

Federal Court



Cour fédérale

**Date: 20160617**

**Docket: T-1353-15**

**Citation: 2016 FC 686**

**Ottawa, Ontario, June 17, 2016**

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

**BETWEEN:**

**DALLAS LEONARD RUDD**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Mr. Dallas Leonard Rudd [Mr. Rudd] seeks judicial review of a decision of the Minister of Transport [the Minister] dated July 14, 2015, in which the Minister's Delegate cancelled Mr. Rudd's transportation security clearance pursuant to the *Transportation Security Clearance Program Policy* [the Policy].

[2] Mr. Rudd is a 63 year old, elevator mechanic and motorcycle enthusiast, who is currently employed by Fujitec Canada Inc. One of his employer's customers is the Vancouver International Airport [the Airport]. In 2008, Mr. Rudd was regularly assigned to perform maintenance at the Airport for which he required a security clearance from the Minister. Upon the expiry of his security clearance in 2013, Mr. Rudd, in January 2014, applied for a renewal.

[3] On October 14, 2014, Transport Canada's Security Screening Program received a Law Enforcement Records Check report [LERC report] from the Royal Canadian Mounted Police [RCMP] Security Intelligence Background Section. The LERC report outlined Mr. Rudd's purported connection to the Hell's Angels and the Jesters Motorcycle Club [Jesters Club], including Mr. Rudd's participation in six recent Poker Runs organized by either the Hell's Angels or the Jesters Club between 2009 and 2013. The parties acknowledge that the Hell's Angels is an Outlaw Motorcycle Gang [OMG] while the Jesters Club is not. According to the LERC report, Mr. Rudd was seen wearing a red "Gus Shop" shirt, a shop owned by a Hell's Angels member, as well as a black leather vest which demonstrated membership in the Shadow Motorcycle Club [Shadow Club]. Once again, all parties acknowledge that the Shadow Club is not an OMG. Further, the LERC report advised that Mr. Rudd was seen at the residence of a Jesters Club member. Each of these sightings and events occurred while Mr. Rudd was in possession of a transportation security clearance.

[4] In a letter dated October 21, 2014, Transport Canada advised Mr. Rudd that his security clearance would be reviewed due to the receipt of some adverse information that raised concerns regarding his suitability to retain a security clearance. In that letter, Transport Canada expressed

its concerns with respect to Mr. Rudd's connection to the Hell's Angels, the Jesters Club and the Shadow Club. Transport Canada also informed Mr. Rudd that a transportation security clearance Advisory Body would review the matter, consider all relevant and available information and make a recommendation to the Minister pursuant to I.4 of the Policy. Transport Canada also encouraged Mr. Rudd to provide additional information that would outline the circumstances surrounding those connections, or any other relevant information or explanation, including extenuating circumstances.

[5] On November 3, 2014, Mr. Rudd responded by letter to Transport Canada. He explained that his "Gus Shop" shirt was given to him after major repairs, involving significant expenses, to his motorcycle by the only motorcycle shop that carries the parts required for his motorcycle. He further explained that since he had spoken with an RCMP officer in May 2013, he had chosen to distance himself from the motorcycle groups referred to in the letter. He stated that he had not had contact with any of the groups since then. Between October 28, 2014 and March 18, 2015, five of Mr. Rudd's colleagues wrote to Transport Canada on his behalf. On March 18, 2015, Mr. Rudd wrote again to Transport Canada. He acknowledged participating in the Poker Runs, but insisted that he only participated as a motorcycle rider, not as a member of the motorcycle clubs. Mr. Rudd also admitted he had visited the residence of a member of the Jesters Club, but explained that he was there to assist a friend in getting his sick dog to a veterinarian, and not in any capacity as a club member. With respect to the black leather vest which demonstrated membership in the Shadow Club, Mr. Rudd explained that he only wore it because he was a member of the Shadow Club and was told to do so. He stated that he was not aware that the Shadow Club was involved in any serious crimes of violence, but that he nevertheless chose to

stop socializing with its members after his exchange with the RCMP officer in May 2013. Mr. Rudd further explained that he is a non-violent person who is not involved in crime, that he values his work and is only two years away from retirement. I here note that Mr. Rudd does not have any criminal record.

## II. Impugned Decision

[6] On March 25, 2015, the Advisory Body panel discussed Mr. Rudd's case and made a recommendation to the Minister. The Advisory Body consists of the Director acting as the Chairperson and other members selected by the Director. The Advisory Body was composed of six voting members, including the Director, and five non-voting members. The Advisory Body's recommendation to the Minister, titled "Justification", was signed by the six voting members. The Advisory Body recommended the cancellation of Mr. Rudd's security clearance based on his association with outlaw motorcycle gangs, as detailed in the LERC report. It noted that Mr. Rudd was seen on six occasions associating with members of those groups, while he was in possession of a transportation security clearance. The Advisory Body stated that, after a review of the information on file, it had reason to believe, on a balance of probabilities, that Mr. Rudd "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", and that Mr. Rudd's written submissions were insufficient to dispel the Advisory Body's concerns.

[7] On July 14, 2015, the Minister's Delegate accepted the Advisory Body's recommendation and cancelled Mr. Rudd's security clearance. In a letter dated July 17, 2015, Transport Canada informed Mr. Rudd of its decision and the reasons therefor.

III. Preliminary Matters

[8] In response to preliminary motions brought by the respondent at the beginning of the oral hearing on the application for judicial review, I allowed an application to amend the style of cause to name the Attorney General of Canada as the Respondent rather than the Minister. I also struck out the affidavits of Mike Funk, Cornelis J. Van Zanten and Jason Devine as they were not before the Advisory Body or the Minister's Delegate. Furthermore, I struck paragraphs 3, 5, 6, 8, and 15 of Mr. Rudd's affidavit due to non-compliance with Rule 81(1) of the *Federal Courts Rules*, SOR98/106.

IV. Issues

[9] Mr. Rudd contends the Minister failed to observe the principles of fairness in the procedure it adopted to cancel his security clearance and that the decision to cancel does not meet the test of reasonableness as set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

V. Standards of Review

[10] It is trite law that the decision to cancel a security clearance must be assessed on the reasonableness standard of review (*Rossi v Canada (Attorney General)*, 2015 FC 961, [2015] FCJ No 950 at para 19 [*Rossi*]; *Clue v Canada (Attorney General)*, 2011 FC 323, [2011] FCJ No 401 at para 14 [*Clue*]). The Minister's discretion to cancel a security clearance, as conferred by s 4.8 of the *Aeronautics Act*, RSC, 1985, c A-2 [the Act], must be afforded significant deference

(*Shabbir v Canada (Attorney General)*, 2014 FC 1020, [2014] FCJ No 1191; *Dunsmuir*, above).

In applying the standard of reasonableness, this Court will only intervene if the Minister's decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at para 47).

[11] Questions related to procedural fairness within the context of security clearances are assessed on the standard of correctness (*Rossi*, above at para 20; *Weekes v Canada (Attorney General)*, 2015 FC 853, [2015] FCJ No 831 at para 9).

#### VI. Relevant Provisions

[12] S 146(1)(c) of the *Canadian Aviation Security Regulations*, 2012, SOR/2011-318 provides that in order to hold a restricted area identity card, an individual must first obtain a security clearance following a comprehensive background check. An existing security clearance may be reviewed upon receipt of adverse information about the individual's suitability to retain his or her security clearance. In promoting civil aviation safety, the Minister is clothed with the discretion to grant, deny, suspend or cancel a security clearance pursuant to s 4.8 of the Act. In making his or her decision, the Minister relies on the Policy, which prevents the uncontrolled entry into a restricted area of a person who the Minister "reasonably believes, on a balance of probabilities, may be prone or induced to commit an act that may be unlawfully interfere with civil aviation or assist or abet any person to commit an act that may unlawfully interfere with civil aviation". When concerns are raised about the suitability of an individual to hold a security clearance the person is invited to make submissions. The Director convenes an Advisory Body to review the file and make a recommendation to the Minister.

## VII. Analysis

### A. *Did the Minister fail to observe principles of procedural fairness in deciding to cancel Mr. Rudd's security clearance?*

[13] Mr. Rudd contends the Minister's decision-making process did not meet the requirements of procedural fairness in that he was denied a fair hearing. He contends that since the cancellation of his security clearance impacts his livelihood, he is entitled to a high degree of procedural fairness which includes an oral hearing (*Meyler v Canada (Attorney General)*, 2015 FC 357, [2015] FCJ No 325 at para 26; *DiMartino v Canada (Minister of Transport)*, 2005 FC 635, [2005] FCJ No 876). He contends the Minister's findings were based upon a lack of credibility, and as a result, he was entitled to an opportunity to be heard in person.

[14] I disagree. First, I would note there is nothing in the Minister's Delegate's decision that indicates she based the cancellation of Mr. Rudd's security clearance on a disbelief of the information he provided. In the circumstances, Mr. Rudd's right to procedural fairness does not include the right to an oral hearing (*Henri v Canada (Attorney General)*, 2014 FC 1141, [2014] FCJ No 1266 at para 27; *Rivet v Canada (Attorney General)*, 2007 FC 1175, [2007] FCJ No 1547 at para 25 [*Rivet*]).

[15] Furthermore, within the context of the cancellation of a security clearance the general rule is that the right to procedural fairness is "limited to the right to know the facts alleged [...] and the right to make representations about those facts" (*Rivet*, above at para 25). In this case, Mr. Rudd received immediate notice of Transport Canada's concerns. He was also invited to

make written submissions, which he did and which were considered by the Advisory Body and by the Minister's Delegate. In fact, Mr. Rudd provided two letters of explanation and five letters of reference from co-workers and supervisors. I am of the view that, in the circumstances, the decision-making process respected the requirements of procedural fairness.

B. *Does the Minister's decision to cancel Mr. Rudd's security clearance meet the test of reasonableness?*

[16] Mr. Rudd contends the Minister's decision is unreasonable because: (1) it has no evidentiary basis; (2) it lacks justification and transparency; and (3) it is inconsistent with the jurisprudence.

[17] First, with respect to the evidentiary basis of the decision, Mr. Rudd contends that there is no basis for the Minister's inferences that there are reasons to be concerned about his judgement, trustworthiness and reliability. He says there is no reason to be concerned that he 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. Some of Mr. Rudd's submissions in this regard are curious to say the least. While failing to address that the poker runs may have been organized by the Hell's Angels, counsel for Mr. Rudd contends that even if Hell's Angels members were present, they (Hell's Angels members) exist in the public at large and that participating in the poker run would be no different than sitting next to a Hell's Angels member at a "poker tournament at a local casino" and having a "casual conversation" with a Hell's Angels member. Such arguments unfairly minimize, in fact, trivialize, the serious threat of the Hell's Angels and other OMG's to security in general and airport security in particular. Participating in a poker run in which the



Hell's Angels is even remotely involved is cause for serious concern. In the same vein, Mr. Rudd contends that his participation in a poker run organized by the Jesters Club, some of whose members associate with the Hell's Angels, is no different than a "bowling club" who organizes "a bowling tournament for its members". Such arguments, again, trivialize the very difficult task faced by the Minister and the courts in dealing with these very serious issues. I reject, with all the judicial restraint of which I am possessed, the attempt to trivialize the very important task the Minister undertook in the present case. This Court will not re-weigh the evidence to liken the poker runs at issue to a bowling tournament or a card game.

[18] Mr. Rudd also contends the Minister's decision is not supported by the jurisprudence under s 4.8 of the Act. He contends the Minister must establish that Mr. Rudd had a direct link or association with Hell's Angels or other criminal organization members. In that respect, Mr. Rudd cites cases from this Court in which the applicants all had direct links or relationships to individuals involved in criminal organizations (see *Fontaine v Canada (Transport, Safety and Security)*, 2007 FC 1160, [2007] FCJ No 1513; *Kaczor v Canada (Minister of Transport)*, 2015 FC 698, [2015] FCJ No 681; *Henri v Canada (Attorney General)*, 2014 FC 1141, [2014] FCJ No 1266; and *Rossi*, above). I disagree. Every case involving the revocation or refusal of a security clearance is highly factual. The Minister was not required to establish that Mr. Rudd was associated with the Hell's Angels or other criminal organizations. Rather, the role of the Minister was to determine whether there were reasonable grounds to believe or to suspect, on a balance of probabilities, that Mr. Rudd may pose a risk to Canadian civil aviation (*Singh Kailley v Canada (Minister of Transport)*, 2016 FC 52, [2016] FCJ No 72 at para 36).

[19] I now turn to Mr. Rudd's contention that the Minister's decision does not meet the reasonableness standard. Part and parcel of that contention is that the reasons are inadequate. I here note that inadequacy of reasons, by itself, does not result in an unreasonable decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 14 [*Newfoundland Nurses'*]). *Newfoundland Nurses'* provides that a reviewing Court should not substitute its own reasons but, may, if necessary, look at the record in order to determine whether a decision is reasonable. In the circumstances, a review of the record compels me to grant this application.

[20] I begin by noting that the RCMP LERC report is presumed to be accurate. From my review of the file that presumption has not been rebutted. The LERC report sets out Mr. Rudd's involvement in two non-OMG motorcycle clubs, the Jesters Club and the Shadow Club. It also refers to potential connections with the Hell's Angels through Gus' repair shop and 6 poker runs from 2009 to 2013. The Summary of Discussion of the Advisory Body also correctly captures most of the facts that were before it, save one. While it mentions that the Hell's Angels is an OMG and the Shadow Club is a non-OMG, it makes no reference to the Jesters Club status.

[21] I now turn to the Advisory Body Justification which was signed by the voting members. That document, which would eventually find its way to the Minister's Delegate is tainted with several significant factual errors. First, it notes that Mr. Rudd had recent and multiple "associations with the Outlaws Motorcycle Gang". I cannot avoid highlighting the definite article "the" before the capitalized phrase Outlaws Motorcycle Gang. No such proper noun describing any motorcycle club or gang was employed by the RCMP in their LERC report, nor was any

such terminology employed by the Advisory Body when it sat en banc (with voting and non-voting members). The Advisory Body Justification then makes another factual error. It states that Mr. Rudd was “seen on six (6) occasions associating with members of those groups”. In the context of the Justification, the term “those groups” refers to the Outlaws Motorcycle Gang, the Hell’s Angels and other OMGs. The only OMG that anyone saw Mr. Rudd potentially associating with was the Hell’s Angels. As an aside, I say “potentially” because one can only conclude Mr. Rudd associated with the Hell’s Angels through the poker runs if one interprets the word “or” conjunctively rather than disjunctively in the LERC report’s reference to poker runs organized by the Hell’s Angels or the Jesters Club. Regardless, there is no evidence whatsoever of Mr. Rudd associating with a gang known as the Outlaws Motorcycle Gang or “other OMGs” as those terms are used in the Justification. Neither the RCMP nor the Advisory Body sitting en banc referred to any OMG other than the Hell’s Angels.

[22] I now turn to the decision signed by the Minister’s Delegate dated July 14, 2015. That decision makes no reference to the Outlaws Motorcycle Gang but on two occasions erroneously refers to the Jesters Club as an OMG. After those two erroneous references the decision then refers to Mr. Rudd’s visit to a “full patch” Jesters Club member’s house. That observation refers to Mr. Rudd’s admitted visit at which he assisted in getting a dog to a veterinary. I note the Minister’s Delegate’s reference to the personal connection between Mr. Rudd and the “full patch” member of the Jesters Club. That reference is understandable if one wishes to show a clear connection between Mr. Rudd and a perceived OMG. The problem with the analysis, however, is that the evidence demonstrates the Jesters Club is not an OMG.

[23] *Newfoundland Nurses* does not permit me to correct the decision or substitute my own view for that of the Minister. It only permits me to look to the record for purposes of assessing the reasonableness of the decision [*Newfoundland Nurses*, above at para 15]. In this case, the Advisory Body Justification and the decision by the Minister's Delegate are not intelligible given the factual matrix that was before them. The Jesters Club is a non-OMG and there is no evidence of any organization known as the Outlaws Motorcycle Gang. Nothing in the record shows these misunderstandings were corrected. I cannot conclude the Minister's decision would have been the same absent these factual errors.

#### VIII. Conclusion

[24] The Minister's decision to cancel Mr. Rudd's security clearance does not meet the test of reasonableness. It does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. Given that the reasons conflict with the evidence they are not justified, transparent and intelligible. I would allow the application for judicial review, quash the Minister's decision and refer the matter back to the Minister for redetermination. The parties agreed that costs be fixed in the amount of \$2,000.

### **JUDGMENT**

#### **THIS COURT'S JUDGMENT is that:**

1. The style of cause is amended to substitute the Attorney General of Canada as the Respondent.
2. The affidavits of Mike Funk, Cornelis J. Van Zanten and Jason Devine filed in this matter are struck.

3. Paragraphs 3, 5, 6, 8, and 15 of Mr. Rudd's affidavit filed in this matter are struck.
4. The application for judicial review is allowed, the Minister's decision is quashed and the matter is referred back to the Minister for redetermination.
5. Costs are awarded to Mr. Rudd in the amount of \$2,000.00.

"B. Richard Bell"

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Judge

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

**DOCKET:** T-1353-15

**STYLE OF CAUSE:** DALLAS LEONARD RUDD v ATTORNEY GENERAL  
OF CANADA

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

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**JUDGMENT AND REASONS:** BELL J.

**DATED:** JUNE 17, 2016

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