

Federal Court



Cour fédérale

Date: 20160216

Docket: T-471-15

Citation: 2016 FC 206

Ottawa, Ontario, February 16, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LI GU LI

Applicant

and

MINISTER OF TRANSPORT CANADA

Respondent

JUDGMENT AND REASONS

[1] Ms. Li seeks to have the decision of the Minister of Transport Canada to cancel her Transportation Security Clearance [TSC] overturned. For the reasons to follow, I find there is no basis to upset that decision.

[2] Ms. Li worked as a groomer with Sunwest Aviation at the Calgary International Airport. In that position she was required to hold a valid TSC. In March 2015, she was fired because her

TSC was cancelled. She had obtained her TSC in 2007 when she was first employed and had successfully renewed it in 2012.

[3] On October 15, 2014, the RCMP provided Transport Canada with a Law Enforcement Record Check [LERC] report that raised concerns about Ms. Li. As a consequence, Transport Canada wrote to Ms. Li advising her that her security clearance was being reviewed. The letter stated that “Transport Canada would encourage you to provide additional information, outlining the circumstances surrounding the above noted incident and associations, as well as to provide any other relevant information or explanation, including extenuating circumstances, within 20 days of receipt of this letter.” The letter reproduced the incident and associations as set out in the RCMP LERC:

In November 2004, Abbotsford Police Department searched a residence in Abbotsford, BC and located a small marihuana grow op. A subject who was inside the residence at the time was arrested for marihuana production. Although you were not present at the residence, your vehicle was located at the residence at the time of the search.

The following subjects are linked to you:

Subject “A”

- Is a very close associate of yours with whom you could interact with on a regular basis;
- Was believed to be associated to Vietnamese Organized Crime;
 - o Vietnamese Organized Crime (Asian gangs) are involved in a long list of criminal activities including credit card fraud, luxury car theft, prostitution, home invasions, contract killings, assaults, welfare and employment insurance fraud, drug trafficking, software piracy, loan-sharking and legal gaming;
- Was known to police for trafficking drugs;
- Was charged in 1998 in two (2) separate incidents. In one (1) incident, was charged with Trafficking in Scheduled Substance and Possession of a Scheduled Substance for the Purpose of

Trafficking (2 counts) and in another incident with Possession of a Scheduled Substance and Fail to Comply with Undertaking. All charges were stayed in 1999.

Subject "B"

- Was involved in the incident described above.
- Was charged in 2004 for Producing a Scheduled Substance, Possession of a Scheduled Substance for the Purpose of Trafficking and Consumes or Uses Electricity or Gas. All charges were stayed in 2005.

[4] Ms. Li responded by letter dated October 30, 2014, but only addressed the grow-op incident and her relationship with Subject B. She advised Transport Canada that in March 2004, after a fight with her husband, she moved with her son into a house on Sugarpine Street in Abbotsford, BC [the Sugarpine residence]. She was told of this rental by a family friend named Kim Mai Le, who knew somebody already living in the building. Ms. Li lived at the Sugarpine residence until November 2004, when the police searched the building and arrested her landlord for growing marijuana in the basement. Ms. Li denied any knowledge of what was going on in the basement and claimed to have had little communication with the landlord. She moved out after the raid and says she was never contacted by the police about it.

[5] The Transport Security Clearance Advisory Body consists of a group of government officials charged with reviewing problem files and making recommendations to the Minister. In December 2014, the Advisory Body examined the LERC report and Ms. Li's reply. It expressed concerns with Ms. Li's association with subjects A and B and felt that her letter did not provide sufficient information to dispel its concerns. It also noted that the Sugarpine Residence was not listed by Ms. Li as a residence in the five years prior to her 2007 TSC application and "questioned whether this was intentional to mislead the minister [sic]."

[6] On March 9, 2015, the Acting Director General, Aviation Security, acting on behalf of the Minister and on the recommendation of the Transportation Security Clearance Advisory Body, cancelled Ms. Li's TSC:

The information regarding your very close association to an individual involved in criminal activities raised concerns regarding your judgment, trustworthiness and reliability. I note that your very close associate is known to police as a drug trafficker, as well as believed to be associated to Vietnamese organized crime. I further note an incident 2004, where you were residing in a house that had contained a marijuana grow operations. This residence was not identified on your previous application, raising concerns as to whether this had been done intentionally. 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 note the written explanation you provided did not supply sufficient information to address my concerns. For these reasons, on behalf of the Minister of Transport, I have cancelled your security clearance.

[7] Ms. Li, in her memorandum of argument, raised a single issue: “[W]hether ... the Minister of Transport Canada’s decision was reasonable or patently unreasonable.” Included in her Record was an affidavit she swore containing facts and documents that were never placed before the decision-maker. The Minister objected to this being in the record before the Court or considered in assessing the reasonableness of the decision under review.

[8] Ms. Li recognized that such evidence is generally not admissible on judicial review but urged the Court to apply the exception noted by the Federal Court of Appeal in *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 25: “[E]vidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the

administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider.”

[9] I am unable to agree with Ms. Li that an issue as described above has been raised. First, all of the evidence, with the possible exception of the omission of the Sugarpine residence in her initial application, could have been put before the decision-maker. Second, as noted by the Minister, there is no suggestion in Ms. Li’s memorandum that natural justice or procedural fairness was an issue being raised in this application. I do not accept the submission of Ms. Li that the reference in paragraph 24 identifies this as an issue. That paragraph reads: “However, the principle of fairness requires that the Minister of Transport Canada must make a decision on reasonably factual basis, in other words, the decision of the Minister cannot be patently unreasonable.”

[10] Moreover, there is nothing in the record that hints at a denial of procedural fairness. The correspondence to Ms. Li clearly set out the Minister’s concerns and invited her comments. She failed to address Subject A and cannot now do so in her affidavit. The only additional basis for the decision that was not raised in that correspondence was the fact that Ms. Li failed to include the Sugarpine residence when she first applied for the TSC. Until Ms. Li identified the grow-op address in her letter and explained that she used to live there, the fact of this omission was unknown to Transport Canada; but it was known to her. She signed the application that contained the omission and agreed to its terms: “Providing misleading or false information on this application may result in a refusal or cancellation of the security clearance.” She can hardly suggest that she is now surprised that her omission was considered by the Minister. The

omission was always within her knowledge, as was its possible consequence. I do not accept that the failure to alert her to this prior to rendering the decision constitutes any unfairness or breach of procedural duty.

[11] For these reasons her affidavit and its attachments are struck from the record.

[12] Ms. Li submits that it was unreasonable to cancel her security clearance simply because she was the tenant of a man who grew marijuana. She says that the Minister's decision was not based on the facts because the record shows that she had no relationship with her landlord: they used separate entrances and could not communicate, since he spoke Vietnamese and she did not. She further notes that she was not involved in any criminal activities, had no criminal record, and was a good employee.

[13] Is the Minister's decision justified, transparent, intelligible and does it fall within the range of possible, acceptable outcomes as dictated by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47? That is the question the Court must address.

[14] In previous decisions, summarized and examined in *Rossi v Canada (Attorney General)*, 2015 FC 961, and *Henri v Canada (Attorney General)*, 2016 FCA 38, it has been noted that the Minister has a very broad discretion when it comes to cancelling a TSC. The Minister need only reasonably believe, on a balance of probabilities, that an individual may be prone or induced to

commit an act that may unlawfully interfere with civil aviation or assist or abet any person to commit such an act.

[15] This Court has previously held that RCMP information of an individual's past association with suspected criminals is sufficient to substantiate such a belief: See *Fontaine v Canada (Transport)*, 2007 FC 1160, [2007] FCJ No 1513 at paras 73 and 75 and *Kaczor v Canada (Minister of Transport)*, 2015 FC 698, [2015] FCJ No 681 at paras 32-33. Ms. Li has not advanced any submission that the circumstances on the record distinguish the case at bar from the ample jurisprudence dealing with similar situations.

[16] Moreover, I find that the decision is supported by the facts which were on the record before the decision-maker. The RCMP information available at the time justified finding that Ms. Li had ties to individuals linked to drug trafficking and organized crime. Her letter of October 30, 2014, did not address all the concerns raised in Transport Canada's letter of October 21, 2014, and specifically she gave no evidence regarding her relationship with Subject A. Although she claimed to have never been to the basement of the Sugarpine residence, it was reasonable to infer, as the Minister did, that she would have known there was a grow-op in the house from the smell of the marijuana plants.

[17] For these reasons, the application must be dismissed. Considering the submissions of the parties, costs will be awarded to the respondent and fixed at \$500.00.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs payable to the respondent and fixed at \$500.00.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-471-15

STYLE OF CAUSE: LI GU LI v MINISTER OF TRANSPORT CANADA

PLACE OF HEARING: CALGARY, ALBERTA

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JUDGMENT AND REASONS: ZINN J.

DATED: FEBRUARY 16, 2016

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