

Federal Court



Cour fédérale

Date: 20150810

Docket: T-1294-14

Citation: 2015 FC 961

Fredericton, New Brunswick, August 10, 2015

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

ROSSI, JOSEPH ANTHONY NICHOLAS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Joseph Anthony Nicholas Rossi (Mr. Rossi) brings an application for judicial review of a decision of the Minister of Transport [the Minister] dated April 24, 2014, wherein the Minister, pursuant to subsection I.4 of the Transportation Security Clearance Program Policy [the Policy], cancelled Mr. Rossi's security clearance.

[2] Mr. Rossi, a manager employed by an airline food service company, Gate Gourmet, requires a security clearance in order to gain access to restricted security areas at his place of employment, the Pierre Elliott Trudeau International Airport (the Airport) in Montréal, Québec. Mr. Rossi has been employed in the food service industry at the Airport since 1998, at which time he was first granted a security clearance. Subsequent to 1998, Mr. Rossi's security clearance was renewed every five years. The most recent renewal application was made on January 13, 2013, and was due to expire on January 31, 2018.

[3] Due to the implementation of enhanced security measures at the Airport the Department of Transport (Department) received, on December 6, 2013, a Law Enforcement Records Check report [LERC report]. The LERC report revealed links between Mr. Rossi and individuals involved in the import and export of drugs at the Airport. The report also revealed a "suspected" association between Mr. Rossi and an organized crime group, notably the Torre organisation. Following routine security checks by the Royal Canadian Mounted Police, coupled with the contents of the LERC report, the Department's security screening personnel had concerns about Mr. Rossi's ability to retain a security clearance.

[4] As a result, on December 17, 2013, the Department sent a letter to Mr. Rossi informing him of the information contained in the LERC report and of its concerns regarding his suitability to retain a security clearance. The Department also informed Mr. Rossi the matter would be reviewed by the Advisory Body whose responsibility it is to recommend to the Minister that she grant, renew, cancel or suspend a security clearance. The Department invited Mr. Rossi to

provide information regarding the allegations set out in the LERC report and any other relevant information he wished to provide.

[5] On December 18, 2013, Mr. Rossi spoke to a representative of the Department. He expressed concerns that departmental officials might be confusing him with his father, who bears the same first and last names and used to work in the food service industry at the Airport. Mr. Rossi also made two written submissions in response to the letter from the Department. It was later confirmed that it was indeed the junior Mr. Rossi to whom the officials were referring.

[6] On March 11, 2014, the Advisory Body recommended to the Minister that Mr. Rossi's security clearance be cancelled. On April 17, 2013, the Minister's delegate [hereinafter included in reference to the Minister] decided to cancel the security clearance. That decision, now under review, was communicated to Mr. Rossi on April 24, 2013. The Minister was of the opinion that Mr. Rossi's suspected association to the Torre organisation raised concerns regarding his judgement, reliability, and trustworthiness. Furthermore, the Minister noted Mr. Rossi's association with two key players involved in drug trafficking through the Airport and that one of those players had recently been convicted of conspiracy and importation of an unlawful substance, for which he received a prison sentence of nearly ten years.

[7] For the reasons set out herein, I would dismiss the application for judicial review.

II. Legislative Scheme

[8] I acknowledge at the outset that I borrow heavily from the respondent's written submission in setting out the legislative scheme governing the granting and cancellation of security clearances at Canadian airports. The Minister is responsible for promoting safety in Canadian aerodromes, in accordance with the provisions of the *Aeronautics Act* [the Act], RSC 1985, c A-2, the *Canadian Aviation Security Regulations* [the Regulations], 2012 SOR/2011-318, and policies promulgated by the respondent. Security at the Airport is governed primarily by the Act and the Regulations.

[9] Pursuant to s. 165(a) of the Regulations, restricted areas within the Airport are accessible only to persons holding a restricted area identity card. Section 146(1)(c) of the Regulations provides that no person may obtain a restricted area identity card without first obtaining a security clearance. Security clearances may only be issued following an application to the Minister. Section 4.8 of the Act provides that 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".

[10] The method by which the Minister will exercise her broad discretion under the Act is set out in the Policy. The Policy describes the procedures relating to applications, suspensions, and cancellations of security clearances. One of the aims of the Policy is to prevent the uncontrolled entry into a restricted area of an airport by any person 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 [My emphasis].

[11] The program is administered by the Director of Security Screening Programs who reviews applications and carries out security verifications such as criminal record checks, enquiries with law enforcement agencies, and indices checks at the Canadian Security and Intelligence Service (CSIS). In those circumstances in which the Director has concerns about the suitability of the holder of a security clearance he refers the file to the Advisory Body established under the Policy. The Advisory Body conducts its own review of the file and makes a recommendation to the Minister whether to grant, renew, cancel or suspend the security clearance.

[12] The Advisory Body is made up of the Director and at least two other members chosen by the Director by reason of their familiarity with the objectives of the security clearance program. Prior to reviewing the file the Advisory Body informs the individual of the unfavourable information that has come to light and invites the person to make submissions. The person is also referred to the Policy for information regarding the grounds upon which the Advisory Board may make a negative recommendation. Following the Minister's decision, the person is informed of the final decision and provided advice about the possibility of seeking judicial review.

III. Submissions of the Parties

A. *Applicant's Submissions*

[13] Mr. Rossi contends the decision is unreasonable because he was never convicted of any criminal charges, was unaware of any of the criminal activities of his co-workers and there is no evidence that he was affiliated with any of those involved in drug trafficking at the Airport. He contends that his security clearance cancellation is nothing more than guilt by association and there is no evidence that he may be “prone or induced to commit an act that may interfere with civil aviation”.

[14] Mr. Rossi further contends that his right to procedural fairness was violated in two ways: (1) the letter dated December 18, 2013, contained limited information which prevented him from fully responding to the allegations made against him; and (2) the April 24, 2014, letter informing him of the decision to cancel his security clearance refers to a statement his lawyer had provided. He says the Minister clearly considered extraneous evidence given that he (Mr. Rossi) had not engaged a lawyer until May, 2014. Mr. Rossi contends it was therefore impossible for the Minister to have considered any submissions from a lawyer engaged on his behalf. According to Mr. Rossi, the Minister's consideration of extraneous evidence constitutes a breach of procedural fairness or natural justice.

[15] Mr. Rossi also suggests his *Charter* rights were violated but does not provide any particulars of those violations, nor does he set out the facts upon which the violations are

established. I am of the view Mr. Rossi has not laid the framework upon which to mount a *Charter* challenge and do not intend to say anything further on the topic.

B. *Respondent's Submissions*

[16] The Respondent submits that the decision to cancel the Mr. Rossi's security clearance is reasonable on the evidence. She states that Mr. Rossi's complaints of guilt by association and that he is being punished for acts he did not commit, demonstrate a misunderstanding of the legislative scheme. The Respondent contends the Minister's decision under section I.4 of the *Policy* is forward looking. The decision, according to the Respondent, recognizes that associations with individuals, who might have a negative influence, can be sufficient grounds for the Minister to reasonably believe that a person may be prone, or induced, to commit an act that may unlawfully interfere with civil aviation.

[17] The Respondent also submits there is no breach of procedural fairness. He argues that all the available information was provided to the Applicant and he was given an opportunity to respond. He adds, in response to the letter dated December 17, 2013, the Applicant demonstrated knowledge, or at least an understanding, of the events described in the letter. He cannot therefore say that the information provided to him limited his ability to respond to the allegations. With respect to the decision letter's reference to a submission from a lawyer, the Respondent submits there was ample evidence for the Minister to make the decision she did, and that the reference to a lawyer is an unfortunate typographical error.

IV. Issues

[18] I would frame the issues as follows:

1. Was the decision to cancel Mr. Rossi's security clearance reasonable in the circumstances?
2. Did the Minister err with respect to the requirements of procedural fairness by failing to provide Mr. Rossi with adequate information about the allegations against him and by making reference to extraneous evidence (the lawyer's submission) in the decision letter?

V. Standard of Review

[19] The decision to cancel the Applicant's security clearance is to be assessed on the reasonableness standard of review (*Clue v Canada (Attorney General)*, 2011 FC 323, [2011] FCJ No 401, at para 14 [*Clue*]). The Court will only intervene if it concludes 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, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]).

[20] Whether the process used to arrive at the decision to cancel the Applicant's security clearance met the requirements of procedural fairness attracts the correctness standard of review (*Pouliot v Canada (Minister of Transport, Infrastructure and Communities)*, 2012 FC 347, 216 ACWS (3d) 527 at para 7 [*Pouliot*]). When applying this standard, this Court will not show deference to the procedure adopted by the Minister, but rather, will undertake its own analysis.

VI. Preliminary Matters

[21] The Respondent raised two preliminary matters. Both were dealt with at the outset of the hearing and need no further elaboration. By way of confirmation: the style of cause is amended to name the Attorney General of Canada as the Respondent (in compliance with Rule 303 of the *Federal Court Rules*, SOR/98-106), and material unavailable to the Minister at the time of her decision will not be considered on this application for judicial review.

VII. Analysis

A. *Is the decision to cancel the Applicant's security clearance reasonable?*

[22] The standard of proof required to support the Minister's decision to cancel Mr. Rossi's security clearance is that of reasonable belief, on a balance of probabilities, that he may be prone or induced to commit an act that may unlawfully interfere with civil aviation [My emphasis.]. As Harrington, J. noted in noted in *MacDonnell v. Canada (Attorney General)*, 2013 FC 719, [2013] FCJ No 799 at para 29 [*MacDonnell*]:

The Policy is forward looking; in other words, a prediction. The Policy does not require the Minister 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".

[Emphasis added]

(See also *Clue*, at para 20, *Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59, [2013] FCJ No. 44 at para 24 [*Thep-Outhainthany*]; *Christie v Canada (Attorney General)*, 2015 FC

210, [2015] FCJ No 203 at para 23 and *Henri v Canada (Procureur Général)*, 2014 FC 1141, [2014] FCJ No 1266 at para 28.

[23] Mr. Rossi's contention that the decision is unreasonable because there is no evidence that he was affiliated with any of the perpetrators of drug trafficking at the Airport and that he was unaware of their criminal activities is misplaced. As noted above, the Policy is forward looking. It has been held by this Court that simply being associated with individuals involved in drug crimes or members of a criminal organization is sufficient for the Minister to exercise her discretion to cancel a security clearance (*Christie*, above at paras 24-25; *Thep-Outhainthany*, above at para 25). Also, the lack of a criminal record is not determinative: *Thep-Outhainthany*, above, at para 20.

[24] In arriving at her decision to cancel Mr. Rossi's security clearance, the Minister's delegate considered the following evidence gathered by the RCMP Airport Federal Investigation Section:

1. The RCMP investigated an organization which imported cocaine from the Dominican Republic to Canada through the Airport;
2. The RCMP investigation lasted from October 12, 2007 to June 4, 2007 and included investigation tools such as surveillance, telephone analysis, dialed number recorders and interception of communications;
3. The organization under investigation employed employees of the CARA airline food service company (a predecessor to Gate Gourmet and former employer of Mr. Rossi) to import cocaine through the Airport;

4. The investigation resulted in the seizure of 9 kg of cocaine in January 2008 and 2 kg of cocaine in April, 2008;
5. The organization under investigation was named after two of its participants, one of whom, Subject A, was a close associate of Mr. Rossi;
6. The organization to which Subject A was a member had connections to organized crime and some of its members were involved with members of the Torre organization;
7. Mr. Rossi's close associate, Subject A, was charged in 2008 with the offences of importing a prohibited substance and conspiracy to commit a criminal offence for which he was sentenced to 59 months in prison. Also, Subject A was the owner of a restaurant identified by the RCMP as a meeting place used to discuss narcotics trafficking. Finally, in 2006, Mr. Rossi was observed in Subject A's restaurant with a key player of the organization then under investigation.

[25] In his reply to the concerns set out in the letter from the Advisory Board, Mr. Rossi makes three concessions. First, that he produced a film, as part of his studies at Concordia University, at Subject A's restaurant. Second, that he frequented the restaurant with co-workers of his then employer, CARA. Finally, he concedes that he frequented the same gym and, on occasion, worked out with one of the other persons under investigation.

[26] Based upon the complete record, including the LERC report, which is considered to be reliable (*MacDonnell*, at para 31, citing *Fontaine*, at para 75), I am satisfied the Minister's

delegate reached a conclusion regarding Mr. Rossi's security clearance which was within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

- B. *Did the Minister err with respect the requirements of procedural fairness by failing to provide Mr. Rossi with adequate information about the allegations against him and by making reference to extraneous evidence (the lawyer's submission) in the decision letter?*

[27] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 at paras 21-27 [*Baker*], the Court, in addition to setting out the factors to be considered in determining the degree of procedural fairness required in any particular circumstance, instructs that the analysis is to be contextual. The context surrounding the cancellation of a security clearance has recently been summarized in *Henri*, at para 28:

Though the content of the duty of procedural fairness is slightly higher when an existing clearance is cancelled than when someone is refused clearance for the first time, it is still, nevertheless, on the lower end of the spectrum (*Pouliot*, above, at paragraph 10); in practical terms, this means that the procedural safeguard related to the process that may lead to the cancellation of a security clearance is limited to the right to know the alleged facts and the right to make representations about those facts; it does not include the right to a hearing (*Pouliot*, above at paragraph 10; *Rivet v Attorney General of Canada*, 2007 FC 1175, at paragraph 25; *DiMartino and Koska v Canada (Minister of Transport)*, 2005 FC 635, at paragraph 36; *Peles*, above, at paragraph 16; *Clue*, above, at paragraph 17).

[Emphasis added]

[28] In the present case, the nature of the decision was not one in which Mr. Rossi faced an extensive restriction of his rights. He could continue to work at the Airport; albeit, not in the managerial position he then held. Furthermore, the Department, by its December 17, 2013, letter informed him of the matters that were of concern. The letter invited him to consult the *Policy* and

to submit additional information regarding the circumstances surrounding the incidents and alleged associations. Mr. Rossi made one phone call and submitted two e-mails in response to the letter.

[29] Mr. Rossi's contention there was insufficient information in the December 17, 2013 letter to permit him to adequately respond does not, in my view, have merit. The letter refers to a "close associate" (who is identified as Subject A) of Mr. Rossi's who owned a restaurant. That restaurant was identified as a meeting place for narcotics traffickers. The letter stated that Subject A was convicted of the crimes earlier referenced in these reasons. The letter also informed Mr. Rossi that he was observed in the restaurant with another key player in the investigation. On the strength of the letter, Mr. Rossi was able to identify both Subject A, and the "other key" player. He was able to respond with information about his relationship to both individuals.

[30] With respect to Subject A, Mr. Rossi was able to refer to his use of the restaurant in making a film while at Concordia University. With respect to the other individual, Mr. Rossi was able to recount the details of their relationship at the same gym. In my view, the information provided by the Minister, met or exceeded the obligation to disclose set out in such cases as *MacDonnell*, *Clue*, and *Salmon v Canada (Attorney General)*, 2014 FC 1098, 247 ACWS (3d) 499. Finally, as explained in *Lorenzen v Canada (Transport)*, 2014 FC 273, 239 ACWS (3d) 10 at para 52, the Minister's delegate is not required to accept Mr. Rossi's explanation or position (See also *Henri*, at para 60).

[31] It is clear that the Minister is given broad power and discretion to grant or cancel security certificates. In terms of Mr. Rossi's legitimate expectations, a security clearance is not a right, but a privilege. It is reasonable for an individual to expect that his personal associations would be relevant to the granting or maintenance of a security clearance.

[32] As for the significance of the decision to the individual, Mr. Rossi will not be imprisoned, nor will he lose his job. As earlier indicated, the nature of his job will change, as he will no longer be able to access restricted areas; however, he will continue to be employed at the Airport in the food service industry, with the same employer.

[33] I now turn to Mr. Rossi's contention the Minister breached the duty of procedural fairness by considering extraneous or non-existent evidence in the form of a "written statement" provided by his lawyer. Indeed the decision does refer to such a statement from a lawyer. The facts are undisputed that Mr. Rossi had not engaged a lawyer as at the date of the decision. The question then becomes whether the Minister actually considered extraneous or non-existent evidence, or perhaps confused Mr. Rossi's file with that of someone else.

[34] In assessing this ground of review I come to the conclusion the reference to Mr. Rossi's lawyer's submission is an unfortunate typographical error. Based upon the Advisory Board Record of Discussion, found at the Respondent's Record Vol 1, pages 43-45, the Minister possessed all the necessary information, including Mr. Rossi's submissions, with which to make her decision. In fact, in the opening paragraph of the decision, the Minister's delegate states that the decision is based on the events described in the December 17, 2013, letter, Mr. Rossi's

submissions dated December 18, 2013, the recommendation of the Advisory Board and the *Policy*.

[35] In my view, the erroneous reference to a lawyer's submission does not constitute a breach of procedural fairness, nor does its reference in the decision render the decision unreasonable within the parameters of *Dunsmuir*. In *Newfoundland and Labrador Nurses' Union v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paras 16 and 17, reviewing courts are instructed to avoid seeking a treasure trove of error and to assess the reasonableness of the decision based upon a review of the material, taken in its totality. As Abella, J. states at paragraph 16 of that decision, "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met." In this case, I am satisfied that upon a consideration of the whole of the material, the decision is defensible. The reference to the lawyer's submission, which did not exist, was superfluous to the decision making process. In my view the decision making process was not tainted by any error which breached Mr. Rossi's right to procedural fairness.

VIII. Conclusion

[36] The decision to cancel Mr. Rossi's security clearance met the test of reasonableness in the circumstances. Furthermore, I am satisfied that the Minister respected Mr. Rossi's contextual rights to procedural fairness. The intervention of this Court is not warranted.

JUDGMENT

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

"B. Richard Bell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Roberto T. De Minico

FOR THE APPLICANT

Sara Gauthier

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Trudeau Dufresne De Minico
Lawyers - Notaries
Montreal, Quebec

FOR THE APPLICANT

William F. Pentney
Deputy General of Canada
Montreal, Quebec

FOR THE RESPONDENT