brown v Canada (Attorney General)*, 2014 FC 1081 at para 41 [*Brown*]; *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at para 86 [*Farwaha*]). The Minister's decision is highly discretionary. This Court will intervene only if the decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[12] An alleged breach of procedural fairness is subject to review by this Court against the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79).

[13] Mr. Sidhu argues that the Minister's decision was procedurally unfair because his written submissions were not properly considered. He concedes that the Minister followed the correct procedure under s 515 of the Regulations by giving him an opportunity to respond to concerns regarding his suitability for a security clearance. However, he complains about the lack of substantive analysis in the reasons provided, or any explanation why the LERC report was preferred over his submissions.

[14] I agree with Mr. Sidhu that the Minister's reasons were terse, and would have benefited from a more comprehensive analysis of Mr. Sidhu's submissions. However, in my view Mr. Sidhu is essentially challenging the weight the Minister placed on his submissions, and her preference for the information contained in the LERC report. This issue concerns the reasonableness of the Minister's decision, rather than the procedure that was followed, and is best addressed in that context.

[15] The regulatory scheme is intended to screen out applicants who present unacceptably high security risks to marine transportation security (*Canada (Attorney General) v ILWU, Locals 500, 502, 514 & 517*, 2009 FCA 234 at para 11 [*Regulations Reference*]). The Regulations focus on security threats emanating from terrorism or organized crime.

[16] The Minister may refuse to issue a security clearance where there are "reasonable grounds to suspect" that an applicant poses a security risk to marine transportation (*Regulations Reference* at para 2). This low standard is forward-looking and predictive, and is based on assessing possibilities rather than probabilities. To satisfy the "reasonable grounds to suspect standard," the Minister may rely on a wide range of information. Contrary to Mr. Sidhu's submissions, the information need not be verifiable and reliable to the standard required to establish a conviction. There is a broad range of acceptable and defensible decisions (*Farwaha* at paras 94-98).

[17] Mr. Sidhu argues that the Minister's decision was unreasonable because it was based on unproven information that comprised a series of incidents, coupled with speculation that he may

have been associated with unidentified individuals who are members of the Hells Angels. He says the allegations made against him in the LERC report were neither relevant nor sufficient to raise reasonable grounds to suspect that he may interfere with the security of marine transportation.

[18] Mr. Sidhu points out that he has no criminal convictions and he was never charged following the incidents described in the LERC report. He argues that the Minister applied the wrong test to determine whether he was “associated” with members of the Hells Angels or individuals involved in criminal activity. In the words of his counsel, “a handshake does not an association make.”

[19] Counsel for the Minister acknowledges that each incident, viewed in isolation, may not have justified the cancellation of Mr. Sidhu’s security clearance. However, the cumulative effect of five encounters with law enforcement over three years, credible reports of threatening behaviour, some criminal behaviour (*e.g.*, participating in a fight, breaking a window), and repeated encounters with known criminals, was more than sufficient to raise serious concerns regarding Mr. Sidhu’s judgment, trustworthiness and reliability. These considerations are relevant in the context of marine safety, and in particular to an assessment of whether Mr. Sidhu may be “suborned to commit an act or to assist or abet any person to commit an act that might constitute a risk to marine transportation security” (Regulations, s 509(c)).

[20] It is true that Mr. Sidhu has no known criminal convictions. However, criminal convictions are not the benchmark to justify the Minister’s revocation of a security clearance

(*Brown* at para 68). Criminal association for the purposes of s 509 of the Regulations must be “relevant to threats to the security of marine transportation from terrorists and criminal organizations” (*Regulations Reference* at para 38). Innocent association will not normally warrant the denial of a security clearance, but in this case there is no dispute that Mr. Sidhu knew the individual with whom he shook hands was a member of the Hells Angels. Mr. Sidhu said that he could not recall the incident where he was stopped while a passenger in a car owned by an associate of the Hells Angels, and he said nothing at all about his alleged associations with Subject A and Subject B. These assertions in the LERC report were effectively uncontested.

[21] I am satisfied that it was reasonable for the Minister to rely on the incidents described in the RCMP’s LERC report and the Advisory Body’s recommendation to cancel Mr. Sidhu’s security clearance. A LERC report is considered to be reliable (*Rossi v Canada (Attorney General)*, 2015 FC 961 at para 26). Moreover, the decisions of persons who are experienced in matters concerning marine transportation security are entitled to deference from this Court. Based on the record before this Court, the Minister’s decision to cancel Mr. Sidhu’s security clearance falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. Conclusion

[22] For the foregoing reasons, the application for judicial review is dismissed.

JUDGMENT

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

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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