

Federal Court



Cour fédérale

**Date: 20160204**

**Docket: T-1273-15**

**Citation: 2016 FC 138**

**Vancouver, British Columbia, February 4, 2016**

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

**BETWEEN:**

**DIEP HO THI DOAN**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant, Diep Ho Thi Doan, seeks judicial review under s 18.1 of the *Federal Courts Act*, R.S.C., 1985 c. F-7, of the decision of a delegate of the Minister of Transport (Transport Canada) dated June 29, 2015, refusing the Applicant a Transportation Security Clearance (TSC) at the Vancouver International Airport pursuant to s 4.8 of the *Aeronautics Act*, R.S.C., 1985, c. A-2. For the reasons that follow, the application is dismissed.

II. Background

[2] Ms. Doan has been employed as a passenger service agent at the Vancouver International Airport since February 2014. When she began the job, she was issued a temporary security pass so that she could perform her duties within the restricted areas of the airport. She applied to Transport Canada for a TSC.

[3] On August 20, 2014, Transport Canada received a Law Enforcement Record Check Report (LERC Report) from the Royal Canadian Mounted Police (RCMP) containing adverse information about the Applicant. While the report noted that the Applicant had no known Canadian criminal convictions, she had come into contact with members of the Vancouver Police Department on several occasions.

[4] The first contact occurred in July 2002 when the Applicant was arrested with the other occupants of a residence in which a marijuana grow operation was being conducted. Although she was released without charges, two of the other occupants were charged and convicted of possession of a controlled substance for the purpose of trafficking and production of a controlled substance.

[5] In July 2003, Vancouver police entered a restaurant which the Applicant was managing during the owner's absence. Upon entry, 12 persons were observed to be engaged in illegal gambling. The premises had been the location of several shootings and arrests in previous years. The Applicant received a warning but was not charged on this occasion.

[6] The Applicant was stopped for speeding in October 2004. At the time, she was in the company of a known drug trafficker and associate of an organized crime group. Her license was suspended under the provincial highway traffic legislation.

[7] On September 11, 2014, the Applicant received a letter from Transport Canada advising of the receipt of adverse information regarding her suitability for security clearance. It informed Ms. Doan that her application would be reviewed because of this information. The letter outlined the information in the same detail Transport Canada received from the RCMP but without references to the statutory provisions. The letter encouraged the Applicant “to provide additional information, outlining the circumstances surrounding the above-noted incidents and associations as well as to provide any other relevant information or explanation, including any extenuating circumstances”. The letter provided her with information about the Transportation Security Clearance Program (TSCP) and gave her contact information, which included a direct telephone number to a Transport Canada representative.

[8] Five months later, on February 16, 2015, the Applicant emailed Transport Canada. She wrote that the incidents occurred more than 12 years ago, and stated that “I really can’t remember much”. Ms. Doan noted that she had confirmed that she had no criminal record in 2010 and that she had inquired but was unable to obtain the record of her suspension in 2004. The Applicant asked for another chance to prove herself.

[9] Transport Canada replied on the same date confirming receipt of the Applicant’s submission. She was again encouraged to “provide any and all relevant information” and to

carefully review the letter and the TSCP policies found on the Transport Canada website. They also informed the Applicant that she could provide written character references.

[10] On March 3, 2015, the Transportation Security Clearance Advisory Body reviewed the Applicant's file and recommended that the security clearance application be refused based on the information contained in the LERC Report. The Advisory Body noted that the Applicant's submissions did not provide sufficient information to dispel their belief, on a balance of probabilities, that she 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.

[11] On June 25, 2015, the Director General of Aviation Security (the Minister's Delegate) on behalf of the Minister of Transport, concurred with the Advisory Body's recommendation and refused Ms. Doan's application for a TSC. A letter informing the Applicant of this decision was sent to her on June 29, 2015. The following day she was informed that her employment would be terminated as she could not access the secure areas of the airport. Since that time, Ms. Doan has been on unpaid leave pending the outcome of this matter.

[12] Ms. Doan is a single mother with a 7-year-old son and a second child born in November 2015.

### III. Decision under Review

[13] The Record of Decision and the notice provided to Ms. Doan stipulate that the Decision made by the Minister's delegate was based on a review of the Applicant's file, the information

outlined in Transport Canada's letter to Ms. Doan dated September 11, 2014, the Applicant's written submissions, the recommendation of the Transportation Security Clearance Advisory Body, and the TSCP Policy.

[14] The Minister's delegate provided the following explanation for the decision:

The information regarding your involvement in, or very close association to an individual involved in a grow-op at your residence, your involvement with illegal gambling and your association to Asian Based Criminals or the Independent Soldiers raised concerns regarding your judgement, trustworthiness and reliability. I note that in July 2002, a three (3) room grow-op was found in the basement of your residence, where a significant amount of marijuana, 12.74 kgs, was seized. The drugs seized amounted to a street value of \$520,000. I also noted that in July 2003, inspectors from the Vancouver Police Department found you managing a restaurant where 12 people were involved with illegal gambling, and where several shootings and arrests had taken place over the years. I further noted in October 2001 [*sic*], you were found in a car with a passenger who is a known drug trafficker and who is an associate to the Independent Soldiers. After reviewing all of the information on file, I have reason to believe, on a balance of probabilities, that you 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 considered the statement provided by you; however, the information presented was not sufficient to address my concerns. For these reasons, on behalf of the Minister of Transport, I have refused your security clearance.

#### IV. Issues

[15] The sole issue in this application is whether Transport Canada breached the Applicant's right to procedural fairness. The parties agree, and I accept that the standard of review for this issue in the context of transportation security clearances is correctness: *Weekes v Canada (Attorney General)*, 2015 FC 853 at para 9 [*Weekes*]; *Meyler v Canada (Attorney General)*, 2015 FC 357 at para 26 [*Meyler*]; *Peles v Canada (Attorney General)*, 2013 FC 294, at para 9.

V. Arguments and Analysis

[16] The Applicant argues that because she was already employed and using a temporary pass she was entitled to a higher degree of fairness than a mere job applicant. In support of this proposition she relies on *Salmon v Canada (Attorney General)*, 2014 FC 1098, in which Madam Justice Kane stated the following at paragraph 45:

The parties agree that the scope or extent of the duty of procedural fairness varies and depends on the context and that the duty owed in the context of revoking an existing security clearance is higher than in the context of refusing an application for security clearance. Although it may be higher than the bare minimum, I agree with the respondent that the duty owed in the circumstances is still not high.

[17] The parties have agreed that the duty of procedural fairness in this context is more than minimal but does not require a high level of procedural safeguards. They are limited to the right to know the facts alleged against the applicant and the right to make representations about those facts: *Salmon*, above, at para 46.

[18] It is not clear to me, however, that the duty is any higher when the individual concerned has merely been given a temporary security pass while an application to Transport Canada for clearance is pending. The jurisprudence which recognizes a slightly higher duty of fairness in the context of revocation of an existing clearance appears to deal with individuals who have held that status for some time.

[19] The Applicant argues that she was denied a meaningful opportunity to address directly the allegations against her set out in the letter dated September 11, 2014. Her argument is that

because she made it clear that she could not recall the details of the incidents outlined in the letter, Transport Canada was obligated to provide Ms. Doan with further information about the dates, times, locations, and nature of criminal activity. Without this additional information, the Applicant asserts that she was unaware of the case she had to meet.

[20] To support this position the Applicant draws an analogy to the facts in *Meyler* (above). In that case, Ms. Meyler was denied a TSC because she was implicated in an ongoing RCMP investigation. For this reason, and because Ms. Meyler had been identified by a police informant, very little information was disclosed by Transport Canada or the RCMP. On those facts, Justice Rennie found that Ms. Meyler was unable to respond to the case against her as she knew neither the time, date, nor the precise activity that gave rise to the revocation.

[21] In my view, this case is distinguishable from *Meyler*. The letter to Ms. Doan from Transport Canada describes the events in question with sufficient detail to alert any reasonable person to the specific incidents and associations of concern. Both “subjects” with whom Ms. Doan had associated were tied to specific incidents and law enforcement concerns. Moreover, in *Meyler*, the applicant was unaware that she was the target of a police investigation. In this case, Ms. Doan was arrested, warned or sanctioned by the police after each event listed in the letter.

[22] The Applicant had every opportunity to deny or explain why the allegations contained in the letter should not be considered a threat to aviation security. This was not the case in *Meyler*. In that matter, as Justice Rennie carefully explained in paragraphs 30 and 31, there were material

omissions in the information communicated to the applicant that had been provided to Transport Canada in the LERC report.

[23] In this case, Ms. Doan's response to the letter was that she "can't remember much" about the events in question. She did not deny that they occurred or that the associations ever existed, and she failed to request additional details from Transport Canada. She was given a second opportunity to respond to the concerns and was informed that she could submit character references. She did neither.

[24] The Applicant also relies on the decision of Mr. Justice Annis in *Weekes* (above). *Weekes* is a case similar to *Meyler* in that the applicant had held a clearance for a considerable length of time before its revocation and the allegations against him were not particularized. While the applicant did nothing in that case in response to the fairness letter he received, Justice Annis considered that it was unlikely that the response to any request would be positive. As I have noted, the information provided by Transport Canada in this instance was adequate, and I have no reason to draw an inference that any request by Ms. Doan for additional information would have been fruitless, as was the case in *Meyler*.

[25] In the result, I am satisfied that there was no breach of procedural fairness.

[26] While this is sufficient to dispose of this application, I note that the Applicant makes several submissions that appear to challenge the reasonableness of Transport Canada's decision. The Applicant asserts that there is no indication that Transport Canada considered her comments

or the profound impact refusing to grant a TSC would have on both her employment and her eligibility for maternity benefits. She claims that the Delegate's comment that the Applicant's response was insufficient to address his concerns is "insufficient and opaque", citing the findings of Justice Harrington in *Ho v Canada (Attorney General)*, 2013 FC 865, at para 28.

[27] I agree with the Respondent that the circumstances in *Ho* are significantly different from the facts in this case. In *Ho*, Justice Harrington found that the applicant provided Transport Canada with a reasonable explanation in response to their concerns about his possible involvement in money laundering. The Court held that to note merely that the applicant's explanation was insufficient was unreasonable under the circumstances, and referred the matter back for reconsideration. The Applicant provided no comparable explanation in this case.

[28] Further, the Applicant has provided no legal justification to support her assertion that Transport Canada should have considered the impact of their decision on her employment or her eligibility for maternity benefits. Neither of those considerations, while undoubtedly important to the Applicant, bears on the question of aviation security.

[29] The length of time between the events of concern to Transport Canada and the application for security clearance may be a factor to take into consideration in determining whether there is any risk to aviation security. Nevertheless, the passage of time is not in itself sufficient to obviate the concerns if the Applicant provides no explanation to discount their seriousness or demonstrate that the Applicant has turned a page in her life and is no longer associated with persons engaged in criminal activity.

VI. Conclusion

[30] This application for judicial review is dismissed. Transport Canada met the standard of procedural fairness. Transport Canada sufficiently informed the Applicant of the allegations that were the cause of their concern. She was advised to review the TSCP policy which outlines the range of factors, considerations, and criteria that Transport Canada may consider in making their decision as to the Applicant's suitability to obtain a security clearance. She had two opportunities to make whatever submissions and advance whatever evidence she could to establish that she was not prone or likely to be induced to commit or assist in an act that may unlawfully interfere with civil aviation. The fact that her memory of events has faded is understandable, but it is not an adequate ground for finding a breach of procedural fairness.

[31] The Respondent is seeking costs in this matter. In the Applicant's present circumstances, I will exercise my discretion not to award them against her.

**JUDGMENT**

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

No costs are awarded.

“Richard G. Mosley”

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Judge

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

**DOCKET:** T-1273-15

**STYLE OF CAUSE:** DIEP HO THI DOAN v THE ATTORNEY GENERAL  
OF CANADA

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** JANUARY 28, 2016

**JUDGMENT AND REASONS:** MOSLEY J.

**DATED:** FEBRUARY 4, 2016

**APPEARANCES:**

Ben E. Tarnow

FOR THE APPLICANT

Nathan Murray

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Ben E. Tarnow Law Corporation  
Richmond, British Columbia

FOR THE APPLICANT

William F. Pentney  
Deputy Attorney General of Canada  
Vancouver, British Columbia

FOR THE RESPONDENT