

Federal Court



Cour fédérale

**Date: 20161024**

**Docket: T-2051-15**

**Citation: 2016 FC 1187**

**Ottawa, Ontario, October 24, 2016**

**PRESENT: The Honourable Mr. Justice Gleeson**

**BETWEEN:**

**ERICA BONNICK**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The applicant, Ms. Erica Bonnick was employed with Airport Terminal Services at Lester B Pearson International Airport. Her continued employment was contingent upon her receiving a Transportation Security Clearance [TSC] from Transport Canada, a clearance she had applied for in January 2014.

[2] In a decision dated October 29, 2015, the Director General, Aviation Security at Transport Canada, acting as the delegate of the Minister of Transport [Minister], refused Ms. Bonnick's TSC. In the decision, the Minister identified information concerning Ms. Bonnick's association with two individuals with lengthy criminal records who are members of street gangs involved in serious criminal activities. The decision noted that Ms. Bonnick's association with these individuals raised concerns regarding her judgment, trustworthiness and reliability.

[3] Ms. Bonnick seeks judicial review of the refusal decision, asking that the Court quash the decision and return the matter for redetermination. Specifically, Ms. Bonnick argues that: (1) key findings underpinning the decision have no rational basis in evidence, that her submissions were not fully considered and that the decision-maker failed to address the historical and transient nature of her contact with the individuals of concern, rendering the decision unreasonable; and (2) there was a breach of procedural fairness as she was not provided an opportunity to address the allegations of ongoing association; allegations that played a role in the refusal decision.

[4] In deciding this application, I will address the two issues raised:

- A. Was the decision to refuse to grant the TSC reasonable?
- B. Was there a breach of the duty of procedural fairness?

[5] For the reasons that follow, I have determined that the decision was reasonable and that there was no breach of procedural fairness. The application will be dismissed.

## II. Background

### A. *The TSC Process*

[6] Section 4.8 of the *Aeronautics Act*, RSC, 1985, c A-2 [*Aeronautics Act*] provides that the Minister of Transport may “grant or refuse to grant a security clearance to any person or suspend or cancel a security clearance”.

[7] Section 165 of the *Canadian Aviation Security Regulations*, SOR/2011-318 [Regulations] provides that any person requiring access, as part of their employment, to a restricted area within an aerodrome must have been issued a Restricted Area Identity Card [RIAC] or possess another document authorizing access. Section 146 of the Regulations sets out the requirements for the issuance of a RAIC. Those requirements include having been granted a TSC.

[8] The TSC process is governed by the Transportation Security Clearance Program [TSCP], a program that Transport Canada implemented to provide guidance concerning the issuance, suspending, refusing and cancelling of TSCs. The Program’s objective is to prevent the uncontrolled entry into a restricted area of a listed airport by any individual in enumerated circumstances. Those circumstances include a situation where the Minister reasonably believes, on a balance of probabilities, the individual may be prone or induced to commit, or to assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

[9] In processing a TSC application, comprehensive background checks are completed. Where a concern is identified as to the applicant’s suitability an Advisory Body reviews the

information and makes a recommendation to the Minister. In advance of the Advisory Body review, the applicant is provided the information regarding the identified concerns and invited to respond.

B. *Ms. Bonnick's Application*

[10] Ms. Bonnick submitted her application for a TSC in January 2014. In conducting background checks pursuant to the TSCP, Transport Canada was provided with Ms. Bonnick's Law Enforcement Record Check Report [LREC]. The report described an incident in 2004 and another in 2011 linking Ms. Bonnick to two individuals known to police. The report disclosed that the first individual had a lengthy criminal record and was a member of a street gang. The report disclosed that the second individual was also a member of a street gang and had been charged with various crimes but not convicted.

[11] Transport Canada wrote to Ms. Bonnick in February 2015 advising her of the concerns and disclosing the information contained in the LREC report. She was encouraged to provide additional information outlining the circumstances surrounding the incidents and any other relevant information including identifying any extenuating circumstances.

[12] Ms. Bonnick submitted two email responses to the February 2015 letter. The emails are substantially the same. She advised that the 2004 incident arose because she was driving her then boyfriend's car and that she was unaware of the extent of his criminal past. With respect to the 2011 incident, she states that she was simply one of four people in the car and that she did not know the driver who was her friend's boyfriend and the person of interest to the police. She also

notes that: “Today I am much wiser...I do not keep the company of anyone mentioned in this letter”.

[13] In June 2015, the Advisory Body found it had reason to believe, on a balance of probabilities, that Ms. Bonnick may be prone or induced to commit an act, assist or abet an individual to commit an act that may unlawfully interfere with civil aviation on the basis of her reported association with the two individuals involved in criminal activities and gangs. The Board stated: “Due to the applicant’s history of association to individuals involved in criminal activities and gangs on two (2) occasions, separated by a 7 year period, the Advisory Body was led to believe that she had continuously been associating with these individuals throughout the period.” The Board further noted that Ms. Bonnick’s submission did not provide sufficient information to dispel their concerns and the Board recommended refusal of the TSC.

### III. Decision under Review

[14] On October 29, 2015, the Minister concurred with the Advisory Body’s recommendation and refused Ms. Bonnick’s application. The reasons for the decision state:

The information concerning the applicant’s association to two (2) individuals with lengthy criminal records and who are members of street gangs involved in serious criminal activities raised concerns regarding her judgement, trustworthiness and reliability. I note that on two (2) occasions, one in 2004 and one in 2011, the applicant was observed by police to be in the company of individuals who are members of street gangs and who have a combined 35 criminal convictions and charges related to violence, weapons, robbery and disrespect for authority. I note that the applicant stated in 2004 that the individual of concern was her boyfriend at the time. I further note that the applicant’s associations are not casual and are to individuals who are members of street gangs. After reviewing all of the information on file, I have 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. I also note the applicant's submission did not contain sufficient information to address my concerns.

IV. Preliminary Issue

[15] The respondent submits that Ms. Bonnick has placed evidence before this Court that was not before the original decision-maker. The respondent argues that this new evidence does not fall within one of the recognized exceptions for the admission of new evidence on judicial review and is also irrelevant.

[16] The evidence in question is found at paragraphs 8 and 9 of Ms. Bonnick's affidavit and comprises three sentences. Specifically, the evidence states that Ms. Bonnick is the primary caretaker and provider for two young children, asserts that the refusal decision has had a substantial impact on Ms. Bonnick and her family, describes changes made to her living situation and arrangements and states that Airport Terminal Services is prepared to revisit her employment should the TSC decision be set aside.

[17] Ms. Bonnick's counsel argues that this is not new evidence but rather information that is implicitly and explicitly referred to in the record before the Court. This may be the case as it relates to Ms. Bonnick being a mother and her loss of employment as a result of the refusal decision; however the evidence goes beyond this. The evidence describes the impact of her lost employment on her living arrangements and the possibility of being rehired. This is all new information.

[18] I am not persuaded that the new information falls within any of the three exceptions identified in *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 19-27 nor has Ms. Bonnicks's counsel argued that the evidence should be recognized as an additional exception on the basis that the list of exceptions is not closed (*Bernard* at para 19). I am also of the view that the evidence is not relevant to the issues raised in this application. The impact of the decision on Ms. Bonnicks's employment or her personal life, issues clearly of importance to her, have no bearing on the question of aviation security (*Doan v Canada (Attorney General)*, 2016 FC 138 at para 28). The evidence will be disregarded in considering the merits of this application. I have however taken this information into account when addressing the question of costs.

#### V. Standard of Review

[19] The discretionary decision of the Minister to refuse Ms. Bonnicks's security clearance is to be reviewed on a reasonableness standard (*Christie v Canada (Attorney General)*, 2015 FC 210 [*Christie*] at para 16).

[20] The jurisprudence has recognized that: (1) the Minister's decision under section 4.8 of the *Aeronautics Act* to grant or refuse a security clearance is a highly discretionary decision; (2) the Minister's margin of appreciation in the exercise of that discretion is high (*Philipos v Canada (Attorney General)*, 2016 FCA 79 at para 30 citing *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56); and (3) in considering whether a decision is reasonable the court must address whether the decision is transparent, justifiable and intelligible (*Dunsmuir v New Brunswick*, 2009 SCC 8 [*Dunsmuir*] at para 47).

[21] In addressing Ms. Bonnick’s submissions alleging a breach of procedural fairness the correctness standard of review will be applied (*Christie* at para 17). The level of fairness in such cases is “limited to the right to know the facts alleged against [the applicant] and the right to make representations about those facts” (*Sylvester v Canada (Attorney General)*, 2013 FC 904 at para 11, citing *Pouliot v Canada*, 2012 FC 347 and *Rivet v Canada (Attorney General)*, 2007 FC 1175 at para 25).

## VI. Analysis

### A. *Was the decision to refuse to grant the TSC reasonable?*

[22] Ms. Bonnick argues that the Minister’s decision is unreasonable citing three errors:

- i. the absence of a rational basis in the evidence to support two key findings. First the Advisory Body’s statement that Ms. Bonnick’s history of association with individuals involved in criminal activities and gangs on two separate occasions separated by a seven year period led the Advisory Body to believe “that she had continuously been associated with these individuals throughout the period” and second, the Minister’s conclusion that Ms. Bonnick’s “associations are not casual”;
- ii. relying on the decision of this Court in *Ho v Canada (Attorney General)*, 2013 FC 865 [*Ho*], the failure to address Ms. Bonnick’s submissions as contained in the two email responses she provided to Transport Canada; and
- iii. the failure to explain how Ms. Bonnick’s past associations support a reasonable belief, on a forward looking basis, that she may be a risk to aviation security.



(1) No Rational Basis

[23] The factual findings made in support of the Minister's decision were reasonably available to the Minister. The evidence demonstrates that Ms. Bonnick was involved in a relationship in 2004 with an individual who possessed a lengthy criminal record spanning 15 years. That record discloses offences involving violence and the possession and use of weapons. In addition, her then boyfriend is described as a known member of a street gang and that street gang's main criminal activity involved the distribution of crack cocaine.

[24] Seven years later, Ms. Bonnick was again found in a car that was observed in the driveway of a residence known to be frequented by individuals involved in the drug trade. When that car was stopped Ms. Bonnick was found to be a passenger in the car with three other individuals. The police report noted the driver had been charged with serious offences involving weapons and was also a member of a street gang involved in criminal activity involving weapons and drugs.

[25] Ms. Bonnick argues that her age should excuse the associations. However, she was an adult in 2004 and 2011. The individual of interest in the 2004 incident was admittedly her boyfriend. The individual of interest in the 2011 incident, while not someone she admitted knowing was the boyfriend of her friend and she was riding in a car he was driving with her friend and one other person. She did not dispute the association.

[26] It was based on this evidence that the Advisory Body was led to believe that Ms. Bonnick's association had been continuous and that the associations were not casual.

[27] While Ms. Bonnick disagrees with the conclusions reached, and there may well have been other reasonable conclusions to be drawn from the evidence, neither her disagreement nor the identification of other reasonable interpretations of the evidence render the findings unreasonable.

(2) Failure to consider submissions

[28] Ms. Bonnick notes that the Minister's sole reference to her email submissions to Transport Canada was an acknowledgement that they were considered and a statement to the effect that the submissions were insufficient to address the concerns. Ms. Bonnick argues that this was insufficient. She submits the Advisory Board and the Minister had a duty to consider that she had stated she was unaware of the extent of her former boyfriend's criminal past; she did not know the individual of interest in the 2011 incident; and that she does not keep the company of either of these individuals. Relying on the decision of Justice Sean Harrington in *Ho*, she submits that, where there is no evidence this information was considered, the decision can be found to have been unreasonable.

[29] In *Ho*, the applicant provided what Justice Harrington described as "two detailed letters, with enclosures" in response to the information of concern. In providing the information, the applicant invited the Advisory Board to review certain other information, an invitation Justice Harrington found the Board did not accept. It was in these circumstances that Justice Harrington

concluded it unreasonable for the Minister to conclude, without more, that the explanations did not contain sufficient information to address the concerns. I agree with the respondent that this is simply not the case here.

[30] Ms. Bonnick did not provide a detailed explanation in response to the concerns. Instead, she provided two emails that were each four paragraphs in length, containing substantially the same information. The information she provided did not contradict the information that was of concern, past associations with gang members, associations that, by definition give rise to a security risk (*Kaczor v Canada (Minister of Citizenship and Immigration)*, 2015 FC 698 [Kaczor] at para 33 referring to *Fontaine v Canada (Attorney General)*, 2007 FC 1160).

[31] The decision letter acknowledged Ms. Bonnick's submissions, referenced those submissions when noting that the individual of concern in the 2004 incident was her boyfriend and concluded they lacked sufficient information to address the concerns. The Minister did not err by failing to individually address Ms. Bonnick's bald declarations.

(3) Forward looking risk

[32] Ms. Bonnick argues that the Minister's failure to articulate why her past associations generated a forward looking security risk undermined the transparency and justifiability and intelligibility of the decision. Again, I disagree.

[33] The mere passage of time or the absence of criminal conduct on the part of an applicant does not eliminate forward looking risk based on past associations, a point made by Justice Gleason in *Kaczor* (paras 32-33).

[34] In *Christie*, the applicant had been involved in incidents dating back to 2007 and had also never been convicted of a crime. In addressing the issue of past association Justice Peter Annis stated at paragraph 25:

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

[35] I agree with Justice Annis's assessment. The Minister is granted a wide discretion under section 4.8 of the *Aeronautics Act*. In the exercise of that discretion, past conduct must of necessity be relied upon in assessing future risk. Future risk in turn is not only to be assessed based on the risk of the applicant personally interfering with aviation security but also based on the risk of the applicant assisting others to do so.

[36] The decision satisfies the requirements of justification, transparency and intelligibility and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

(4) Was there a breach of the duty of procedural fairness?

[37] Ms. Bonnick submits that she was owed an elevated level of procedural fairness in light of the impact of the decision on her employment. She argues that the TSC was denied on the basis of a belief that she had been continually associated with the individuals of interest throughout the 2004 to 2011 period, a belief she was not provided an opportunity to respond to. I disagree.

[38] The content of the duty of fairness in the security clearance context has been found to be minimal (*Pouliot v Canada (Minister of Transport, Infrastructure and Communities)*, 2012 FC 347 [*Pouliot*] at para 9). While it has been recognized that the revocation or failure to renew an existing security clearance may attract a slightly higher standard, that standard remains on the lower end of the spectrum (*Pouliot* at para 10). Procedural fairness does not include an opportunity to respond to or refute conclusions drawn as a result of the conduct of an individual disclosed by the information under consideration, information that in this case included Ms. Bonnick's own submissions (*Pouliot* at para 14).

[39] Ms. Bonnick was fully informed of the Transport Canada concerns and provided a fair opportunity to respond. There was no breach of procedural fairness.

## VII. Conclusion

[40] In this case, the onus was on Ms. Bonnick to address the concerns raised, which she had the opportunity to do following the February 2015 letter, but failed to do in her responses sent in

March 2015 (*Charlebois v Canada (Attorney General)*, 2015 FC 1098 at para 10). I am unable to conclude that the decision was unreasonable or that there was any breach of procedural fairness.

The application is dismissed.

[41] Ms. Bonnick argues that costs are not appropriate in this case. She submits that the application was brought in good faith, notes her current circumstances and that she has relied on *pro bono* representation to place her arguments before the Court. The respondent is seeking costs.

[42] In light of Ms. Bonnick's circumstances and recognizing the discretionary nature of a cost award, I will not award costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is dismissed. No costs are awarded.

"Patrick Gleeson"

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2051-15

**STYLE OF CAUSE:** ERICA BONNICK v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 22, 2016

**JUDGMENT AND REASONS:** GLEESON J.

**DATED:** OCTOBER 24, 2016

**APPEARANCES:**

Pam Hrick FOR THE APPLICANT

Matthew Parker FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Stockwoods LLP FOR THE APPLICANT  
Barristers  
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of  
Canada  
Toronto, Ontario