

Federal Court



Cour fédérale

Date: 20170310

Docket: T-1256-16

Citation: 2017 FC 271

Ottawa, Ontario, March 10, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

OSMAN MOHAMED

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated July 12, 2016, [Decision] made by the Director General of Aviation Security acting as the delegate of the Minister of Transport [Minister] to cancel the transportation security clearance [TSC] of Mr. Mohamed at the Lester B. Pearson International Airport.

[2] For the reasons that follow, I find there was no procedural unfairness by the Minister and the Decision is reasonable. Considering the broad discretion given to the Minister by Parliament, the Decision falls within the range of possible, acceptable outcomes defensible on the facts and law. The application will be dismissed.

II. **Background Facts**

[1] Mr. Mohamed worked for Servisair Inc. as a Customer Service Specialist handling baggage. In that capacity, he required access to the restricted areas of the airport. To receive such access, he had to periodically obtain a TSC, after which he was given the necessary approval and access privileges via a restricted area identity card [RAIC]. The Transportation Security Clearance Program Policy [TSCPP] requires that a new security clearance application must be submitted, and a renewal of the TSC and RAIC obtained, at least once every five years.

[2] Mr. Mohamed first received a RAIC in 2004; it was renewed in 2009. At the time of the 2009 renewal, Transport Canada was aware through a Canadian Police Information Centre [CPIC] check that Mr. Mohamed had been charged with uttering threats, but that the charges were withdrawn. Transport Canada did not have access to any details regarding the withdrawn charge and Mr. Mohamed's TSC was renewed.

[3] Later that year, Transport Canada entered into a memorandum of understanding with the Royal Canadian Mounted Police [RCMP] to have the RCMP conduct enhanced background checks, across a variety of law enforcement databases, for security clearance applicants.

[4] On June 27, 2014, Mr. Mohamed was again required to renew his TSC and RAIC. He prepared and submitted the necessary paperwork. The RCMP then conducted a bulk query of the

relevant databases on July 8, 2014. That query provided information indicating a more in-depth review of the databases and a formal report was required.

[5] On September 8, 2015, the RCMP provided Transport Canada with a Law Enforcement Records Check [LERC] report, which provided details of three incidents involving Mr. Mohamed and the police. In two of the incidents, criminal charges were laid but ultimately were withdrawn. In the third incident, no charge was laid after Mr. Mohamed attended at the police station and provided a videotaped statement. Transport Canada also received a CPIC check for Mr. Mohamed on September 15, 2015 that revealed no criminal convictions were on file against Mr. Mohamed. While these background checks were carried out, Mr. Mohamed's security clearance remained in place.

[6] As a result of the background check information, a letter was sent on September 18, 2015, to Mr. Mohamed by the Chief of Security Screening Programs at Transport Canada. The letter outlined the details of the LERC report. It also indicated to Mr. Mohamed that the information raised concerns as to his suitability to retain his security clearance and invited him to provide additional information outlining the circumstances of the three incidents as well as to provide any other relevant information or explanation including any extenuating circumstances. Mr. Mohamed was advised that the Transportation Security Clearance Advisory Body [Advisory Body] would review the information and make a recommendation to the Minister. The letter provided him with the website address where he could review the TSCPP and it drew to his attention specifically section 1.4, which contains the various grounds on which the Advisory Body might make a recommendation to the Minister. At the end of the letter Mr. Mohamed was

provided with a name and telephone number for a person to contact should he wish to discuss the matter further.

III. **The LERC Information**

[7] The LERC report outlined three separate incidents:

- in July 2006, Mr. Mohamed attempted to purchase two Xbox 360 consoles and multiple video games at EB Games for a total cost of \$1,250. The store clerk was suspicious of the Visa card Mr. Mohamed used, and upon making inquiries discovered that it was a fraudulent card. Mr. Mohamed provided his driver's licence to the clerk but left before the police arrived, leaving his licence behind. The police located Mr. Mohamed and he advised them that he had found the credit card (which was in his name) at the airport. Mr. Mohamed was arrested and charged with one count of attempting fraud and one count of possessing a credit card obtained by crime. The report indicated the charges did not appear to have proceeded for reasons unknown to the RCMP.
- in July 2007, a complainant called the Toronto Police after he said he saw Mr. Mohamed holding someone, referred to as the victim, by the collar. When the complainant asked what was going on, Mr. Mohamed allegedly said that the victim had disrespected him. The complainant and Mr. Mohamed got into an argument and Mr. Mohamed threatened to shoot the complainant; the complainant taunted Mr. Mohamed to go ahead. Mr. Mohamed allegedly left the lobby and returned with his hands behind his back appearing to be holding something. Mr. Mohamed then called the complainant outside. The complainant instead returned to his apartment and notified police, who located Mr. Mohamed in the parking lot and arrested him. No weapon was located and the complainant suffered no injuries. The victim, who turned out to be the son of the complainant, refused to provide a statement. Mr. Mohamed was charged with one count of uttering threats to cause bodily harm. This charge was withdrawn in 2008 for reasons unknown to the RCMP.
- in January 2009, Toronto Police received information from a theft recovery officer at a Tennessee company reporting that a laptop, stolen in Memphis, had tracking software which indicated that it was being used in Toronto at Mr. Mohamed's residence. Police attended at the residence and spoke with Mr. Mohamed's sister, who gave police the laptop and stated that Mr. Mohamed obtained the laptop at the airport. Mr. Mohamed subsequently attended at the police station to provide a videotaped statement. The Tennessee company was notified by the police that the laptop had been recovered. The police were advised to return the laptop to the rightful owner. No charges were pursued by police for reasons unknown to the RCMP.

IV. **Mr. Mohamed's Submissions to the Advisory Body**

[8] On September 24, 2015 Mr. Mohamed emailed Transport Canada with his response to the LERC report explaining his side of the story.

[9] With respect to the credit card, he said he found it in a payphone at the airport, and noticed it had his first and last name; he thought he had lost it. He put it in his wallet, intending to contact the bank but the bank was closed when his shift ended. He went to EB games, which is located 2 blocks from his house. He said he was unaware he had taken the wrong credit card from his wallet, and when the clerk accused him of fraudulent activities he offered to use debit or a different card. He decided to leave because he was caught off guard and was nervous because he was unaware of what he had done wrong. Later that evening, the police attended at his home and after he explained what had happened he was given a slip promising to appear in court. He completed workshops for educating youth and cleaned offices and bathrooms at a local community centre.

[10] Regarding the apartment building incident, Mr. Mohamed explained that the alleged victim had assaulted Mr. Mohamed's cousin and had bullied and beaten up Mr. Mohamed's cousin for a long period of time. He stated his cousin had lost one of one of his molars and had been robbed of his mobile phone by the victim. He denied ever making a threat to anyone and said he never left the scene while waiting in the parking lot for the police to arrive. He said he was arrested because he did not call the authorities before the complainant did. He said he had several witnesses to corroborate his story and that neither the victim nor complainant was hurt while Mr. Mohamed had scratches on his neck, chest and face. He also pointed out that no weapon was involved and said the charges were dropped because the complainant discovered his

son, the victim, had assaulted and robbed Mr. Mohamed's cousin. He added that the phone was returned, the charges were dropped and he received an apology from both the victim and the complainant.

[11] As to the final incident involving the laptop, Mr. Mohamed said that a friend had given it to him and asked him to fix it up to help him with programs in university. Mr. Mohamed had majored in computer networking and technical support, so he agreed to help. When his sister told him the police had seized the laptop, he went to the police station and gave a statement. He said his friend who gave him the laptop got it from the friend's father, who owned several businesses in Memphis. The friend's father had purchased the laptop and sent it to his son, who in turn asked Mr. Mohamed to format it and reinstall a clean operating system with antivirus software.

[12] Mr. Mohamed concluded his submissions by saying he was appalled the matters had surfaced and could contribute against his future opportunities. He took pride both in his work and in being a good citizen who is not a violent person. He said he would never do anything to cause harm to someone or disturb civil aviation, and although he had made mistakes in the past he believed he had learned from them and had proven himself to be a good person and employee. He provided his telephone number and indicated they should not hesitate to contact him by phone or email for any additional information.

[13] A Security Screening Officer at Transport Canada acknowledged Mr. Mohamed's email. She replied that she did not have any questions but she was not a decision maker and it was his opportunity to provide any and all relevant information. She indicated he may also provide written character references if he would like.

[14] Mr. Mohamed made no further submissions; nor did he provide any character references. On March 1, 2016, the Advisory Body met to review his file.

V. **The Advisory Body Recommendation**

[15] The Advisory Body noted the three incidents. On the first, it appears to have accepted that Mr. Mohamed did use the fraudulent card, and did not comment on Mr. Mohamed's submissions.

[16] Regarding the incident in the apartment lobby, the Advisory Body found that in his submissions Mr. Mohamed admitted to taking the initiative to go to the complainant's apartment and he acted aggressively enough to cause the complainant to believe that Mr. Mohamed was aggressive, acted with premeditation and caused the complainant to call the police, believing he had a weapon.

[17] Regarding the third incident, the Advisory Body noted the Applicant's submission, but questioned why his friend's father, who owned several businesses, would have his son's friend fix a computer instead of a professional.

[18] The Advisory Body noted that at the time of these incidents, Mr. Mohamed was in possession of a TSC. While the incidents were dated, it found they raised serious concerns regarding Mr. Mohamed's judgment, trustworthiness and reliability. The Advisory Body therefore concluded, on the balance of probabilities, that Mr. Mohamed may be prone to commit an act, or assist or abet any person to commit an act that may unlawfully interfere with civil aviation. While it considered Mr. Mohamed's submissions, those submissions "did not provide sufficient information to dispel the Advisory Body's concerns".

VI. **The Decision under Review**

[19] On June 28, 2016, the Minister made the decision to cancel Mr. Mohamed's TSC. The Minister's reasons were slightly different from the Advisory Body meeting notes. She identified the issue as being whether to allow Mr. Mohamed to retain his TSC or cancel it in light of the information received by Transport Canada. She indicated her decision was based on a review of the file, including the concerns drawn to Mr. Mohamed's attention in the initial letter, his written submissions, the recommendation of the Advisory Body and the TSCPP. She outlined each incident very briefly as follows:

I note in July 2006, the applicant attempted to purchase electronics with the fraudulent credit card, and left the store before police could arrive.

I also note in July 2007, the Applicant was involved in an altercation with another individual, where the individual was so fearful of what he might do that they called the police.

I further note in January 2009, the Applicant was involved in an incident regarding a stolen laptop.

[20] The Minister noted that although the incidents were dated they did raise serious concerns regarding his judgment, trustworthiness and reliability. She concluded that after an in-depth review of the information on file she reasonably believed, on a balance of probabilities, that he may be prone or induced to commit an act or assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

[21] The conclusion of the Minister was that she concurred with the Advisory Body's recommendation to cancel Mr. Mohamed's TSC. She indicated she considered the statement provided by Mr. Mohamed, however the information presented was not sufficient to address her concerns.

VII. **Issues**

[22] The issues to be determined are:

- A) Was the Decision arrived at in a manner which was procedurally unfair?
- B) Is the decision reasonable?

[23] Issues of procedural fairness involving cancellation of a security clearance are reviewable on a standard of correctness. Where an existing security clearance is not being renewed, the standard of procedural fairness is higher than when there is no existing right being affected, however it is still on the lower end of the spectrum. The required level of procedural fairness is limited to the right to know the facts alleged against an applicant and the right to make representations about those facts: *Pouliot v Canada (Transport)*, 2012 FC 347 at paras 7 and 9-10 [*Pouliot*].

[24] In determining whether the decision was reasonable, the Minister is entitled to a large degree of deference; the consideration of whether to cancel a TSC is highly specialized and the Advisory Body and Minister have developed expertise in rendering such decisions: *Varadi v Canada (Attorney General)*, 2017 FC 155 at para 24 [*Varadi*].

[25] A decision is reasonable if the decision-making process is justified, transparent and intelligible, resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

VIII. **Positions of the Parties**

A. *Was the Decision arrived at in a procedurally unfair manner?*

[26] Counsel for Mr. Mohamed alleges the reasons provided were inadequate, containing nothing more than bald and conclusory statements, resulting in a breach of procedural fairness. Overall, Mr. Mohamed says the Decision was unfair, as well as unreasonable, because the reasons do not address why his submissions to the Advisory Body were rejected and the Decision contains poorly copied and pasted text of two disjointed and unrelated points made by the Advisory Body.

[27] The Minister denies there was any procedural unfairness in general. The Minister also points out that because there were reasons, the Decision cannot be procedurally unfair on that ground: the adequacy of the reasons is reviewable on a standard of reasonableness.

B. *Analysis*

[28] Mr. Mohamed's criticism of the adequacy of the reasons does not raise a matter of procedural unfairness. Only an absence of reasons can be considered procedurally unfair. In that respect, the Supreme Court has described a review of reasons as an organic exercise where the reasons must be read together with the outcome in determining whether the result falls within a range of possible outcomes: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14 and 22.

[29] In the September 18, 2015 letter from Transport Canada Mr. Mohamed was provided with much information:

- the complete information contained in the LERC report;
- the right to make submissions, which he did;
- the website address where he could review the TSCPP and to which he was specifically directed to section 1.4, containing the various grounds upon which the Advisory Body might make a recommendation;
- general instructions that he should outline circumstances and provide any other relevant information or explanation, and that the information to be reviewed would include the “criminal charges for Uttering Threats to Cause Bodily Harm that were withdrawn”; and
- a telephone number at which he could contact a person to discuss the matter.

[30] Mr. Mohamed was given the opportunity to present his views before the decision was reached. He was provided with the facts alleged against him. His submissions were received and considered by the decision maker. As a result of this, Mr. Mohamed knew the case he was to meet. He provided his views prior to the decision and he had the opportunity, although he did not take it, to provide further information such as character references. All in all, Mr. Mohamed’s procedural rights as set out in the jurisprudence and summarized in *Pouliot* were met.

C. *Was the Decision reasonable?*

[31] Mr. Mohamed submits the Decision does not fall within the range of reasonable outcomes, as there was no evidence to conclude that there is any correlation between the three incidents and his access to restricted areas of the airport. The incidents, which were minor and dated many years ago, have no causal connection to civil aviation therefore they should not raise any concern as to aviation security. Relying on paragraph II.35(2)(a) of the TSCPP, Mr. Mohamed also points out that he was not associating with a criminal organization and there were

no weapons involved in his conduct. He has not been involved in importing contraband through the airport and there was no dishonesty on his part. He also points out that there was no nexus between the three incidents and his job as a baggage handler at the airport.

[32] Mr. Mohamed also says the reasons do not show him “how” or “why” the Minister came to the conclusion that he was a risk to aviation security. His submissions clarified his lack of culpability by highlighting the withdrawal of the charges in two cases and the lack of charges laid in the third instance. Counsel for Mr. Mohamed says the Advisory Board ignored the explanations. For example, Mr. Mohamed denied there was ever any physical assault in the apartment building and said he received apologies from the complainant and the “victim”, but that was not taken into account.

[33] The Minister submits the Decision was reasonable, as section 4.8 of the *Aeronautics Act*, RSC 1985, c A-2, provides a broad discretion that allows the Minister to take into account any factor considered relevant. Receiving a TSC is a privilege, not a right. When balancing the public interest in aviation security against Mr. Mohamed’s privilege of access to a restricted airport area the scales must tip in favour of the public interest. The fact that the Minister’s broad discretion is forward-looking is inherently speculative as he or she determines, on a balance of probabilities, whether the applicant for a TSC or renewal of one “may be prone or induced” to commit an act that may unlawfully interfere with civil aviation. To arrive at that determination, the Minister assesses propensities, character, trustworthiness and the judgment of an applicant, keeping in mind the public interest in safety. The Minister says that Mr. Mohamed is simply asking the Court to re-weigh the evidence and second-guess the Minister.

D. *Analysis*

(1) Date of the incidents, age of Mr. Mohamed at the time and charges withdrawn

[34] While Mr. Mohamed says the Minister failed to take into account the dated nature of the incidents, his young age and the fact that there were no charges, that claim is not borne out by the evidence on the record. Mr. Mohamed's submissions were in the record and were specifically acknowledged by the Advisory Body as well as the Minister. The LERC report shows the two criminal charges were withdrawn and no charge was laid with respect to the laptop. As to whether Mr. Mohamed was innocently in possession of the laptop that had been reported stolen, as suggested by counsel at the hearing, the Minister was entitled to take a different view, since the LERC report indicated it had been reported stolen.

[35] Mr. Mohamed's youth at the time of the incidents and his clean record in the intervening years was relied upon as a significant factor in critiquing the Decision. He essentially invites me to re-weigh the evidence and substitute my analysis for that of both the Advisory Body and the Minister. In security clearance cases, the very broad discretion given to the Minister and the low threshold that the Minister need only find that a person may be induced or prone to unlawfully interfere with civil aviation warrants a significant degree of deference: *Varadi* at para 24.

[36] The Advisory Body noted that when the incidents occurred, Mr. Mohamed was in possession of a valid TSC. It also considered whether enough time had elapsed to demonstrate a change in his behaviour but determined that it had not. The Minister decided that the incidents, although dated, raised serious concerns regarding Mr. Mohamed's judgment, trustworthiness and reliability. The Minister may rely on the incidents in question even though they are dated and the

criminal charges did not proceed: *Mangat v Canada (Attorney General)*, 2016 FC 907 at para 58 [*Mangat*].

[37] It is also the case that the evidence which underlies a withdrawn charge may be sufficient to found a good-faith opinion as to present or future conduct in the exercise of the Minister's discretion: *Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59 at para 19.

[38] The record shows that the dated nature of the incidents and Mr. Mohamed's young age were taken into account. The expertise of the Advisory Body and the Minister should not be subject to second-guessing by the Court on these facts, which support that the determination falls within the range of possible, acceptable outcomes.

(2) No correlation to aviation security

[39] Mr. Mohamed argues there is no correlation between the incidents and whether he should continue to be permitted access to the restricted area of an airport. He says that none of the incidents involve the kinds of activity that would indicate airport security is at risk.

[40] In *Mitchell v Canada (Attorney General)*, 2016 FCA 241 [*Mitchell*], Madam Justice Dawson addressed this correlation argument. Mr. Mitchell had been involved in an escalating pattern of sexual misconduct involving children. He argued that there was no correlation between his misconduct and maintaining access to restricted areas of airports. In dismissing the argument, Madam Justice Dawson noted that the determination of whether a decision was reasonable depends on the context of the decision and the context was informed by a number of factors. Those factors included not only the broad discretion granted to the Minister but also the fact that the Minister is only required to hold a reasonable belief, on a balance of probabilities, that a

person may be prone or induced to commit an act that may unlawfully interfere with civil aviation as well as the inherently forward-looking predictive nature of a risk assessment:

Mitchell at para 7.

[41] In effect, the task of the Minister is predictive. The determination of whether to cancel or renew Mr. Mohamed's TSC is based on a forward-looking assessment of his character and propensities. Review of past incidents is a common way to judge a person's future potential activities. A specific correlation is not required between the past activity and possible future conduct. That is why there is a process in which the facts are considered, a recommendation is made and a final determination occurs after input from the person applying for the TSC. Where the past event bears a direct correlation to aviation security, the decision will often be obvious. In other cases, the process of review, input and determination assists the Minister in assessing past conduct as well as any mitigating or aggravating circumstances to come to a conclusion on the scope of the threat to aviation security. This is necessarily a very fact-specific exercise and no general rule would be appropriate about the specific sorts of conduct that can or cannot give rise to a reasonable belief that a person poses an aviation security risk.

[42] Without agreeing that there is a lack of correlation between the past incidents and future aviation security I also note that the determination by the Minister took into account the past activities of Mr. Mohamed in considering whether, on a balance of probabilities, he may pose a possible future risk to aviation security. This Court owes a significant degree of deference to the expert opinion of the Minister. There is no evidence that the opinion was unreasonable on the basis of this allegation by Mr. Mohamed. The Minister believed that Mr. Mohamed could pose a risk because his previous conduct demonstrated a lack of reliability, judgment and

trustworthiness and because he had not restrained his conduct out of consideration of the position of trust he held as the holder of a TSC. This is an intelligible chain of analysis linking the Minister's findings of fact on Mr. Mohamed's conduct to the conclusion on his risk to aviation security.

(3) Were Mr. Mohamed's submissions taken into account?

[43] Mr. Mohamed suggests his submissions were not considered. That is not the case. The Advisory Body and the Minister each specifically referred to considering the submissions. On review, the Decision does not contradict the explanations given by Mr. Mohamed. The Decision notes that in the first incident, he attempted to make a purchase with a fraudulent credit card and then left the premises before police arrived. The Decision does not state that Mr. Mohamed uttered threats, but points out that in the second incident, the altercation with the complainant was clearly serious enough, and the complainant was fearful enough, that the complainant called the police. The third incident is only described as "regarding a stolen laptop", which is accurate. If anything, the Decision tends to accept the thrust of Mr. Mohamed's explanations, which did not actually deny the essence of the three incidents. The Minister simply did not agree with Mr. Mohamed on whether inferences about Mr. Mohamed's character should have been drawn from the incidents in light of his explanations. The Minister is not required to accept that Mr. Mohamed's interpretation of his explanations show he may not be prone or induced to commit an act that may unlawfully interfere with civil aviation.

E. *Conclusion: the Decision was reasonable*

[44] Mr. Mohamed has now lost the only job he has held in his adult life. He believes that he has done nothing deserving of punishment other than a brief instance of community service; a

view, based on the face of the record, that is apparently shared by the authorities responsible for investigating and prosecuting crime. He can object that the Decision is unfair and ask, “does the punishment fit the crime?” While I have sympathy for Mr. Mohamed’s situation, my task is to determine whether the Decision is reasonable, not whether I might have decided differently.

[45] As set out in my analysis, having reviewed the record, I am persuaded that the Decision is reasonable. In addition to being described as “very broad”, the Minister’s discretion has been referred to as “unfettered”, enabling the Minister to consider any facts. The requirement is not that an applicant for a TSC “will” commit an act that “will” interfere with civil aviation but rather that an applicant “may” do so: *Mangat* at paras 53 and 57.

[46] The Minister found that Mr. Mohamed’s involvement in the incidents raised serious concerns about his judgment, trustworthiness and reliability; attributes required to be trusted in airport restricted areas. The outcome was based on a review of the file, including the letter to Mr. Mohamed on September 18, 2015, and his written submissions in reply. Although the reasons are brief, when they are considered in the context of the record, which includes the LERC report, the Advisory Body recommendation and Mr. Mohamed’s submissions, they indicate the grounds upon which the Decision was reached. That Mr. Mohamed’s submissions did not overcome the other factors does not make the Decision unreasonable.

[47] The analysis in the Decision meets the *Dunsmuir* criteria. It balances the length of time since the incidents with their seriousness and the accompanying breach of trust that Mr. Mohamed involved himself in incidents indicating a lack of judgment even though he had been entrusted with a TSC. The Decision allows Mr. Mohamed to understand why his TSC was not renewed.

[48] The application is therefore dismissed. Costs are awarded to the Respondent as a fixed lump sum in the amount of \$750.00 payable by the Applicant.

JUDGMENT

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

Costs are payable by the Applicant to the Respondent in a fixed lump sum amount of \$750.

“E. Susan Elliott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1256-16

STYLE OF CAUSE: OSMAN MOHAMED v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 2, 2017

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DATED: MARCH 10, 2017

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