

Federal Court



Cour fédérale

Date: 20160802

Docket: T-2007-15

Citation: 2016 FC 892

Vancouver, British Columbia, August 2, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

EDMUND VUNG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application made by Mr. Edmund Vung for the judicial review of a decision of Ms. Brenda Hensler-Hobbs, Director General, Aviation Security for Transport Canada [Minister's Delegate] acting on behalf of the Minister of Transport [Minister], dated November 3, 2015, denying the applicant's application for a security clearance at the Vancouver International Airport [the Airport].

[2] The applicant is employed as a Helicopter Engineer by Hyland Helicopters. To expand the duties he could perform while working, he applied on April 17, 2014 for a security clearance and a corresponding Restricted Area Identity Card [RAIC]. In the meantime, he was issued a temporary pass which allowed him to access secure areas in the company of a permanent pass holder.

[3] On February 11, 2015, Transport Canada, Transportation Security Screening Program [Transport Canada] received a Law Enforcement Records Check report [LERC Report] from the Royal Canadian Mounted Police's Security Intelligence Background Section [RCMP SIBS]. On February 24, 2015, the applicant received a letter from Transport Canada outlining three incidents giving rise to concerns regarding his suitability to possess a security clearance. The incidents dated back to July 2007, November 2007 and November 2011.

[4] The LERC Report set out that:

- In July 2007, while on patrol, members of the Burnaby RCMP approached a parked vehicle containing 3 occupants including the applicant as a passenger. A smell of dried marihuana coming from inside the vehicle was noted. All parties were detained under the Controlled Drug and Substances Act, and 2 grams of marihuana were seized from one of the subjects. The driver identified himself with a forged driver's license which was seized along with an opened case of beer. The parties were all given a verbal warning and released;
- In November 2007, while on patrol 2 members of the Burnaby RCMP observed a subject placing a canister of bear spray underneath a semi-truck. Upon close inspection, police found a bag containing ecstasy pills, marihuana, and what appeared to be cocaine, another canister of bear spray and another small bag of marihuana. At the time, the applicant and another individual were also in the vicinity. Members were unable to determine ownership therefore all items were seized for destruction and no charges were laid;

- In November 2011, a member of the Burnaby RCMP observed the applicant on foot in a cul-de-sac in Burnaby, BC, accompanied by an individual known to police as being involved in criminality and street gang activity.

[5] The LERC Report set out that subjects mentioned in the report included:

- Subject “A”, who:
 - i. Was with the applicant in one of the incidents mentioned above;
 - ii. Is associated to a possible “grow rip crew” and has documented loose association with the United Nation (UN) Gang whose criminal activity includes cocaine and marihuana trafficking including cross border drug trafficking. They are also known to be involved in violent crimes.
- Subject “B”, who:
 - i. Was involved with the applicant in one of the incidents mentioned above;
 - ii. Is presently accused under the CDSA of Trafficking and Possession for the Purpose of Trafficking;
 - iii. In 2008, was convicted of Breaking and Entering with Intent;
 - iv. Is a member of the West Bradley et al street gang (The report notes that aboriginal gangs are noted to be among the most prone to perpetrating violent offences. The REDD Alert, Bradley West crew, and Indian Posse are involved in a protracted conflict on Vancouver's Downtown Eastside over drug territory);
 - v. In 2011, admitted to police of having been in the drug trade since he was 13 years old and mostly deals with crack.

[6] On March 2, 2015 the applicant provided a brief response. He simply denied any on-going association with the people mentioned in the February 24, 2015 letter. The applicant states in the March 2 Email:

(. . .) I am reassuring you, Transport Canada, and the Transportation Advisory Body that I no longer have any association, with any of the subjects mentions [sic] in the letter.

[7] On August 25, 2015, the Advisory Body for the Transportation Security Clearance Program [Advisory Body] recommended that the Minister cancel the applicant's security clearance. Indeed, on November 3, 2015, the Minister's Delegate denied the applicant's application for a security clearance at the Airport on the grounds that she had reason to believe, on a balance of probabilities, that the applicant may be prone or induced to conduct an act that may unlawfully interfere with civil aviation.

[8] At the hearing, the applicant's counsel did not pursue before the Court the general allegation made in his memorandum of fact and law that a breach of procedural fairness had occurred. In a nutshell, the applicant submits today that the Decision is unreasonable because the Minister's Delegate failed to take into consideration or give adequate weight to relevant considerations, namely the dated nature of the information provided by the RCMP SIBS and the lack of evidence of the applicant's participation in any wrongdoing in drug trafficking. Furthermore, the applicant submits that the Decision is based on inferences which are unsupported by the evidence, including the finding that the applicant associated with two individuals connected to street gangs. The applicant has indeed denied any current association with the "subjects" in question while the most recent incident dates back to 2011.

[9] The present case does not raise any particular issue of law and turns on a pure question of fact, or of mixed fact and law. The case law is clear on the broad discretion conferred on the Minister to refuse, suspend, or cancel a security clearance, and which is contemplated by section 4.8 of the *Aeronautics Act*, RSC 1985, c A-2 and the various relevant provisions of the *Canadian*

Aviation Security Regulations, 2012, SOR/2011-318 [Regulations] (see *Wu v Canada (Attorney General)*, 2016 FC 722).

[10] The present application must fail. I find that the Decision to refuse the applicant's clearance falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. I basically endorse the arguments made by the respondent in her memorandum of fact and law and which were reasserted at the hearing by her counsel. In addition to the materials, representations and cases submitted by counsel, I have considered the decision rendered in (*Israel v Canada (Minister of Citizenship and Immigration)*, 2013 FC 385) and invoked after the hearing by the applicant's counsel. The comments made by the Court in this refugee matter are not determinative and do not change my reasoning.

[11] First, I note that the reasons to deny the application for a security clearance certificate are intelligible and transparent.

[12] Indeed, the Advisory Body noted, as set out in its Summary of Discussion, that:

- The applicant has no criminal convictions;
- Transport Canada, Security Screenings Program, received a report from the RCMP dated February 11, 2015, detailing the applicant's involvement in criminal activities related to drugs;
- The Advisory Body noted three incidents related to drugs from 2007-2011;
- The Advisory Body also noted that at the time of the first incident the applicant was 17 years old;
- The Advisory Body noted that, in July 2007, while on patrol, members of Burnaby RCMP approached a parked vehicle containing three occupants including the applicant, who was a passenger. A smell of dried marijuana coming from inside the vehicle was noted. Two grams of marijuana

(estimated street value \$20) was seized from one of the subjects. An open case of beer was also found;

- The Advisory Body further noted that in November 2007, while on patrol, two members of the Burnaby RCMP observed a subject placing a canister of bear spray underneath a semi-truck. Police found a bag containing ecstasy pills, marijuana, what appeared to be cocaine, another canister of bear spray and another small bag of marijuana. The applicant and another individual were in the vicinity when the items were found. It was noted that cocaine is a serious, addictive substance and is not considered an entry-level drug;
- The Advisory Body noted in November 2011, a member of Burnaby RCMP observed the applicant on foot in a cul-de-sac in Burnaby, BC, accompanied by an individual known to police as being involved in criminality and street gang activity;
- The Advisory Body also noted the applicant's association to an individual who is associated to a possible "grow rip crew" and has documented loose association with the UN Gang, who has a presence in the Lower Mainland and their criminal market is cocaine and marijuana trafficking including cross-border drug trafficking, are involved in violent crime and are business associates of other gangs;
- The Advisory Body further noted the applicant's association to another individual who is presently accused of Trafficking and Possession for the Purposes of Trafficking, who has been convicted of Breaking and Entering with Intent, who is a member of the West Bradley et al street gang, and who has admitted to police having been involved in the drug trade since he was 13 years old, dealing mostly with crack;
- The Advisory Body noted that aboriginal gangs are noted to be among the most prone to perpetrating violent offences. The REDD Alert, Bradley West Crew and Indian Posse are involved in a protracted conflict on Vancouver's Downtown Eastside over drug territory. The Bradley West Crew are well known, violent and to be feared;
- The Advisory Body noted the exploitation of Canadian airport facilities is a current threat to airport transportation security, and Canadian airports could be susceptible to exploitation by organized crime groups;
- The Advisory Body further noted that while the applicant does confirm his association with the individuals in his written submission, he does not address any of the other issues or provide any further information;
- The Advisory Body noted the applicant had contact with one of the association after he had completed school;

- A review of the file led the Advisory Body to have reason to believe, on a balance of probabilities, 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.

[13] Second, I note that there has been no serious attack by the applicant on the particular content of the LERC Report and the general reasoning of the Advisory Body. The Advisory Body considered the written submissions provided by the applicant; however, the submissions did not provide sufficient information to dispel the Advisory Body's concerns. This Court has, in this respect, repeatedly confirmed that it is reasonable for the Minister to refuse or cancel a security clearance on the basis of associations with criminals or gang members. The Minister's delegate had before her uncontradicted information that the applicant associated with individuals connected to organized drug crime. It turns out that the applicant submitted a very brief and inconclusive response to the information set out in the LERC Report. The March 2 Email does not contain a denial of any of the events alleged in the LERC Report. It does not offer any explanation for the applicant's involvement in the events set out in the LERC Report. It does not suggest that the applicant is unaware of who the individuals described as "Subject A" and "Subject B" are. To the contrary, he appears sufficiently certain that he knows who they are, since he asserts that he "no longer has any association" with either. He also does not suggest when he stopped associating with criminals and gang members. It was not unreasonable for the Minister's delegate to be left with a belief on a balance of probabilities that the applicant 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.

[14] Third, it is not the role of this Court to substitute itself for the Minister and to reassess the totality of the evidence. The applicant now invokes the passage of time and his youth at the time of the incidents. Overall, I find it nevertheless not unreasonable for the Minister to refuse a security clearance on the basis of drug activity and associations with criminals in 2007 and 2011, which is not so long ago. The applicant also submits that there was an erroneous finding of fact, as the Minister's delegate referred to three incidents related to drugs, while he says that there was nothing connecting his being accompanied by a known street gang member to drugs. Again, I find that there was nothing unreasonable about the Minister's delegate classifying an incident where the applicant was observed by the RCMP accompanying a known street gang member as an incident related to drugs.

[15] In the case at bar, the applicant submits that, irrespective of the result, no costs should be awarded to the winning party, while the respondent seeks costs in the amount of \$2000 in case of dismissal. Costs normally follow the result of the case. I find no special reason to exercise my discretion not to allow costs in favour of the respondent. The claimed amount of \$2000 is reasonable in the circumstances.

[16] For all these reasons, the present application is dismissed with costs of \$2000 in favour of the respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that the present application for judicial review is dismissed with costs of \$2000 in favour of the respondent.

"Luc Martineau"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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