Federal Court  Cour fédérale

Date: 20180706

Docket: T-1628-17

Citation: 2018 FC 696

Ottawa, Ontario, July 6, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

RODRIGO RAMOS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision [Decision] by the Minister's Delegate, the Acting Director General of Aviation Security [the ADG or Minister's Delegate] to deny the Applicant’s request for leave to re-apply for a Transportation Security Clearance [Security Clearance] under section II.36 of the *Transportation Security Clearance Program*

Policy [*TSCP Policy*]. The Decision is dated October 6, 2017.

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

II. Background

[3] The Applicant came to Canada from the Philippines in 1992. In 2004, the Applicant began working at the Airport as a cleaner for which he was granted a Security Clearance.

[4] In July 2015, the Applicant was involved in multiple incidents of inappropriate touching and sexual assault of an exchange student who was living in the Applicant's home through a homestay program. He was arrested in August 2015. The charge was eventually withdrawn in exchange for the Applicant entering into a Peace Bond.

[5] On October 17, 2016, Transport Canada wrote to the Applicant to inform him that the allegations of sexual assault raised concerns as to his suitability to retain a Security Clearance [Adverse Information Letter]. The Adverse Information Letter invited the Applicant to "provide additional information, outlining the circumstances surrounding the above noted criminal charge and incidents, as well as to provide any other relevant information or explanation, including any extenuating circumstances, within 20 days of the receipt of the letter". The Applicant failed to provide any response to the Adverse Information Letter.

[6] On September 29, 2017, the ADG wrote to the Applicant to communicate that his Security Clearance had been cancelled due to the fact that "information regarding [his]

involvement in recent incidents and withdrawn charge for sexual assault raised serious concerns regarding [his] judgment, trustworthiness and reliability" [Cancellation Letter].

[7] The Applicant has not challenged the decision of September 29, 2017 cancelling his Security Clearance by way of application for judicial review, and confirms the accuracy of the underlying facts on which the decision is based.

[8] Following the cancellation of the Applicant's Security Clearance, his security pass was seized by his employer and he was not permitted to attend work in the restricted access area of the airport.

[9] On October 2, 2017, the Applicant contacted Transport Canada and stated that he had provided a submission in response to the Adverse Information Letter. The Applicant then forwarded a copy of the information, which he alleged was originally submitted on October 25, 2016. The submission he provided was a copy of his Security Clearance Application which contained information which was in front of the decision maker at the time of the Cancellation Decision. Transport Canada confirmed receipt of the Applicant's submissions and informed the Applicant that he had until October 6, 2017, to provide any additional submissions.

[10] On October 4, 2017, the Applicant phoned Transport Canada and confirmed that his email submission constituted the submissions which were sent in response to the Adverse Information Letter. A day later, the Applicant again contacted Transport Canada to ask if there was any additional, specific, information which he needed to provide.

[11] On October 6, 2017, Transport Canada wrote to the Applicant to confirm that he did not meet the standards set out in section II.36 of the *TSCP Policy* [Decision Letter] and that the decision to refuse his Security Clearance would not be reconsidered at that time.

[12] On or about October 10, 2017, the Applicant elected to retain counsel. Following the expiry of the deadline imposed by Transport Canada of October 6, 2017, counsel for the Applicant wrote to Transport Canada and requested a reconsideration of the Cancellation Decision.

[13] His initial Submission Letter on October 13, 2017 was followed by two emails, both on October 16, 2017.Submissions by counsel can be fairly summarized as arguing that Transport Canada retains a residual discretion to reconsider a decision and that such reconsideration should be exercised on the basis of two main arguments:

a) The Applicant's misunderstanding of what was being requested of him by the Adverse Information Letter coupled with the impact on the Applicant constitutes a breach of procedural fairness absent an opportunity to make additional submissions;

b) The nature of the criminal behaviour which forms the basis of the cancellation does not meet the threshold contemplated by the *TSCP Policy* and the decision to cancel his Security Clearance is not reasonable.

[14] On October 17, 2017, the Superintendent of Security Screening Programs responded to counsel's letter and emails:

> Further to our conversation and your emails dated October 16, 2017, and your letter dated October 13, 2017, please refer to the letter dated October 06, 2017, addressed to your client and attached hereto.

[15] At the termination of submissions at the hearing, the Applicant's counsel requested a further amendment to the amended application in order to modify the date of the decision to be judicially reviewed to that of October 17, 2017, being the date of the refusal of the ADG to consider his request for a reconsideration of its Decision. The Court permitted submissions from the parties to be made in writing regarding whether an amendment to the amended application should be granted.

III. Standard of Review

[16] The established standards which apply to judicial review of a transportation security clearance decision have been repeatedly identified by this Court: the decision to cancel a security clearance is an exercise of discretion based on an assessment of the facts and is reviewable on a standard of reasonableness: *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 16.

[17] The same standard of review applies to the ADG's Decision to reconsider pursuant to section II.36(b) of the *TSCP Policy*.

IV. Issues

[18] The Applicant submits that the ADG fettered her discretion to reconsider the cancellation of his Security Clearance by confining any consideration to that arising under section II.36(b) of the *TSCP Policy* by demonstrating that "a change has occurred in the circumstances that led to the refusal or cancellation". He argues that this procedure is confined to accepting a new application and not a "reconsideration" of a former decision.

[19] Additionally, the Applicant argues that by simply returning its Decision Letter of October 6, 2017 in response to his submissions of October 13, 2017, it is clear that the Superintendent of Security Screening Programs did not consider his request for reconsideration at all.

[20] The issues therefore appear to be threefold:

1) Does section II.36(b) of the *TSCP Policy* amount to a reconsideration policy, and if so, was the Applicant denied procedural fairness in the application of the policy?

2) Is there a residual reconsideration requirement whereby the decision-maker would be required to reconsider her decision in light of counsel's submissions of October 13, 2017?

3) If not, should the Applicant be permitted to amend his application to modify the decision under review to be that refusing to consider his counsel's submissions?

V. Law

[21] My colleague Justice Diner has recently summarized the law on reconsideration involving the Human Rights Commission in the matter of *Bossé v Canada (Attorney General)*, 2017 FC 336 at paras 10−12 [*Bossé*] as follows:

> [10] While the Act is silent on the Commission's jurisdiction to reconsider past decisions not to refer a matter to the Tribunal, the Commission, as "master of its own procedure", has the discretion to reconsider decisions: *Kleysen Transport Ltd v Hunter*, 2004 FC 1413 (CanLII) at paras 8 and 13. Weighing against the Commission's ability to reconsider a past decision, is the doctrine of *functus officio*, which favours the finality of decisions and holds that generally tribunals may not reconsider past decisions (*Chandler v Association of Architects* (*Alberta*), 1989 CanLII 41

> (SCC), [1989] 2 SCR 848 at 861-863 [*Chandler*]). Justice Sopinka held in *Chandler* that the *functus officio* doctrine applies to administrative tribunals, where it is somewhat more flexible than in a judicial context.
>
> [11] Justice Mainville, in *Merham* at paras 23-25, after considering Justice Sopinka's ruling in *Chandler* as well as other cases, specifically ruled on the Commission's discretion to reconsider its decisions. He held that this discretion should only be used sparingly and in exceptional circumstances.
>
> [12] More recently, Justice Scott summarized four exceptions that *Chandler* established to the *functus officio* doctrine, which are limited to grounds of (1) new evidence, (2) natural justice, (3) jurisdictional error or (4) neglecting an open issue: *Chopra v Canada (Attorney General)*, 2013 FC 644 (CanLII) at paras 64-65 [*Chopra*]. The Applicant, in this case, has argued on the basis of (A) new evidence, and (B) natural justice.

[22] In addition to these propositions, the Court notes that the Supreme Court in the *Chandler* decision (referred to in *Bossé* above) stated at page 862 that a reopening of administrative proceedings should not normally occur "where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by the enabling legislation."

[23] It also goes without saying that ignorance of the law or unreasonable conduct by an applicant is not a valid ground upon which to base a reconsideration request.

VI. Analysis

(1) Does section II.36(b) of the *TSCP Policy* amount to a reconsideration policy, and if so was the Applicant denied procedural fairness in the application of the policy?

[24] The Court concludes that section II.36(b) of the *TSCP Policy* is a form reconsideration provision, even though expressed as providing an applicant with an opportunity to submit a new application. In reference to a change in circumstances, the provision provides the ground of "new evidence" to revisit the cancellation. Therefore, in accordance with the citation from *Chandler* above, any reconsideration is properly limited to the issue of new evidence.

[25] It must be borne in mind that a reconsideration of a decision involves a two-step process: first, whether the facts are sufficient to require a reconsideration, and second whether the reconsideration should change the decision being reconsidered. Moreover, there are normally conditions attaching to the introduction of new evidence to modify a past decision, namely that the evidence was not known or reasonably available at the time the decision was made.

[26] In exercising her discretion to reconsider, the ADG, as the Minister's Delegate, possesses a broad discretion pursuant to section 4.8 of the *Aeronautics Ac*t, RSC 1985, c A-2. I described this discretion in *Ng v Canada (Attorney General)*, 2017 FC 376 at para 34, as follows:

> [34] […] The context of the statutory language of section 4.8 of the *Aeronautics Act* is expressed about as broadly as it could be without making it a form of unreviewable discretion. It provides that "[t]he Minister may, for the purposes of this Act, grant or refuse to grant a security clearance to any person". It is equally

> significant that the Policy is not statutorily supported by a Regulation. There is no Regulation providing direction as to how the Minister's discretion is to be exercised, or even a Regulation requiring a policy to be adopted for the same purpose. This reflects the policy reasons underlying section 4.8 of the *Aeronautics Act* as described at paragraph 28 of *Sargeant* [*Sargeant v Canada (Attorney General)*, 2016 FC 893]: "aviation safety being an issue of substantial importance and access to restricted areas being a privilege, not a right, the Minister, in exercising his discretion under section 4.8, is entitled to err on the side of public safety which means that in balancing the interests of the individual affected and public safety, the interests of the public take precedence".

[27] Section II.36(b) of the *TSCP Policy* relates to the first step, that of the Applicant getting his foot in the door by providing probative new evidence that would amount to a change in circumstances, such that a re-examination is required of the refusal or cancellation of the security clearance.

[28] There is no hint of new evidence that could constitute a change in circumstances in this matter. The Applicant acknowledges his own failure in the first instance to understand what was being requested despite the clear wording of the Adverse Information Letter. There is no explanation for his failure to respond to the request for information, or even to successfully communicate the information to Transport Canada.

[29] For this reason there is also no basis to claim that he was denied procedural fairness in bringing forth the evidence of new circumstances. The Court agrees with the Respondent’s submissions that they only have minimal requirements of procedural fairness in any event

concerning a decision under section II.36(b) of the Policy.

[30] All of the contextual factors determining the content of procedural fairness described in *Baker v Canada*, [1999] 2 SCR 817 at paras 22−28 generally apply in favour of the Respondent: nature of the decision, nature of the statutory scheme, importance of the decision to the individual affected, legitimate expectations of the person, or choices of procedure made by the agency.

[31] The case law has consistently held that the level of procedural fairness is minimal for an individual making a first application for a Security Clearance, which resembles the situation at bar for reconsideration, requiring only that the applicant be permitted to submit an application in writing and that the decision not be based upon an erroneous finding of fact made in a perverse or capricious manner, without regard for the material before it, or consideration of irrelevant factors: *Motta c Canada (Procureur général)*, [2000] FCJ No 27 at para 13 [Motta] ; *Irani v Canada (Attorney General)*, 2006 FC 816 at paras 21−22; *Pouliot v Canada (Minister of Transport, Infrastructure & Communities)*, 2012 FC 347 at para 9.

[32] While the Cancellation Decision is important to the Applicant, the decision being challenged is not that decision, but the denial of the request to reconsider it. The Applicant can have no expectation that he will be granted a Security Clearance, even if permitted to re-apply.

[33] The only possible issue argued was that of procedural fairness, which is not supported by the facts. As noted, the failure of the Applicant to make relevant submissions is acknowledged to

rest entirely on his own shoulders. Instead of responding to this unambiguous request, he instead allegedly filed a new application, although it was never received by Transport Canada officials.

[34] With respect to the events in the fall of 2017, upon learning that his Security Clearance had been withdrawn on September 30, 2017, the Applicant engaged in a series of telephone conversations and email exchanges with Transport Canada staff.

[35] He failed to respond to any of the requests for relevant information and explanations for his behaviour, instead providing only the copy of the new application that he indicated he had attempted to provide in responding to the Adverse Information Letter of October 17, 2016.

[36] Despite not responding to the request for information, on October 3, 2017, Transport Canada agreed to permit the Applicant to provide submissions by October 6, 2017 that would be "sufficient to demonstrate a material change in circumstances that may warrant a re-consideration of the decision to cancel your Security Clearance".

[37] This information was requested in order to determine whether the Applicant was eligible to submit a new application to demonstrate that "a change has occurred in the circumstances that led to the refusal or cancellation" of his security clearance in accordance with section II.36 of the *TSCP Policy*.

[38] Transport Canada proceeded to deny the Applicant's reconsideration request because he had only provided a copy of his application that he had attempted to send on October 25, 2016,

which was already on his file and had been considered during the review process.

[39] The Applicant complains that this Decision was rendered on October 6, 2017, and therefore prior to any submissions that might have been received on the same date, which had been fixed as the deadline for further submissions. However, the Applicant failed to file submissions during the intervening period before being in receipt of the Decision of October 6, 2017 the following week, indicative of his intention not to respond within the time period provided by Transport Canada.

[40] The Court concludes that there is no basis to consider that the Decision of October 6, 2017 was unreasonable.

(2) Is there a residual reconsideration requirement whereby the ADG would be required to reconsider her Decision in light of counsel's submissions of October 13, 2017?

[41] The Applicant's counsel made additional submissions after the refusal of the ADG to reconsider the matter on October 6, 2017. Counsel argues that the Applicant provided new information that constituted "a change […] in the circumstances that led to the refusal or cancellation". The alleged new evidence was as follows: the Applicant was remorseful; the prejudice to him severe in light of his years of service; the decision-maker should consider that the criminal court found his offence as an aberration; and the interests of justice weigh in his favour regarding the unfortunate circumstances in failing to respond to the Adverse Information Letter. Together this information of new circumstances should be viewed as sufficient to require a reconsideration of the decision removing Security Clearance. Instead, the ADG's response of

simply providing a copy of the October 6, 2017 amounted to a fettering of her discretion to reconsider, such that the Decision should be set aside.

[42] The Court also agrees with the Respondent that the alleged new evidence and related submissions raised in counsel's letter of October 13, 2017 were not before the ADG when she rendered her Decision on October 6, 2017. Not being part of the record, counsel's submissions cannot therefore be considered by the Court in determining the reasonableness of the ADG's refusal to reconsider her earlier Decision: *Gitxsan Treaty Society v Hospital Employees' Union*, [2000] 1 FC 135 at para 13.

[43] At the hearing, the Applicant argued that the ADG's response of October 17, 2017 was just an attempt to 'recycle' the October 6, 2017 Decision, but the submission does not respond to the fact that his letter of October 13, 2017 cannot form part of the record relating to the October 6, 2017 Decision and is not relevant to assess the reasonableness of that Decision.

[44] Had the Applicant concluded that the return of his letter of October 13, 2017 on October 16, 2017 was a decision on that later date refusing to reconsider the September 29 decision, he could have designated it as the underlying decision upon which his application was based. The letter of October 13, 2017 would then have been relevant as forming part of the record of the decision on October 6, 2017.

(3) Should the Applicant be permitted to amend his application to modify the decision under review to be that refusing to consider his counsel's submissions?

[45] After indicating to the Applicant's counsel that the Court could only consider the Decision from the perspective of the materials before the decision-maker on October 6, 2017, it indicated that it would entertain submissions in writing allowing the Applicant to amend his application to replace the decision to be reconsidered of October 6, 2017, with that of October 17, 2017 in order to allow counsel's submissions to be considered.

[46] The only reason the Court permitted submissions on whether to allow such an extraordinary 11th hour amendment was because, although urging the Court to refuse to consider the Applicant's "hypothetical argument", the Respondent nevertheless advanced fulsome submissions to counter the substance of the Applicant's arguments that the post refusal submissions did not warrant a reconsideration of the Decision terminating his Security Clearance.

[47] Ultimately, the Court rejects the late amendment, mostly because it agrees that there is no reasonable prospect of success based on counsel's reconsideration submissions. This is in addition to the Respondent's persuasive supporting submissions that to allow such an amendment would interfere with the process of a summary procedure for efficient and expeditious review of decisions, as well as ignoring the evidence that this would be the second amendment to date of the Decision in the Application.

[48] Based on the Court's discussion above, the *TSCP Policy* concerning new circumstances

for reconsideration does not extend to evidence that was known to the Applicant or reasonably available at the time of the decision. Nor does the policy make allowance for ignorance of the law, which includes reasonably recognizing the need for the assistance of lawyers in complex matters, unless evidence is provided that the individual was suffering a disability or condition that somehow affected the person's judgment. Counsel's submissions acknowledge that the actions of the Applicant relate to his "misunderstanding" of the unambiguous Adverse Information Letter.

[49] In any event, the Applicant is unable to bring himself with any of the four exceptions described in *Chandler*. No new evidence has been brought forward by his counsel. The evidence on the Applicant's criminal charges being withdrawn in lieu of a peace bond was known to the ADG. Similarly there is no issue of jurisdictional error or neglecting an open issue. The Applicant's argument that his misunderstanding of the situation, coupled with the harsh impact that the cancellation of his Security Clearance has on him and his family are not relevant factors supporting a reconsideration of the September 29, 2017 decision removing his Security Clearance.

[50] Otherwise, his counsel submits that the nature of criminal behaviour related to a sexual assault charge, which was not prosecuted, does not meet the threshold contemplated by the *TSCP* Policy. The Court disagrees that this is a sustainable submission. The ADG based her Decision on relevant factors concerning the Applicant's conduct and judgment from the circumstances giving rise to the charges. These were not addressed by counsel.

[51] Counsel's submissions relate to the exercise of the ADG's discretion in reweighing of evidence. Moreover, they could have been made in 2017, along with the provision of any additional information relating to the criminal proceedings and the counselling report dated August 9, 2016, which were not provided by the Applicant. The evidence and submissions are either irrelevant or insufficient to demonstrate that the ADG's Decision to refuse to reconsider was unreasonable.

VII. Conclusion

[52] The application is therefore dismissed. This is not an appropriate case in which costs should be awarded.

JUDGMENT in T-1628-17

THIS COURT'S JUDGMENT is that application is dismissed and no costs are awarded to either party.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1628-17
STYLE OF CAUSE:	RODRIGO RAMOS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO
DATE OF HEARING:	MAY 24, 2018
JUDGMENT AND REASONS:	ANNIS J.
DATED:	JULY 6, 2018

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