

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160208

Docket: A-574-14

Citation: 2016 FCA 38

**CORAM: TRUDEL J.A.
BOIVIN J.A.
DE MONTIGNY J.A.**

BETWEEN:

PIERRE-LOUGENS HENRI

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montréal, Quebec, January 12, 2016.

Judgment delivered at Ottawa, Ontario, on February 8, 2016.

REASONS FOR JUDGMENT BY:

TRUDEL J.A.

CONCURRED IN BY:

**BOIVIN J.A.
DE MONTIGNY J.A.**

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] Pierre-Lougens Henri is a licensed aeronautics technician and mechanic. At the time of the incidents in question, he held this position with Air Transat airlines at Pierre Elliott Trudeau International Airport in Montréal. This position requires access to restricted areas that is available only to employees who have security clearance that has been granted by the Minister of

Transport, Infrastructure and Communities of Canada (The Minister) under the provisions of the *Aeronautics Act*, R.S.C. 1985, c. A-2 (Act), its regulations and policies enacted pursuant thereto.

[2] On July 17, 2013, the Minister revoked Mr. Henri's security clearance (decision of the Minister's Delegate, Erin O'Gorman, Appeal Book, Vol. 2, at page 446). Mr. Henri is appealing the Federal Court decision of LeBlanc J., dated September 9, 2014 (2014 CF 1141) dismissing his application for judicial review of the Minister's decision.

[3] I would dismiss this appeal. After a thorough review of the record, I find that Mr. Henri's right to procedural fairness was respected and the Minister's decision was reasonable.

Furthermore, I am of the view that the Federal Court correctly disregarded the new evidence in the affidavit supporting Mr. Henri's application for judicial review.

I. Statutory scheme and its applicable enforcement policy

[4] The granting or cancellation of security clearance is governed by the Act and its Regulations:

| | |
|--|---|
| <p><i>Aeronautics Act, R.S.C. 1985, c. A-2</i></p> <p>3(1) In this Act,</p> <p>...</p> <p>Security clearance</p> <p>means a security clearance granted under section 4.8 to a person who is considered to be fit from a</p> | <p><i>Loi sur l'aéronautique, L.R.C. 1985, ch. A-2</i></p> <p>3(1) Les définitions qui suivent s'appliquent à la présente loi</p> <p>[...]</p> <p>Habilitation de sécurité</p> <p>habilitation accordée au titre de l'article 4.8 à toute personne jugée acceptable sur le plan de la sûreté des</p> |
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|---|---|
| transportation security perspective; | transports. |
| ... | [...] |
| 4.71(1) The Governor in Council may make regulations respecting aviation security. | 4.71(1) Le gouverneur en conseil peut, par règlement, régir la sûreté aérienne. |
| (2) Without limiting the generality of subsection (1), regulations may be made under that subsection | (2) Les règlements visés au paragraphe (1) peuvent notamment : |
| ... | [...] |
| (b) respecting restricted areas in aircraft or at aerodromes or other aviation facilities, including regulations respecting their identification, access to them and their administration or management; | b) régir les zones réglementées des aéronefs, aérodromes ou autres installations aéronautiques, y compris la délimitation et la gestion de ces zones, ainsi que l'accès à celles-ci; |
| ... | [...] |
| (g) requiring any person or any class of persons to have a security clearance as a condition to conducting any activity specified in the regulations or to being | g) exiger d'une personne ou catégorie de personnes une habilitation de sécurité comme condition pour exercer les activités précisées ou pour être : |
| (i) the holder of a Canadian aviation document, | (i) soit titulaire d'un document d'aviation canadien, |
| (ii) a crew member, or | (ii) soit membre d'équipage d'un aéronef |
| (iii) the holder of a restricted area pass, within the meaning of section 1 of the Canadian Aviation Security Regulations; | (iii) soit titulaire d'un laissez-passer de zone réglementée, au sens de l'article 1 du Règlement canadien sur la sûreté aérienne; |
| ... | [...] |
| 4.8 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. | 4.8 Le ministre peut, pour l'application de la présente loi, accorder, refuser, suspendre ou annuler une habilitation de sécurité |

[5] It is not necessary in this case to refer specifically to the wording of the regulations adopted under the Act. It suffices to know that the *Canadian Aviation Security Regulations, 2012*, SOR/2011-318, include provisions requiring persons with access to restricted areas of airports to have valid security clearance, such as the kind Mr. Henri had.

[6] The Minister exercises discretion to grant or refuse to grant a security clearance to any person or suspend or cancel a security clearance pursuant to a policy entitled the *Transportation Security Clearance Program* (Available at the following website: <http://tc.gc.ca/eng/aviationsecurity/tscp-113.htm>). The purpose of the program is to prevent unlawful acts of interference with civil aviation by granting security clearances only to persons who meet the standards set out in that program. More specifically, and as set out in section 1.4 of the Security Clearance Program, the objective is to prevent the uncontrolled entry into a restricted area of an airport by any individual, among others, who “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; or assist or abet any person to commit an act that may unlawfully interfere with civil aviation”.

[7] This program provides that an Advisory Body “shall review [the] applicant’s information and make recommendations to the Minister concerning the granting, refusal, cancellation or suspension of clearances” (section 1.8 of the policy) – thereby allowing the Minister to exercise his or her discretion under section 4.8 of the Act.

II. Relevant facts

[8] Mr. Henri has held a security clearance for the purposes of his employment since the late 1990s. Holding a security clearance is a necessary condition for Mr. Henri to continue in his employment. It was consistently renewed, until concerns regarding his file were raised following a Royal Canadian Mounted Police (RCMP) records check during the renewal process in 2012. This triggered a further RCMP investigation that was completed in 2013.

[9] The RCMP reported to Transport Canada on April 4, 2013, that an individual (Subject A) was arrested in possession of 2.4 kg of cocaine following arrival on a flight from Haiti to Montréal. Two electronic devices containing emails were seized. On one of these devices, emails originating from Mr. Henri and transmitted through another individual (Subject C) were found containing photographs of airport employees. The RCMP determined that Mr. Henri had spoken 63 times with Subject C by telephone, and that Mr. Henri had been seen several times at Subject C's home.

[10] The RCMP also uncovered that Mr. Henri had received undocumented cash transactions amounting to \$25,000 and that he had acquired property that he could not realistically have afforded on the basis of his salary as an aeronautics mechanic. Further, the RCMP identified two individuals as associates of Mr. Henri, both of whom were members of street gangs involved in drug smuggling.

[11] Criminal charges against Mr. Henri were not laid as the RCMP did not believe it had sufficient evidence to prove beyond a reasonable doubt that he was importing narcotics (Appeal Book, Vol. 1 at page 320).

[12] On April 12, 2013, Mr. Henri was informed of this evidence by letter, and informed that it could provide a basis for the Advisory Body to recommend that the Minister revoke his security clearance. The letter referred to the program, and included an Internet address at which it could be consulted. Mr. Henri was invited to provide information to explain his situation, and referred to a contact person with whom he could discuss the issues raised by the letter.

[13] After receiving Mr. Henri's representations, the Advisory Body recommended to the Minister to cancel his security clearance on the basis that "on a balance of probabilities, [Mr. Henri] 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" (Transportation Security Clearance Advisory Body, Record of Recommendation, Appeal Book, Vol. 3 at page 648). The Minister followed this recommendation and cancelled Mr. Henri's security clearance for substantially the reasons provided by the Advisory Body.

[14] The Federal Court reviewed the Minister's decision with respect to procedural fairness and on its merits, finding both that the decision met the requirements for procedural fairness in the circumstances, and that on its merits the decision was reasonable. On a preliminary issue, the Federal Court rejected additional evidence Mr. Henri sought to introduce by affidavit.

III. Issues

[15] This appeal presents three issues:

1. What is the level of procedural fairness required when revoking a security clearance under the *Aeronautics Act*, and did the Minister satisfy his duty of procedural fairness in this case?
2. Did the Federal Court err in refusing to accept new affidavit evidence from Mr. Henri?
3. On its merits, was the Minister's decision to revoke Mr. Henri's security clearance reasonable?

IV. Analysis

A. *Standard of Review*

[16] The parties agree that there are two standards of review at play in this case and that they were correctly identified by the Federal Court: correctness for the question of procedural fairness, and reasonableness on the merits of the Minister's decision. I agree that these are the correct standards (See *Mission Institution v. Khela*, 2014 SCC 24 at paragraph 79, [2014] 1 S.C.R. 502; *Clue v. Canada (Attorney General)*, 2011 FC 323 at paragraph 14, [2011] F.C.J. No. 401).

[17] As a result, I turn now to whether the Federal Court erred in its application of these standards and its conclusions that the Minister met his obligations of procedural fairness and that his decision to cancel Mr. Henri's security clearance was reasonable.

B. *Procedural Fairness*

[18] The level and the content of the duty of procedural fairness are variable and are determined according to the context of each case. Its purpose is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 21 and 22, 174 D.L.R. (4th) 193) [*Baker*].

[19] In *Baker*, at paragraphs 23 to 27, the Supreme Court of Canada set out five factors to be considered in determining the duty of procedural fairness owed in a particular situation:

- 1) the nature of the decision being made and the process followed in making it;
- 2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- 3) the importance of the decision to the individual or individuals affected;
- 4) the legitimate expectations of the person challenging the decision; and
- 5) respect for the agency's choice of procedure.

[20] Mr. Henri contends that the Federal Court misapplied these factors. In particular, he claims that LeBlanc J. gave insufficient weight to the importance of the decision to him, given that his employment depends on maintaining his security clearance, that LeBlanc J. gave excess importance to the discretionary nature of the decision, and that he inappropriately characterized

the Minister's discretion as requiring only a possibility rather than the probability that an individual would commit an illegal act.

[21] Mr. Henri urges this Court to conclude that the Federal Court therefore erred in its conclusion that the level of procedural justice required is minimal. Specifically, the Federal Court found that procedural fairness in the circumstances of revoking a security clearance under the Act amounts to [TRANSLATION] "the right to know the alleged facts and the right to make representations about those facts" (Federal Court's reasons at paragraph 27).

[22] Despite his counsel's able arguments, Mr. Henri has not convinced me that the Federal Court made any error warranting this Court's intervention in its determination of the level and content of procedural fairness to which he was entitled.

[23] It must certainly be recognized that, where a person's employment is dependent on maintaining a security clearance, the decision is of enormous personal importance. This, however, is just one of the factors to be considered.

[24] The statutory scheme provides the Minister with a great deal of discretion. Section 4.8 simply provides that he "...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". The only further legislative guidance is in the definition of "security clearance", meaning "a security clearance granted under section 4.8 to a person who is considered to be fit from a transportation security perspective."

[25] Parliament entrusted the Minister with the duty of granting security clearances to individuals who do not pose a security risk, and to refuse, suspend, or revoke in the cases of individuals who are not fit from a transportation security perspective. The nature of the decision and the statutory scheme militate towards reduced levels of procedural fairness.

[26] Although neither the Act nor the regulations require it, the Minister has chosen to administer security clearances with the assistance of the Transportation Security Clearance Advisory Body, in accordance with the Transportation Security Clearance Program Policy. This Policy sets out the process to be followed in the course of reviewing an individual's security clearance, ensuring greater procedural protection for individuals affected. This choice of procedure suggests heightened requirements of procedural fairness, and might in some circumstances give rise to legitimate expectations that the procedures be followed. In my view, the procedures were followed in Mr. Henri's case.

[27] Although I frame the analysis somewhat differently, I find that the level of procedural fairness set out by the Federal Court is reflective of these factors in the context of this case. The decision is of great importance both to the individuals affected and to the public interest in safety and security. Parliament has entrusted the decision not to a court or a quasi-judicial tribunal but to the Minister's discretion. The Minister has elected to exercise this discretion with the assistance of an Advisory Body under a policy that ensures individuals are informed of claims made against them and that they have the opportunity to respond before a recommendation to the Minister, and then the Minister's decision, are rendered.

[28] Specifically, the Federal Court's determination that procedural fairness requires that an individual who may have his security clearance under the Act revoked is informed of the facts alleged and is afforded with the opportunity to respond, is consistent with the *Baker* factors and with the goal of ensuring a fair and open procedure.

[29] I note that this approach is also consistent with the comments of Stratas J.A., for this Court in *Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, a case with similar factual circumstances under a different regulatory regime, concerning the revocation of a security clearance required to access restricted areas in the Port of Vancouver: “At all stages of the process, the Minister provided Mr. Farwaha an opportunity to make his case. Although the Minister was subject to an obligation to preserve the confidentiality of some aspects of the sensitive materials in his hands, he gave Mr. Farwaha sufficient access to information to know the case against him and to make a meaningful response to it. Overall, the process was fair” (at paragraph 118).

[30] Here, a thorough examination of the record convinces me that Mr. Henri knew the case against him. He was well aware of the Minister's concerns regarding his relationship with his ex-brother-in-law and Subject A, even if only through his ex-brother-in-law. As early as November 2011, the RCMP carried out a voluntary audio and forensic interview with Mr. Henri with respect to his association with two Subjects, including his ex-brother-in-law. Both Subjects were members of street gangs and known to the police.

[31] Moreover, the request for information sent to Mr. Henri in April 2013 clearly stated the Minister's concerns and that the evidence that could end-up grounding a decision to revoke his security clearance. This letter is aptly summarized at paragraphs 11-13 of the Federal Court's reasons:

[11] On April 12, 2013, the Director's office, based on this report, informed Mr. Henri by letter that his security clearance was under review because of his association with individuals involved in criminal activities. Specifically, the said letter linked Mr. Henri to two individuals who were members of a street gang in Montréal in the following circumstances:

- a. The first (Subject A) was arrested in January 2011 at Pierre Elliott Trudeau airport, travelling from Haiti, in possession of cocaine and an electronic device containing photos of two individuals working in baggage handling for Air Canada at the Port-au-Prince airport, photos attached to an email from Mr. Henri;
- b. Though he initially denied knowing him during a voluntary forensic interview with the RCMP held in November 2011, Mr. Henri nevertheless identified Subject A from a photo presented by the investigator;
- c. The second (Subject C) is the one through whom Mr. Henri's email containing the photos of the two Port-au-Prince airport employees passed to Subject A; an analysis of telephone records that was conducted on the cellular telephone numbers that Mr. Henri was using at the time indicates that Mr. Henri allegedly contacted Subject C approximately 63 times, including 38 times during the period, in 2011, in which Subject C was incarcerated;
- d. Mr. Henri was observed a number of times at the residence of Subject C and was in constant telephone communication with his residence.

[12] The letter of April 12, 2013, also stated:

- a. That following the seizure of the electronic device in Subject A's possession at the time of his arrest, the RCMP had initiated an investigation to attempt to analyze the degree of internal corruption at Pierre Elliott Trudeau airport;

- b. That Mr. Henri was the primary target of that investigation, since the RCMP had reasonable grounds to believe that he had been—or was going to be—involved in the commission of offences related to the importation of drugs and the possession of drugs for the purposes of trafficking;
- c. That checks of the land register and bank records seemed to substantiate Mr. Henri's involvement in the commission of this type of offence, since they established that Mr. Henri was the owner of three buildings with a combined value of \$869,400 and that relatively large sums had passed through his bank accounts, thus painting a picture of assets and a financial situation that, in the RCMP's opinion, was incompatible with the salary of a mechanic employed by Air Transat; and
- d. That despite the presence of incriminating evidence, the RCMP's investigation had been closed without any charges being laid because it was impossible to determine beyond a reasonable doubt Mr. Henri's involvement in the importation of narcotics.

[13] Finally, the letter of April 12, 2013, informed Mr. Henri of the existence of the Security Clearance Program, as well as the existence and mandate of the Advisory Body and the grounds upon which it could base its recommendation to the Minister to grant, refuse to grant or cancel a security clearance. Said letter also contained, at the very end, the following notice:

[TRANSLATION]

Transport Canada encourages you to provide additional information describing the circumstances surrounding the aforementioned information and associations, and to provide additional relevant information or an explanation, including any extenuating circumstances, within 20 days of receiving this letter. Any information that you provide us will be considered when making the decision regarding your security clearance. This information may be submitted by mail to the attention of Transport Canada (ABPB), (...), or by facsimile to (...), or by email to the following address: (..).

If you wish to discuss these issues further, please contact Pauline Mahon at (...).

[32] After receiving two extensions, Mr. Henri provided a written response by means of a letter from his lawyer on June 20, 2013 (Appeal Book, Vol. 1 at page 72). The Advisory Board indicated in its record of discussion that, before recommending revocation, it considered Mr. Henri's written statement but found it "did not provide sufficient information to dispel concerns" when weighed against the other evidence (Appeal Book, Vol. 3 at page 650). The Minister's decision reflects a similar weighing of the evidence.

[33] There is no procedural defect here. Mr. Henri was presented with the evidence against him, and he was invited both to make inquiries and to respond. He was provided with sufficient time to provide his response, including extensions of the initially allotted time, and his response was considered by the Advisory Board and by the Minister.

[34] Mr. Henri opines that in his case, this was not enough. If the Minister found the information insufficient, Mr. Henri should have been called in for an interview in order to supplement the information contained in the letter sent by his lawyer. He should have been given the opportunity to better explain his relationship with his ex-brother-in-law *viva voce*.

[35] I disagree with this approach. Neither the Minister nor the Advisory Board was under the obligation to hold an interview with Mr. Henri because of the impact of a negative decision on his livelihood. Mr. Henri knew the importance of the decision for him and had the responsibility to defend his case when asked. Procedural fairness demands only that persons in his situation are provided with a meaningful opportunity to respond to the evidence against them, and for that response to be considered. This is exactly the treatment Mr. Henri received.

C. *The new affidavit evidence*

[36] This brings me to the new affidavit evidence.

[37] The Federal Court rejected Mr. Henri's new affidavit evidence reflecting facts that were not before the Minister when the original decision was made, because judicial review of administrative decisions are to proceed on the basis of the information that was before the decision-maker, unless it falls into one of two exceptions. The Federal Court stated that new evidence is admissible only if it relates to procedural fairness or to the decision-maker's jurisdiction (Federal Court's reasons at paragraph 22).

[38] At the hearing of this appeal, Mr. Henri argued that the evidence he sought to introduce provided useful and relevant background information and that the interests of justice supersede any procedural bar to the affidavit. He also suggested for the first time that it may relate to the procedural fairness of the Minister's decision.

[39] It is well established that judicial review on the merits is to proceed on the basis of the evidence that was before the original decision-maker (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraph 19, [2012] F.C.J. No. 93).

[40] Although affidavit evidence to present background information that assists the Court may, under some circumstances, be admissible and LeBlanc J. neglected to specifically

acknowledge that exception to the rule, this Court has expressed caution that such evidence must not go any further than background, and must not be relevant to the merits of the matter (*ibidem* at paragraph 20). The Federal Court found that the affidavit Mr. Henri proposed to submit was relevant to the merits of the decision (Federal Court's reasons at paragraph 22). Mr. Henri provides no compelling reason to disturb this assessment of the affidavit.

[41] The general rationale prohibiting introduction of new evidence on the merits continues to hold in this case. Consideration of facts that were not before the decision-maker would turn this Court's attention away from the decision under review and towards a *de novo* consideration of the merits. That is never the role of a judicial review, and would be entirely incoherent with review on a standard of reasonableness. The Federal Court was correct in excluding Mr. Henri's new evidence.

[42] In any event, I have read this affidavit and it does not add anything significant to the information already given by Mr. Henri to the Minister about his relationship with his ex-brother-in-law, nor to the question of procedural fairness Mr. Henri raised in this matter.

D. *The merit of the Minister's decision*

[43] Finally, I turn to the reasonableness of the decision on its merits: Mr. Henri's submissions on this issue were presented as subsidiary arguments.

[44] Mr. Henri alleges that the Federal Court "used too arbitrary, deferential and permissive a test for the exercise of discretion by the Minister on matters of security" (appellant's

Memorandum of Fact and Law at paragraph 31). According to the appellant, it is unreasonable to cancel a security clearance required for employment “on mere suspicion” (*ibidem* at paragraph 34).

[45] Mr. Henri relies on *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350. I find this case to be of little assistance: neither the legal issues nor the factual situation before the Supreme Court resemble those at issue in this matter.

[46] Mr. Henri is not challenging the constitutional validity of the legislative regime enabling the Minister to exercise his discretion to refuse to renew a security clearance when, in his opinion and based on the “probabilities” at issue, a person may be prone or induced to participate in an act of unlawful interference with civil aviation. He is instead challenging the reasonableness of the Minister’s decision in his case, arguing that a suspicion was not a reasonable basis for the conclusion the Minister reached. According to the appellant, the test applicable to the review of the Minister’s decision cannot be limited to a mere suspicion: the Minister should have asked himself whether the relationship between the appellant and his former brother-in-law “rendered the commission of a crime likely”.

[47] I take this argument to mean that Mr. Henri would be entitled to a review of the Minister’s decision on the basis of an intermediary standard of reasonableness falling between the balance of probabilities and proof beyond a reasonable doubt. In other words, recalling the analogy drawn by the appellant during the hearing to war crimes and crimes against humanity, proof of an unlawful act is not necessary, but a mere suspicion is not sufficient.

[48] I cannot accept the appellant's arguments. It is settled law that in matters reviewable on a standard of reasonableness, a decision will be upheld if it is justified, transparent and intelligible and falls within a range of reasonable outcomes (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 S.C.R. 190).

[49] In this case, the Minister had before him, among other things, the results of an RCMP investigation, the Advisory Committee's recommendation and the appellant's written submissions. Bearing in mind that the facts were reviewed in light of the possibility of unlawful interference with civil aviation, Mr. Henri has not persuaded me to vary the Federal Court's finding. The Minister's decision demonstrates that he considered the evidence before him and that the decision is reasonably supported by that evidence.

E. *Proposed disposition*

[50] As a result, I would dismiss the appeal with costs.

“Johanne Trudel”

J.A.

“I agree.

Richard Boivin J.A.”

“I agree.

Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DE MONTIGNY J.A.

DATED: FEBRUARY 8, 2016

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