Date: 20071108

Docket: T-1021-06

Citation: 2007 FC 1160

Ottawa, Ontario, the 8th day of November 2007

Present: the Honourable Mr. Justice Shore

BETWEEN:

WOOBY FONTAINE

Applicant

and

TRANSPORT CANADA SAFETY AND SECURITY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

OVERVIEW

[1] The applicant is challenging the validity of the Minister's decision to cancel his security clearance.

[2] The applicant did not show that the Minister's decision to cancel his security clearance was "patently unreasonable" or "not in accordance with reason" or even unreasonable.

[3] Further, the evidence in the record showed that the Minister kept the applicant informed of the investigation and gave him an opportunity to present his views.

[4] Further, despite the opportunity given to him the applicant never refuted the information collected by the Royal Canadian Mounted Police (the RCMP) about the nature of his ties to the "Ruffriders".

[5] Accordingly, it cannot be claimed on the basis of the applicant's contentions that the Minister's decision to cancel his security clearance was "patently unreasonable".

[6] In the case at bar, the Minister established the Security Clearance Program and an Advisory Body to ensure that security clearances were granted after checks were made into the record of the person requesting a clearance (Transportation Security Clearance Program, s. II.19).

[7] Accordingly, in the case at bar it is not specific acts which make the applicant unable to hold a security clearance, but rather the fact that he is associated with individuals who might have a negative influence upon him that gives the Minister reason to believe that the applicant may be "prone or induced to . . . commit an act that may unlawfully interfere with civil aviation" (Clearance Program, *supra*, s. I.4*d*).

[8] In *Motta v. Canada (Attorney General)*, [2000] F.C.J. No. 27 (QL), Yvon Pinard J. noted:

> [13] . . . therefore, I consider that the requirements imposed by the duty to act fairly are minimal and that, after allowing the plaintiff to submit his application in writing as he did, the Minister only had to render a decision that was not based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before him.

INTRODUCTION

[9] The appeal at bar concerns one of the most important questions in our society, namely air safety.

[10] The applicant Wooby Fontaine is seeking judicial review of the decision by the Minister of Transport, Infrastructure and Communities to cancel his security clearance.

[11] The decision was made in accordance with the enabling legislation and Mr. Fontaine has not in any way shown the existence of an error or circumstance that would allow this Court to intervene in the Minister’s decision.

Proceedings

[12] By a notice of an application for judicial review filed on June 19, 2006 Mr. Fontaine is seeking an order directing the Minister (1) to reverse his decision of March 24, 2006 to cancel his security clearance, and (2) to grant the applicant the said clearance (applicant's record (AR), p. 4).

Cancellation of applicant's security clearance

[13] The Minister is responsible for guaranteeing safety in Canadian aerodromes pursuant to the provisions of the *Aeronautics Act*, R.S.C. 1985, c. A-2 (the Act), and its implementing regulations and policies.

[14] *Inter alia*, the Minister's function includes the regulation of access to airports and the granting of security clearances for individuals seeking access to restricted areas of aerodromes (Act, *supra*, s. 4.8; *Canadian Air Safety Regulations*, SOR/2000-111, s. 4 (the Regulations)).

[15] On December 29, 2003, Mr. Fontaine submitted an application for a security clearance at Pierre E. Trudeau International Airport (affidavit of Francine Massicotte, para. 12, Exhibit C).

[16] On October 13, 2004 the Transport Canada Director of Information, who is responsible for security clearances, was informed of circumstances which gave him good reason to believe that Mr. Fontaine posed a risk to the safety of the airport (affidavit of Francine Massicotte, para. 15, Exhibit D; Clearance Program, *supra*, s. I.6).

[17] On October 25, 2005 the Information Branch sent a letter to the Head of Airport Security at Pierre E. Trudeau International Airport recommending that a pass for restricted areas not be issued to Mr. Fontaine until the Minister had been able to consider his application (affidavit of Francine Massicotte, para. 19, Exhibit H).

[18] The information obtained in the screening process indicated that Mr. Fontaine had been associated with members of the criminal organization known as the “Ruffriders” since 1997 (affidavit of Francine Massicotte, para. 18, Exhibit G).

[19] On December 14, 2005 Transport Canada notified Mr. Fontaine that, based on prejudicial information obtained in the screening process, his case would be submitted to the Transport Security Clearance Review Committee (the Advisory Body) for it to study the matter and make a recommendation to the Minister on his security clearance. Mr. Fontaine was invited to submit further information (affidavit of Francine Massicotte, para. 17, Exhibit F).

[20] In December 2005, Mr. Fontaine and his female friend contacted Transport Canada to provide explanations relating to his case. This information was entered in the record by Guy Mathieu (affidavit of Francine Massicotte, para. 21, Exhibit I).

[21] On March 14, 2006, after completing a review of Mr. Fontaine's application, the Advisory Body recommended to the Minister that his security clearance be cancelled. The Advisory Body considered that based on his record Mr. Fontaine was a person associated with known members of criminal organizations (affidavit of Francine Massicotte, para. 22; Clearance Program, *supra*, para. I.4*d*).

[22] This recommendation was approved by the Minister on March 22, 2006 and the decision communicated to Mr. Fontaine on March 24, 2006 (affidavit of Francine Massicotte, para. 23, Exhibit J).

[23] On June 19, 2006 Mr. Fontaine filed an application for judicial review from the Minister's decision to cancel his security clearance (AR, notice of application, p. 3; affidavit of Francine Massicotte, para. 24).

ISSUE

[24] The only point at issue is whether Mr. Fontaine has shown that the Minister of Transport's decision was patently unreasonable.

ANALYSIS

Administrative process leading to Minister's decision

[25] As with any application for judicial review, analysis has to be based on consideration of the legislative background in question.

[26] The main objective of the legislation in question is air safety.

[27] To attain its objective Parliament gave the Minister of Transport responsibility for administering a complex and detailed legislative scheme.

[28] The cornerstone of this scheme is the granting of security clearances to individuals requesting special access to restricted areas at certain designated airports.

[29] Section 4.8 of the Act, *supra*, simply states:

Security Clearances	**Habilitations de sécurité**
Granting, suspending, etc.	Délivrance, refus, etc.
4.8 The Minister may, for the purposes of this Act, grant or refuse to grant a security	**4.8** Le ministre peut, pour l'application de la présente loi, accorder, refuser, suspendre ou

clearance to any person or suspend or cancel a security clearance.	annuler une habilitation de sécurité.

[30] This discretionary power enjoyed by the Minister is not subject to any limitations as to its objective: guaranteeing air safety in Canada.

[31] Access to certain areas of Canadian airports is limited to persons holding restricted area passes, in accordance with the Regulations (Airport Restricted Area Access Security Clearance Measures).

[32] A directive titled “Airport Restricted Area Access Security Clearance Measures” indicates airports with restricted access areas (affidavit of Francine Massicotte, para. 4, Exhibit A; Measures, *supra*, Appendix A).

[33] Under section 4 of the Regulations, the operator of an aerodrome which is an airport listed in Appendix A of the Measures “shall establish, maintain and carry out the security measures set out in that publication”.

[34] The document provides that only individuals holding clearances approved by the Minister may obtain a pass from the operator of an airport to have access to restricted areas of the listed aerodromes. Pierre E. Trudean International Airport in Montréal is on this list (Measures, Appendix A; affidavit of Francine Massicotte, para. 5).

[35] To ensure that his powers are exercised openly pursuant to section 4.8 of the Act, the Minister adopted the Clearance Program (affidavit of Francine Massicotte, para. 6, Exhibit B).

[36] Under section 4.3 of the Act, the Clearance Program is administered by the Transport Canada Director of Information. The latter considers applications and carries out security checks such as determining criminal offences with the RCMP, the existence of a criminal record, charges, arrest warrants and/or association with criminal organizations or terrorist groups (Clearance Program, *supra*, s. I.6; affidavit of Francine Massicotte, para. 8).

[37] If prejudicial information results from this review, the Director may decide to suspend a security clearance and initiate an investigation (affidavit of Francine Massicotte, para. 9).

[38] Mr. Fontaine is then notified that his security clearance has been suspended and invited to make submissions (affidavit of Francine Massicotte, para. 11).

[39] A file is then created and forwarded to the Advisory Body, which reviews it and makes recommendations to the Minister regarding the refusal, cancellation or suspension of security clearances (affidavit of Francine Massicotte, para. 9; Clearance Program, *supra*, s. I.8).

[40] At the time the decision was made the Advisory Body consisted of five members, the Director of Information (chairperson), the Canada Border Services Agency Director of Information (vice-chairperson), the Director of the Security Screening and Information Program (secretary) as well as legal counsel and a Transport Canada security inspector (affidavit of Francine Massicotte, para. 10; Clearance Program, *supra*, s. II.31).

[41] Pursuant to the recommendation by the Body, the Minister exercises his power under section 4.8 of the Act to grant, refuse, cancel or suspend security clearances.

Court's function in judicial review and applicable standard of review

[42] Paragraph 1 of the judgment by the Supreme Court of Canada in *New Brunswick Law Society v. Ryan*, [2003] 1 S.C.R. 247, reads as follows:

> [1] According to the governing jurisprudence, a court reviewing the decision of an administrative tribunal should employ the pragmatic and functional approach to determine the level of deference to be accorded to the decision in question. The appropriate level of deference will, in turn, determine which of the three standards of review the court to the decision: correctness, reasonableness *simpliciter* or patent unreasonableness.

[43] The respondent argued that according to the pragmatic and functional analysis of the degree of deference required, the decision by the Minister could only be reviewed in the case of a patently unreasonable error (*Motta, supra*).

[44] It was further submitted that, even if this Court came to the conclusion that it was the intermediate standard that should be applied, namely reasonableness, Mr. Fontaine's application for judicial review raised no error of fact or law that would meet this test.

Factors to be considered

[45] According to the case law setting out the guiding principles in this area, four factors should be considered in identifying the applicable standard of intervention, namely (1) the presence or absence or a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question – law, fact or mixed law and fact (see in particular *Ryan*, *supra*, para. 27). None of these factors is conclusive in itself: Parliament's intent regarding the extent of judicial review to which the decision in question is subject governs (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, paras. 16 and 18).

1st factor: presence or absence of right of appeal or privative clause

[46] The legislative scheme in question does not make any provision for a privative clause or a right of appeal.

[47] In these circumstances, this first factor is neutral in an analysis of the degree of deference required, since "the absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard" (*Ryan, supra*, para. 29, citing the comments by Michel Bastarache J. in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, para. 30).

2nd factor: specialization of decision-maker

[48] On the second factor, that of the specialization of the respondent relative to that of the Federal Court, the respondent argued that this is heavily in favour of the patently unreasonable standard, since the test is based on "specialized knowledge about a topic or from experience and skill in the determination of particular issues" (*Ryan, supra*, para. 30).

[49] The Advisory Body which undertook the analysis of Mr. Fontaine's case was made up of the Director of Information (chairperson), the CBSA Director of Information (vice-chairperson), the Director of the Security Screening and Information Program (secretary) as well as legal counsel and a Transport Canada safety inspector (affidavit of Francine Massicotte, para. 10; Clearance Program, *supra*, s. II.31).

[50] These individuals all have expertise as a result of their respective professional experience and unquestionably have knowledge relating to the questions they have to consider.

[51] Consequently, the question of whether a security clearance falls within the expertise of the Minister and the Advisory Body favours a high degree of deference.

3rd factor: purpose of Act

[52] The third factor, namely the purpose of the Act and the provision in particular, includes an important component of protection for the public, in that the Act is intended *inter alia* to guarantee safety at airports and in air transport.

[53] This is unquestionably one of the most important and urgent matters which the government must consider.

[54] As it is legislation "that . . . is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations", we may conclude that the Minister enjoys broad discretion. In view of this, the legislation "will demand greater deference from a reviewing court" (*Ryan, supra,* para. 39).

[55] Additionally, "the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options" (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para. 56.)

4th factor: nature of question

[56] On the last factor to be considered, namely the nature of the question before the Minister, the respondent argued that it also established the desirability of reviewing the Minister's decision only if the latter was patently unreasonable. The questions the Minister had to answer following his investigation were mixed questions of fact and law.

[57] The question before the Minister was to determine whether the security clearance application before him should be granted.

[58] This question also concerned public safety. A federal body should be allowed great latitude when it is making decisions with a view to protecting the public and no substantive rights of individuals affected are compromised by its decision.

[59] Access to restricted areas is a privilege. The only right Mr. Fontaine enjoys in connection with his security clearance application is procedural in nature. In the case at bar, this right has been fully observed.

[60] Finally, the mixed nature of a question "will call for more deference if the question is fact-intensive, and less deference if it is law-intensive" (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226).

[61] In the respondent's view, the function of assessing the risk associated with certain conduct is primarily a matter of weighing the facts and this falls within the field of expertise of the Minister and the Advisory Body.

[62] Further, in carrying out the objectives of the Act the Minister enjoys broad discretion in developing and implementing the Clearance Program. This discretion is entirely reasonable and even essential, since the purpose of the Act is ensuring public safety.

[63] In analyzing the four applicable factors, this Court considers that the standard applicable to the Minister's decision to deny Mr. Fontaine's security clearance is that of patent unreasonableness.

Effect of choosing standard

[64] When the patently unreasonable standard applies to a decision, this means that the Court may intervene only if the decision is immediately or obviously flawed, that is, the flaw can be explained simply or easily. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Ryan*, *supra*, para. 52).

[65] Even if this Court actually considered that the applicable standard was that of reasonableness, this should also be rejected in view of the definition of that standard:

> [46] Judicial review of administrative action on a standard of reasonableness involves deferential self-discipline. A court will often be forced to accept that a decision is reasonable even if it is unlikely that the Court would have reasoned or decided as the tribunal did (see *Southam, supra*, paras. 78-80).

(*Ryan*, *supra*.)

[66] Mr. Fontaine did not establish that the Minister's decision to cancel his security clearance was "patently unreasonable" or "not in accordance with reason" or even unreasonable.

[67] As Johanne Gauthier J. repeated, "the duty of fairness [does not extend] to the level of requiring a full or formal hearing, but it requires that the [applicant] be afforded a meaningful opportunity to present [his view] at one point before the final decision is made" (*DiMartino v. Canada (Minister of Transport)*, 2005 FC 635, [2005] F.C.J. No. 876 (QL), para. 36). In the case at bar, the evidence in the record indicates that the Minister kept Mr. Fontaine informed of the investigation and gave him an opportunity to present his views.

[68] Mr. Fontaine is challenging the validity of the Minister's decision to cancel his security clearance for the following reasons.

[69] First, Mr. Fontaine argues that the information obtained through the investigative process is not specific as to any person (applicant's record, memorandum, p. 8).

[70] As appears from the examination on affidavit of Ms. Massicotte, there was no confusion in the decision-making process between Wooby Fontaine and his twin brother Woody Fontaine (AR, Exhibit 7, examination on affidavit of Francine Massicotte, pp. 15 and 16; respondent's record, affidavit of Francine Massicotte, Exhibit G).

[71] Secondly, Mr. Fontaine argued that the representations made by him, to the effect that he has never been part of a criminal organization, were not checked (AR, memorandum, p. 8).

[72] There was no need to check these statements as they were never questioned.

[73] The decision regarding Mr. Fontaine was based solely on his association with a known criminal organization, the "Ruffriders", not on his status as a member. There was never any question that Mr. Fontaine might himself be a member of a criminal organization (affidavit of Francine Massicotte, paras. 18 and 22, Exhibit G).

[74] Finally, Mr. Fontaine submitted that the file prepared on him was [TRANSLATION] "based on hearsay which was not checked" (AR, memorandum of fact and law, p. 8).

[75] The reliability of the information obtained from the RCMP was sufficient for the purposes of the checking process established by the Clearance Program (affidavit of Francine Massicotte, Exhibit G; AR, examination on affidavit of Francine Massicotte, p. 14).

[76] Further, despite the opportunity he was given Mr. Fontaine never refuted the information gathered by the RCMP about the nature of his ties to the “Ruffriders” (respondent’s record, Exhibit F, p. 38, and Exhibit G, p. 39). In reply, Mr. Fontaine simply stated that [TRANSLATION] “if certain friends I had as a child are now in such groups, it is unfair to claim that I am a part of them because my name was associated with theirs in our youth” (respondent’s record, Exhibit I, p. 52).

[77] Accordingly, Mr. Fontaine’s arguments do not provide a basis for concluding that the Minister’s decision to cancel his security clearance was patently unreasonable.

[78] In exercising his discretion under section 4.8 of the Act the Minister may take any factor he considers relevant into account.

[79] In the case at bar, the Minister established the Clearance Program and an Advisory Body to ensure that security clearances were granted after checks were made into the record of the person requesting a clearance (Clearance Program, *supra*, s. II.19).

[80] The existence of such a procedure may create procedural rights, but does not in any way limit the broad discretion enjoyed by the Minister under section 4.8 of the Act.

[81] Further, the Advisory Body does not have a duty to collect evidence established beyond all reasonable doubt of acts endangering public safety.

[82] On the contrary, the Clearance Program which governs the granting of security clearances only requires that there should be a probability that a person:

(*d*) the Minister reasonably believes, on a balance of probabilities, may be prone or induced to	*d*) qui, selon le ministre et les probabilités, est sujette ou peut être incitée à:
i. commit an act that may unlawfully interfere with civil aviation; or	i. commettre un acte d'intervention illicite pour l'aviation civile; ou
ii. assist or abet any person to commit an act that may unlawfully interfere with civil aviation.	ii. aider ou à inciter toute autre personne à commettre un acte d'intervention illicite pour l'aviation civile.

(Clearance Program, *supra*, s. I.4).

CONCLUSION

[83] Accordingly, in the case at bar it was not any specific acts that made Mr. Fontaine incapable of holding a security clearance, but rather the fact that he is associated with individuals who might have a negative influence on him that gives the Minister reason to believe that Mr. Fontaine might be "prone or induced to . . . commit an act that may unlawfully interfere with civil aviation" (Clearance Program, *supra*, s. I.4).

[84] Accordingly, the Minister made no error on the basis of which this Court may intervene.

JUDGMENT

THE COURT ORDERS that

1. the application for judicial review is dismissed;

2. without costs.

"Michel M.J. Shore"
Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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