Federal Court  Cour fédérale

Date: 20160803

Docket: T-1548-15

Citation: 2016 FC 893

Ottawa, Ontario, August 3, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

DAVID GORDON SARGEANT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review application of a decision of the Director General of Aviation Security (the Director General), made on behalf of the Minister of Transport (the Minister) pursuant to the Minister's discretion under section 4.8 of the *Aeronautics Act*, RSC 1985, c A-2 (the Act), which cancelled the Applicant's Transportation Security Clearance (TSC), thereby preventing his continued employment with Air Canada at the Vancouver International Airport.

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

II. Background

[3] The Applicant is 50 years of age. He has been employed by Air Canada (and its predecessor, Canadian Airlines) since 1987 as a Station Attendant. His main duties included baggage handling, towing aircrafts and providing customer service for passengers with disabilities. As a Station Attendant, he was required to hold a TSC enabling him to access restricted areas at the Vancouver International Airport and other airports where he worked. The Applicant was granted successive TSCs every five years over the course of his career with Air Canada.

[4] On January 10, 2015, Transport Canada received from the Royal Canadian Mounted Police (RCMP) a Law Enforcement Record Check (LERC) report which identified the Applicant as having been arrested in February 2003, in the State of Washington, in the company of another individual, and in possession of 26 pounds of marijuana and $353,430 in bulk United States currency. The LERC report, which was prepared in support of Transport Canada's Transportation Security Clearance Program, reads as follows:

> In February 2003, the Bellingham (Washington) Police Department (BPD) and Homeland Security Investigation (HIS) in Blaine, Washington arrested the applicant and one other individual in possession of 26 pounds of marijuana and $353,430 in bulk United States currency. During an interview by BPD and HIS Blaine, the applicant stated that he knew he was smuggling marijuana and was to be paid $200 to complete the job. During the interview, the other individual also admitted to knowingly smuggling the marijuana and currency and stated that he had hired the applicant for $200 to assist him with the smuggling of these items. Due to the sensitive nature of the investigation and

> unforeseen circumstances, neither of the individuals were charged for the possession of the marijuana or the bulk currency. BDP destroyed the marijuana and the bulk currency was forfeited to the State of Washington as neither individual ever crossed back into the United States to claim custody of the money.

[5] On January 14, 2015 the Applicant was informed by letter from the Chief, Security Screening Programs at Transport Canada (the Notice Letter), that adverse information raising concerns as to his suitability to retain a security clearance had recently been made available to Transport Canada and that his TSC would accordingly be reviewed in light of that information. The information provided in the LERC report was then reproduced almost *verbatim*. The Notice Letter also provided details about the review process. In this regard, the Applicant was informed of the existence and role of the Security Clearance Advisory Body (the Advisory Body) in assisting the Minister in the granting, refusal or cancellation of security clearances and was provided with a link to the online version of the Transportation Security Clearance Program Policy (the TSC Program Policy).

[6] The Applicant was then encouraged to provide, within 20 days of the receipt of the Notice Letter, any additional information outlining the circumstances surrounding the incident noted therein, as well as any other relevant information or explanation, including any extenuating circumstances. He was also informed that any such information provided would be carefully considered in making the decision in respect of his security clearance. Finally, he was provided with the phone number of the author of the letter "should [he] wish to discuss this matter further".

[7] On January 29, 2015 the Applicant, through his lawyer at the time, Mr. Reza Mansoori-Dara, sought an extension of time to respond to the Notice Letter. He also requested further details of the incident reported in the said letter as well as copies of any documents relevant to it. The Applicant was given until February 20, 2015 to respond.

[8] On February 9, 2015 Mr. Mansoori-Dara informed the Chief, Security Screening Programs that he was in the process of gathering material and information to reply to the Notice Letter but that he needed more time to do so and better formulate his client's position. He reiterated his request for further details and any documents relevant to the reported incident. The deadline for responding to the Notice Letter was extended to March 7, 2015. The Applicant was also informed that Transport Canada did not have further details of the incident referred to in the said letter.

[9] On March 5, 2015 the Applicant, through a letter from Mr. Mansoori-Dara, provided his response to the Notice Letter. Mr. Mansoori-Dara first noted that although the Applicant was not able to provide a minute-by-minute account of the relevant incident because of the passage of time, he had been able "to identify details that are crucial to understanding [his] unintentional involvement with that unfortunate incident and his state of mind at the relevant time". Those details are:

a. In February 2003 the Applicant was asked by an individual by the name of Lore Antonio Echelli to assist him by travelling to Seattle to pick up "the proceeds of a transaction concerning the sale of a boat"; they were to meet with an acquaintance of Mr. Echelli whose name the Applicant does not recall;

b. The morning the trip to Seattle was scheduled to take place, Mr. Echelli asked the Applicant to drive down alone, pick up the money and meet him later as Mr. Echelli was unable to make the trip that morning; Mr Echelli agreed to pay the Applicant the sum of $200 to compensate him for his travel expenses;

c. Once at the pick-up point the Applicant recalled meeting with a gentleman, whose name he does not recall either, in a parking lot of an apartment building; there, the Applicant was handed down a box and a duffle bag which he did not open as he never suspected that anything illegal was going on or recall anything suspicious in the behaviour of that gentleman;

d. After a brief discussion with the gentleman, the Applicant drove to Bellis Fair Mall in Bellingham to meet with Mr. Echelli; upon his arrival at the Fair Mall, he was arrested and detained at gun point by two officers and transported with Mr. Echelli, to the Bellingham Police Department. There, he was extensively questioned about a large amount of money and marijuana, neither of which was shown to him; also, his vehicle was seized as part of the police investigation; he was told that his vehicle had been searched but that no evidence related to the investigation could be located;

e. During questioning at the police station Mr. Echelli agreed to work with the officers and inform them of what he knew while the officers assured the Applicant that he would not be charged or detained further or have any difficulty travelling back to the United States, only if he cooperated with them by providing a statement; and

f. The Applicant signed a statement prepared by the police but has no recollection of the details of the statement as, at the time, he was "under tremendous stress and would have done anything to guarantee his release from police custody"; the statement was signed without the benefit of legal advice.

[10] Mr. Mansoori-Dara then indicated that once released from custody the Applicant immediately returned to Canada and was never contacted or questioned about that incident by the Canadian or American authorities until now. He also provided background information on the Applicant's personal life and work history, noting that (i) his 28 year employee record with Air Canada was impeccable; (ii) he was a dedicated husband and a loving father for his two sons aged 11 and 8; and (iii) he had the support of family members, colleagues and friends as evidenced by a number of reference letters which speak to his good name and character as a respectable member of the community.

[11] Mr. Mansoori-Dara concluded by claiming upon review of the TSC Program Policy, that the Applicant (i) does not pose, and has never posed, any type of risk to anyone or any property; (ii) has never resorted to the use of violence or threat of violence against any person or property; (iii) has never been associated with or knowingly involved or acquainted with anyone or any group involved in any type of criminal or terrorism-related activities; (iv) has never jeopardized the safety, health, or security of any person either in the course of or outside employment; (v) has never jeopardized the safety or security of civil aviation; and (vi) has never interfered in any way with civil aviation. He also stressed the importance of the Applicant's employment for his wellbeing and livelihood and that of his family, the hardship his family would suffer in the event he was to lose his employment as a result of the cancellation of his TSC, and the negative impact his dismissal would have on his pension.

[12] The Advisory Body comprised of five voting members, met on April 28, 2015 to review the allegations against the Applicant and the Applicant's submissions before making a recommendation to the Director General. It first noted that criminal records checks showed that the Applicant has no criminal convictions. It also noted that Transport Canada had first acquired information in 2009 regarding the Applicant's involvement in the 2003 incident but was advised at the time that this information was not to be shared and was therefore un-actionable under the TSC Program Policy. It became actionable only in 2015.

[13] The Advisory Body then proceeded to list its findings. Its Record of Discussion provides as follows in this respect:

a. During the interview with the Bellingham Police Department, the Applicant admitted he knew he was smuggling marijuana and was to be paid $200 to complete the job, so did the Applicant's associate who also stated that he had suborned the Applicant for the said amount of money to smuggle both the marijuana and the currency;

b. The boat transaction was suspicious as there was no record of transaction, besides the receipt of money from an unknown individual in a box and a duffle bag, so was the fact that the Applicant would perform such a task involving a significant amount of drugs and money for such a small reward;

c. The Applicant's admission of guilt immediately following the 2003 incident is inconsistent with the explanation provided in his response to the Notice Letter that he had no knowledge of the content of the duffle bag and box; it is also difficult to believe that the Applicant would accept responsibility for trafficking large quantities of drugs and sign a statement to that effect unless he was guilty of it;

d. The quantity of drugs and money involved and their possible transportation across an international border leads to believe that these criminal activities might be related to organized crime; and

e. The 2003 incident occurred while the Applicant was in possession of a TSC, which leads to question his judgment, trustworthiness and reliability; although this incident is dated, it is reasonable to believe that the Minister of Transport would have concerns in relation to it.

[14] The Advisory Body concluded that it had reason to believe on a balance of probabilities, that the Applicant "may be prone or induced to commit an act, or assist or abet an individual to commit an act that may unlawfully interfere with civil aviation" and that the Applicant's submissions did not provide sufficient information to dispel its concerns in this regard. As a result it recommended to the Minister that the Applicant's TSC be cancelled.

[15] On August 14, 2015 the Director General on behalf of the Minister, accepted the recommendation of the Advisory Body and cancelled the Applicant's TSC. She indicted that her decision was based on a review of the Applicant's file, including the information outlined in the Notice Letter, the Applicant's submissions, the recommendation of the Advisory Body as well as the TSC Program Policy. The core of the Director General's decision reads as follows:

> The information regarding your involvement in a cross-border drug smuggling incident in 2003 raised concerns regarding your judgment, trustworthiness and reliability. I note that you were knowingly in possession of 26 pounds of marijuana and $352,430 in bulk United States currency. I note that the quantity of drugs and money could be consistent with large scale organized crime. I further note you admitted to police your knowledge and participation in the incident at the time of your arrest; however, in your letter to Transport Canada you now claim you only signed the sworn statement to avoid charges and that you were there to pick up the proceeds from the sale of a boat. I find it difficult to believe anyone would accept responsibility for trafficking large quantities of drugs if they were not guilty. I also note you were suborned by another individual to assist him with the drug smuggling and were to be paid $200. After reviewing all of the information on file, including the passage of time and the seriousness of the incident

> noted above, I have reason to believe, on a balance of probabilities, that you may be prone or induced to commit an act, or assist or abet an individual to commit an act that may unlawfully interfere with civil aviation. I considered the statement you provided and the multiple letters of reference, however, the information presented was not sufficient to address any concerns. For these reasons, on behalf of the Minister of Transport, I have cancelled your security clearance.

[16] The Applicant claims that the Director General's decision is flawed in two respects. First, he submits that that decision is unreasonable as it is based on hearsay and/or on unreliable and speculative evidence. Second, he contends that the Director General breached the principles of procedural fairness by failing to provide the Applicant with (i) a copy of all the documentation she relied on to render her decision; (ii) a meaningful opportunity to know the case he had to meet; and (iii) meaningful reasons for her decision.

III. Issues and Standard of Review

[17] This case raises the following two issues:

a. Was the decision to cancel the Applicant's TSC reasonable?

b. Was that decision procedurally fair?

[18] It is not disputed by the parties that the standard of review applicable to the first issue is reasonableness whereas the second issue is reviewable on a standard of correctness (*Henri v Canada (Attorney General)*, 2016 FCA 38, at para 16 [*Henri FCA*]). Where the standard of reasonableness applies, the role of the Court is to determine whether the impugned decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts

and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47, [2008] 1 SCR 190[*Dunsmuir*]. This approach recognizes that there may be more than one reasonable outcome and that as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to the Court to substitute its own view of a preferable outcome (*Salmon v Canada (Attorney General)*, 2014 FC 1098, at para 29, 468 FTR 204, citing *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 59, [2009] 1 SCR 339).

[19] As a preliminary matter, the Respondent claims that more than half of the 52-paragraph affidavit the Applicant swore in support of the present judicial review application (paragraphs 2 to 24, 27, 29, 30, and 38 to 47) should be struck as they introduce evidence that was not before the Director General or contain impermissible opinion and argument.

[20] It is well-settled that judicial review is to proceed on the merits on the basis of the evidence that was before the original decision-maker (*Henri FCA*, at para 39). This principle is subject only to the new evidence being related to issues of procedural fairness or issues associated with the decision-maker's jurisdiction or providing general background information as long as this information is not relevant to the merits of the matter (*Henri FCA*, at para 40; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at paras 18-29).

[21] Here, I find that paragraphs 3 to 23, 27, 29 and 30 of the Applicant's affidavit, although they recoup in some instances what is already on record regarding the Applicant's personal life, work history, good character and post-2003 border crossings, do provide more than mere general background information on these topics. Hence, to the extent they are intended to bolster the Applicant's case on the merits,something which is not allowed on judicial review, they are inadmissible. This applies also to paragraphs 41 to 47 which essentially confirm the Applicant's apprehensions outlined in his response to the Notice Letter as to the impact the revocation of the Applicant's security clearance would have on his employment with Air Canada. In any event, I do not find that the evidence contained in all these paragraphs would have affected, if found admissible, the outcome of this case.

IV. Analysis

A. *The Applicable Legislative and Policy Framework*

[22] According to the Act and its implementing regulations, the Minister is responsible for promoting and ensuring safety in Canadian airports, which includes controlling access to restricted areas of certain designated airports. The Vancouver International Airport is one such airport. Access to restricted areas of designated airports is more specifically governed by the *Canadian Aviation Security Regulations, 2012*, SOR/2011-318. Pursuant to these regulations, such access is limited to persons in possession of a restricted area identity card whose issuance is conditional on, *inter alia*, the person to whom it is issued possessing a security clearance.

[23] In accordance with section 4.8 of the Act, the Minister is vested with the discretionary power to grant, refuse to grant, suspend or cancel a security clearance. The Minister exercises this discretion pursuant to the TSC Program Policy whose purpose is to prevent unlawful acts of interference with civil aviation by granting security clearances only to persons who meet the standards set out in that Policy. As set out in section 1.4 of the TSC Program Policy, the objective is to prevent the uncontrolled entry into a restricted area of an airport by any individual, among others, who "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" (see also: *Henri FCA*, at para 6).

[24] For the most part, the TSC Program Policy sets out the procedure for processing and reviewing security clearance applications. That process requires at a minimum, a fingerprint-based criminal records check, a check of the relevant files of law enforcement agencies, and a Canadian Security Intelligence Service indices check.

[25] When those verifications reveal that there is reason to recommend the refusal, suspension or cancellation of a security clearance, the Advisory Body, as was done in the present case, is convened and tasked to proceed with a full analysis of the case and make a recommendation to the Minister through the Director General, as to whether the security clearance application under review should be refused, suspended or cancelled.

B. ***The Director General's Decision is Reasonable***

[26] In security clearance cases, this Court has stated three important principles.

[27] First, section 4.8 of the Act confers on the Minister a broad discretion to grant, suspend or cancel a security clearance, which empowers him to take into account any relevant factor (*Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59, at para 19, 425 FTR 247 [*Thep-Outhainthany*]; *Brown v Canada (Attorney General)*, 2014 FC 1081, at para 62 [*Brown*].

[28] Second, aviation safety being an issue of substantial importance and access to restricted areas being a privilege, not a right, the Minister, in exercising his discretion under section 4.8, is entitled to err on the side of public safety which means that in balancing the interests of the individual affected and public safety, the interests of the public take precedence (*Thep-Outhainthany v Canada*, at para 17; *Fontaine v Canada (Transport)*, 2007 FC 1160, at paras 53, 59, 313 FTR 309 [*Fontaine*]; *Clue v Canada (Attorney General)*, 2011 FC 323, at paragraph 14). *Rivet v Canada (Attorney General)*, 2007 FC 1175, at para 15, 325 FTR 178).

[29] Third, in such matters the focus is on the propensity of airport employees to engage in conduct that could affect aviation safety which requires a broad and forward-looking perspective. In other words, the Minister "is not required to believe on a balance of probabilities that an individual "will" commit an act that "will" lawfully interfere with civil aviation or "will" assist or abet any person to commit an act that "would" unlawfully interfere with civil aviation, only that he or she "may"" (*MacDonnell v Canada (Attorney General)*, 2013 FC 719, at para 29, 435

FTR 202 [*MacDonnell*]; *Brown*, at para 70). As such, the denial or cancellation of a security clearance "requires only a reasonable belief, on a balance of probabilities, that a person may be prone to or induced to commit an act that may interfere with civil aviation" (*Thep-Outhainthany*, above at para 20). Any conduct which causes to question a person's judgment, reliability and trustworthiness is therefore sufficient ground to refuse or cancel a security clearance (*Brown*, at para 78; *Mitchell v Canada (Attorney General)*, 2015 FC 1117, at paras 35, 38 [*Mitchell*]).

[30] As indicated previously, the Applicant's main contention regarding the reasonableness issue is that the impugned decision is based on speculative and highly unreliable evidence. In particular, he contends that in the absence of any corroborating documentation, such as a video, audio or transcript of the Applicant's interview with the police, a copy of the statement he signed while detained by the police, a copy of any police narrative reports, including reports on the quantity of marijuana and United States currency, if any, allegedly found in the box or the duffle bag, the LERC report, on which the Director General's decision is primarily based, is, at best, double or triple hearsay evidence. He says that relying on such evidence, which would be inadmissible in law according to sound evidentiary principles, as a basis for concluding that the Applicant was likely to commit or abet an act that may unlawfully interfere with civil aviation, is an unreasonable exercise of discretion.

[31] This argument cannot succeed since the Minister was under no obligation to verify or cross-check the accuracy of the information received from the RCMP in the LERC report. He was therefore entitled to rely on that information exclusively even though from an evidentiary stand point, it constituted hearsay (*Fontaine*, at para 75; *MacDonnell*, at paras 16, 31; *Henri v*

Canada (Attorney General), 2014 FC 1141, at para 40, 469 FTR 124; *Christie v Canada (Transport)*, 2015 FC 210, at para 23, 476 FTR 101 [*Christie*]; *Kailley v Canada (Transport)*, 2016 FC 52, at paras 28-29). At the hearing counsel for the Applicant argued that it is unreasonable to rely on an LERC report because the incident occurred outside Canada. I agree with the Respondent that this argument cannot stand in this case since there is no evidence that the American law enforcement authorities are not credible or reliable. I believe it is safe to say that to the extent Canada shares a common border with the United States, both countries, who also share common legal values, have an interest in a strong and efficient cooperation of their law enforcement apparatus.

[32] To the extent the case put to the Applicant, if left unanswered, was sufficient to justify revoking his security clearance, the burden was on him to show that the case was unfounded (*MacDonnell*, at para 34). Here, I am satisfied that the Director General's finding that the Applicant's response was not sufficient to meet that burden was reasonable. The Applicant does not deny that he was arrested in 2003 while travelling back from Seattle and that while there he was remitted a box and a duffle bag from an unknown individual in the parking lot of an apartment building. He recognizes that he signed a statement when detained by the police while admitting that his associate, Mr. Echelli, "agreed to work with the officers and informed them of what he knew". He does not deny either that he may indeed have stated to the police that he knew he was smuggling marijuana and American currencies and that he was paid $200 to do that. His explanation that he made the trip to Seattle in order to pick up the proceeds of the sale of a boat, that he had no knowledge of the content of the box and the duffle bag, which he never opened as he never suspected that anything illegal was going on, and that he signed a statement at the police

station for the sole purpose of avoiding charges, was clearly not found plausible by the Director General and before her, by the Advisory Body.

[33] That is how I read and understand the recommendation of the Advisory Body and the decision of the Director General. It was open to them not to believe the Applicant's story of being at the wrong place at the wrong time (*Brown*, at para 75) and to dismiss the theory of his "unintentional involvement in that unfortunate incident" which involved quantities of drugs and currency normally associated with organised crime. It was also open to them to rely on dated behaviour, even if there is no evidence of other incidents of the nature contemplated by the TSC Program Policy involving the Applicant (*Christie*, at para 25).

[34] In an area of such importance as aviation safety where wrong decisions can lead to grave consequences (*Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56, at para 92), one instance of conduct that causes to question a person's judgment, reliability and trustworthiness may, given the low threshold of whether a person may be prone or induced to unlawfully interfere with civil aviation, be sufficient to justify the revocation of a security clearance. In the case at bar, I find that such an outcome was reasonably open to the Director General.

[35] For the same reasons, I find that there is no merit to the Applicant's claim that the Director General did not reconcile her discretion with the particular facts of the case, the availability of less punitive methods of addressing her concerns and the Applicant's unblemished security history over 28 years as an Air Canada employee. The Director General had before her

the Applicant's response to the Notice Letter, together with the letters of reference attached to it, but she was not satisfied that this information was sufficient to address her concerns. In particular as I have just indicated, she found the Applicant's explanations regarding the 2003 incident implausible. In balancing public safety and the Applicant's interests from the standpoint of the other considerations put forward in his response, it was open to her, as noted at paragraph 28 of these reasons, to give precedence to the interests of the public.

[36] For these reasons, I am of the view that the impugned decision falls within a range of possible and acceptable outcomes and satisfies, as a result, the standard of reasonableness.

C. ***The Director General's Decision is Procedurally Fair***

[37] In *Henri FCA*, the Federal Court of Appeal confirmed that procedural fairness requires that an individual who may have his security clearance revoked be informed of the facts alleged and be afforded with the opportunity to respond (*Henri FCA*, at para 28). Although it recognized that the decision to revoke a security clearance is of "enormous personal importance", especially where a person's employment is dependent on maintaining such clearance, it reminded that this was only one of the factors to be considered in determining the content of the duty of procedural fairness owed to the Applicant by the Minister.

[38] As in the case of Mr. Henri, the Applicant was presented with the case against him and was invited to make inquiries and respond. He was also provided with sufficient time to provide his response, including two extensions of the initially allotted time, and his response was

considered by both the Advisory Body and the Director General. In *Henri FCA*, the Federal Court of Appeal found that this process was procedurally fair.

[39] Here, the Applicant takes issue with the fact that a number of documents were disclosed to him as part of the Certified Tribunal Record transmitted to him pursuant to rule 318 of the *Federal Courts Rules*, SOR/98-106, only after the impugned decision was made. These documents consist of some of the Applicant's previous security clearance applications, background checks, information about the Applicant's involvement in the 2003 incident, which the RCMP would not provide to the Minister when it came to its attention, and internal correspondence about information sharing policies and privacy concerns that prevented the sharing of the information at the time.

[40] The Applicant claims that had he received these documents in due time, he could and would have conducted his defence much differently and would have had the opportunity to provide a more compelling and convincing response to the Notice Letter. He refers in particular to the LERC reports for the years 2009, 2011, 2012 and 2015. The Applicant contends that these documents revealed the names of officers and RCMP units who were involved in the gathering of the information relied upon by the Director General to cancel his security clearance. The Applicant contends this information would have allowed him to make further inquiries with these individuals and units, which could have assisted in his ability to respond.

[41] I do not agree that the principles of procedural fairness required the Minister to provide the Applicant with its entire file. The Minister was under the duty to inform the Applicant of the facts allowing him to be aware of the case to meet and provide him the opportunity to respond. In other words, he only had to inform the Applicant of the alleged facts that raised concerns about his suitability to hold a security clearance. Although it shows that the Applicant has been on the radar of the TSC Program Policy authorities for some time, I agree with the Respondent that the non-disclosed material added no new factual allegations to those relied upon by the Advisory Body and ultimately the Director General. In particular, it did not include any additional factual allegations about the 2003 incident than the ones found in the 2015 LERC report.

[42] The Applicant's review of the case law on the procedural fairness issue does not advance his position. In *DiMartino and Kosta v Canada (Minister of Transport)*, 2005 FC 635, 272 FTR 250 [*DiMartino*], the only information given – verbally - to the applicants prior to the revocation of their security clearance was that they were suspended "because of their association with a known criminal" whereas the record that was before the Advisory Body contained the identity of that "known criminal", details of the alleged association, evidence affecting the applicants' credibility and opinion evidence as to the propensity of one of the applicants to place the interests of that criminal ahead of those of the police or her employer.

[43] In *Xavier v Canada (Attorney General)*, 2010 FC 147, 406 FTR 49 [*Xavier*], Mr. Xavier's TSC was suspended after he was charged with possession of stolen property and falsified credit cards subsequent to the search of his vehicle on the premises of Pearson

International Airport while at the employ of Air Canada Cargo. Despite the charges being subsequently withdrawn, Mr. Xavier was invited to submit another written statement. The matter was then sent back to the Advisory Body which recommended that his TSC be cancelled. The Minister agreed.

[44] As in *DiMartino*, there were material pieces of information before the Advisory Body that were not disclosed to Mr. Xavier, including (i) an email suggesting that there was a connection between the charges and Mr. Xavier's airport employment; and (ii) a report from Pearson's airport intelligence unit alleging that:

a. Mr. Xavier was found in possession of 25 forged credit cards, various sets of identification, and a significant amount of cash in U.S. and Canadian dollars;

b. Police officers noticed him trying to hide something under the floor mat of his vehicle;

c. Two credit cards were found on the floor of the vehicle; and

d. More credit cards and other forms of identification were found in a hidden compartment behind the ashtray.

[45] As he was unaware of these two pieces of information, the Court found that Mr. Xavier was prevented from being able to give a "substantive response" to the allegations against him as evidenced by the fact that his written submission to the Advisory Board on the possible cancellation of his TSC was not "commensurate with the accusations against him" (*Xavier*, at para 14). In particular, the Court held:

> [12] As mentioned, Mr. Xavier did make submissions to the Advisory Body. He stated that he had been stopped for a traffic violation and the police had found someone else's wallet in his car. Not having received disclosure of the other information put before the Advisory Body, he never had an opportunity to address the allegation that he was found with numerous credit cards, various sets of identification, and a large sum of cash. Nor did he have a chance to answer the suggestion that he had tried to hide materials under the floor mat of his car and had hidden a large number of credit cards in a secret compartment. Finally, he was unaware of the suggestion that his alleged criminal conduct was somehow related to his job.

[46] In *Meyler v Canada (Attorney General)*, 2015 FC 357 [*Meyler*], the applicant's TSC was revoked after she received a letter indicating that she was allegedly associated with an unidentified individual named "Subject A." Subject A was said to be the "group leader of a drug importation ring" at Pearson Airport. The letter also alleged that Ms. Meyler was a suspect in a criminal investigation of drug importation at the airport between 2007 and 2009, four years prior to the notice letter being sent to her.

[47] The notice letter did not identify Subject A, the nature of the alleged association between Ms. Meyler and Subject A, when the alleged association arose, the duration of the alleged association or whether the alleged association was still in effect. Ms Meyler replied with a one page letter to Transport Canada in which she denied having any knowledge of the identity of Subject A as well as any involvement in drug smuggling activities.

[48] The Court found that the notice letter had "material omissions" from the LERC report in it:

> [30] The respondent submits that the letter provided to the applicant on November 8, 2013 provided sufficient disclosure, as it "repeated virtually verbatim the details of the LERC report including that certain information was provided by 'reliable sources'". There were, however, material omissions. For example, the LERC report contained the alleged associate's (Subject A) Transportation Clearance number, but this information was not disclosed to the applicant in the letter sent November 8, 2013. In addition, the LERC report explained that Subject A "[h]ad a valid RAIC, but in August 2013 the Advisory Body recommended cancelling his security clearance…" This information was not contained in the November 8, 2013 letter to the applicant and instead the letter stated that Subject A "[d]oes not have a valid RAIC", thereby implying that Subject A never held a valid RAIC.

[49] It found that had these material omissions been disclosed to the applicant, then she may have been able to determine who "she was alleged to have been associated" with, and details "regarding the nature, if any, of her association with the individual; the duration of the association; the time period during which any association took place; the circumstances in which the association occurred; whether any association was ongoing; and if it was ongoing, any steps she was willing to take to disassociate from the individual" (*Meyler,* at para 31).

[50] All three cases are distinguishable from the case at hand because in this case the Applicant was made aware of the exact reasons why his security clearance was under review in the Notice Letter: he was caught in possession of marijuana and a large sum of cash in Washington State; he was interviewed by Homeland Security and the Bellingham Police Department; he signed a document acknowledging that he was smuggling marijuana and cash and that he was paid $200 to do so. In other words, the allegations against the Applicant were precise, detailed and situated both in time and space.

[51] The Applicant claims that the non-disclosed information would have allowed him to contact some of the people involved in gathering the information contained in the 2015 LERC report but he does not say how these additional inquiries would have helped him respond better. His arguments are very hypothetical in that the Applicant does not point to any concrete information that was not disclosed to him that could have had an actual impact on the Minister's decision to revoke his TSC. Again, this is different from the three cases relied on by the Applicant, where the applicants in those cases were able to demonstrate that the failure to disclose specific information was unfair in that it may have negatively affected their ability to provide a meaningful response to the Advisory Body. Here, contrary to these three cases, "the basis of the security concern was readily apparent from the circumstances" (*Meyler*, at para 33).

[52] Therefore, I am satisfied that the Minister's obligation to inform the Applicant of the case he had to meet was met, irrespective of the content of the Certified Tribunal Record. The Applicant's response to the Notice Letter is a clear indication, in my view, that the Applicant knew the case against him and that he was able to provide a meaningful response. Transport Canada's response to Mr. Mansoori-Dara that it did not have further details of the incident to the ones already communicated in the Notice Letter was, in that context, factually accurate and from a procedural fairness stand-point, legally correct. It is worth reiterating at this point that in his response to the Notice Letter, Mr. Mansoori-Dara indicated that although they were not able to provide a minute-by-minute account of events on the relevant date, he and the Applicant had nevertheless been able "to identify details that we feel are crucial to understanding our client's unintentional involvement with that unfortunate incident and his state of mind at the relevant time". In other words, there is no indication in that response that the Applicant's ability to

provide a meaningful response to the case against him was hampered to any material degree by a lack of details.

[53] Finally, as long as reasons are provided, the duty of procedural fairness is met (*Mitchell*, at para 14). Alleged deficiencies or flaws in the reasons of a decision do not engage the rules of procedural fairness; they rather go to the reasonableness of the decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 21, [2011] 3 SCR 708 [*Newfoundland Nurses*]). Here, I have already found that the Director General's decision is reasonable. In *Newfoundland Nurses*, the Supreme Court of Canada held that a decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion and that as long as its reasons allow the reviewing court to understand why it made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met (*Newfoundland Nurses*, at para 16). I am satisfied that this threshold was met in the present case.

[54] I appreciate that the consequences of the decision to revoke the Applicant's security clearance are very serious and that he has made significant efforts before this Court to have this decision reconsidered. However, the role of the Court is not to determine whether what the Applicant says about his involvement in the 2003 incident is true or not. Its role is to determine if the Director General's decision was reasonable and procedurally fair. As I have already indicated, I cannot say that it wasn't.

[55] The Respondent is seeking costs in the amount of $1680. Given that the Respondent is the successful party in these proceedings, it will be entitled to an award of costs. However, I find that an amount of $500, disbursements included, would be reasonable in the circumstances of this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs to the Respondent in the amount of $500.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1548-15
STYLE OF CAUSE:	DAVID GORDON SARGEANT v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 18, 2016
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	AUGUST 3, 2016

APPEARANCES:

Ash Ayliffe Chris D. Drinovz	FOR THE APPLICANT
Nathan Murray	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fraser Valley, Employment & Disability Law Barristers and Solicitors Langley, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT