Federal Court  Cour fédérale

Date: 20170208

Docket: T-2171-15

Citation: 2017 FC 155

Ottawa, Ontario, February 8, 2017

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

JULIUS VARADI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant Mr. Julius Varadi is a professional pilot and has been working as captain of civil aircrafts for some 35 years. Mr. Varadi's position requires access to restricted areas in airports that is available only to employees who have been granted security clearance by the Minister of Transport [the Minister] under the provisions of the *Aeronautics Act*, RSC 1985, c A-2 [the Act], its regulations and the policies enacted pursuant to it. Until recently, Mr. Varadi was

approved for transportation security clearance [TSC] to work as a pilot at the Pierre-Elliott Trudeau international airport in Montreal.

[2] In early 2015, the Royal Canadian Mounted Police [RCMP] sent a report to the Transportation Security Clearance Program [the TSC Program] of Transport Canada regarding four incidents involving Mr. Varadi, in which Mr. Varadi sent life-threatening emails to various organisations. The TSC Program aims to prevent unlawful acts of interference with transportation systems and, under this program, professional pilots like Mr. Varadi must receive their TSC and satisfy comprehensive background checks in order to be able to exercise their profession.

[3] Upon receipt of the RCMP report, Transport Canada investigated the matter and, in October 2015, the TSC Program Advisory Body [the Advisory Body] reached the conclusion that Mr. Varadi "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". In December 2015, further to her review of the RCMP report, of Mr. Varadi's submissions and of the recommendation of the Advisory Body, the Director General, Aviation Security at Transport Canada [the Director General], acting on behalf of the Minister, decided to revoke and cancel Mr. Varadi's TSC [the Decision].

[4] Mr. Varadi has applied to this Court to seek judicial review of the Decision. He argues that the Decision is unreasonable and based on various erroneous findings of facts. Mr. Varadi also claims that he had a legitimate expectation that Transport Canada would not cancel his TSC

as it had been recently renewed in 2014. Finally, Mr. Varadi contends that the Advisory Body and the Director General breached the rules of procedural fairness as they failed to give him a fair opportunity to respond to the reproaches made against him and did not properly consider the serious prejudice of the Decision on his life, given that the revocation of his TSC meant the loss of his employment as a pilot.

[5] The application for judicial review filed by Mr. Varadi raises four issues: 1) was the Decision issued by the Director General reasonable?; 2) was there a legitimate expectation that Transport Canada would not cancel Mr. Varadi's TSC?; 3) did the Director General breach her duty of procedural fairness towards Mr. Varadi?; and 4) was the Director General required to consider alternative measures less intrusive than the cancellation of Mr. Varadi's TSC?.

[6] For the reasons that follow, I must dismiss Mr. Varadi's application. I cannot conclude that the Decision cancelling Mr. Varadi's TSC was unreasonable. On the contrary, the Decision was responsive to the evidence and the outcome is defensible based on the facts and the law. I find that the Decision has the required attributes of justification, transparency and intelligibility, and that it does not fall outside the range of possible, acceptable outcomes available to the Minister's delegate. I also find that the doctrine of legitimate expectations does not apply here and that, at all times, Mr. Varadi was treated fairly and had ample opportunities to respond to the case against him. Furthermore, the Minister's delegate had no express or implied obligation to consider measures other than the cancellation recommended by the Advisory Body. There are therefore no grounds to justify this Court's intervention.

II. Background

A. *The factual context*

[7] Mr. Varadi has been a professional pilot and captain of civil aircrafts since the beginning of the 1980s. He was initially granted a security clearance in 2009 and Mr. Varadi's TSC was renewed by Transport Canada in 2014.

[8] In early January 2015, the Security Intelligence Background Section [SIBS] of the RCMP sent a Law Enforcement Record Check report on Mr. Varadi to Transport Canada. The RCMP report referred to four different incidents involving Mr. Varadi between 2007 and 2013 and uncovered further to routine verifications conducted by the RCMP in support of the TSC Program. The report revealed that:

> A. In February 2007, Mr. Varadi sent an email through the Service Canada website, stating that "Je viens de tuer, une grosse crises [sic] de bitch, du gouvernement du Canada" ([TRANSLATION] "I have just killed a big fucking bitch from the government of Canada") and that more would follow. Subsequent e-mails were sent by Mr. Varadi, containing derogatory comments alluding to women and the Canada Pension Plan. The RCMP investigated but the matter was concluded without charge.
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> B. In October 2010, Mr. Varadi sent an email to the Sûreté du Québec through its website, in reaction to an arrest that had made the headlines at the time. The email stated: "Oh by the way, froggie, the raid on the idiot who sent internet messages makes you an even bigger idiot in case you don't understand, we do not want to live in your Quebec society, so fuck off and die. Sad to say, we importees are stuck in this piece of property and you do not like importees, do you? You can raid the house at 18 des Lilas in Kirkland and make the national news. It will be my pleasure to expose you fucking Nazis for what you are, Nazis. Bye bye, Julius

Varadi". No charges were laid against Mr. Varadi at the time.

C. In September 2011, Mr. Varadi started to send hate emails to Pratt and Whitney Inc. In February 2012, he sent an email to the president of Pratt and Whitney stating that he should be "hung, shot by a firing squad or better yet decapitated". Another disgraceful email followed in March 2012. Further to those emails, Mr. Varadi was questioned by the police and he entered into an undertaking to keep the peace.

D. In October 2013, Mr. Varadi submitted a message using the Air Canada Pilots Association Web Form, which read as follows: "The next time I see an Air Canada moron who shits on me; I will most probably explode and will most probably do something that will give me a life in prison sentence. I am a human. I have a lot to deal with; I am not Air Canada royal family. You shit a lot on humanity, and because you are superior. You shit on me, I slit your throat. Goodbye. Julius Varadi". At a meeting with Air Canada Internal Security following this incident, Mr. Varadi was made aware of the potential consequences of such actions but no further action was taken by Air Canada.

[9] On January 22, 2015, further to the receipt of the RCMP report, Transport Canada sent a notice letter to Mr. Varadi, warning him that his TSC was under review because of these four incidents [the Notice Letter]. The Notice Letter informed Mr. Varadi that the adverse information uncovered by the RCMP, and not available before, had raised concerns regarding his suitability to retain his security clearance. The information provided in the RCMP report was reproduced at length in the letter. The Notice Letter also invited Mr. Varadi to provide any additional information about the circumstances surrounding these incidents, including any mitigating circumstances. The Notice Letter further provided details about Transport Canada's review process. In this regard, Mr. Varadi was informed about the existence and role of the Advisory Body in assisting the Minister in the granting, refusal or cancellation of security

clearances and he was provided with a link to the online version of the *Transportation Security Clearance Program Policy* [the TSC Program Policy]. Mr. Varadi was also told that any information provided would be carefully considered in making the decision in respect of his security clearance. Finally, he was provided with the phone number of a contact person should he wish to discuss the matter further.

[10] Mr. Varadi was initially given 20 days following the receipt of the Notice Letter to submit his additional information to Transport Canada, but two formal extensions of time were subsequently granted to him. Between January 26, 2015 and September 14, 2015, Mr. Varadi ended up sending a total of 79 emails and made four phone calls to Transport Canada to ask questions, as well as to provide information and comments on the review of his security clearance conducted by Transport Canada.

[11] The Advisory Body met on October 2, 2015 to review the allegations against Mr. Varadi and to consider Mr. Varadi's submissions before making a recommendation to the Director General. The role of the Advisory Body is to review the information and make recommendations to the Minister concerning the granting, refusal, cancellation or suspension of clearances. In its Summary of Discussions for this October 2015 meeting, the Advisory Body first noted that Mr. Varadi had no criminal convictions. It then proceeded to review the RCMP report and Mr. Varadi's involvement in the activities related to the threats he voiced against various entities. The Advisory Body discussed the four incidents in detail, and noted that Mr. Varadi's reactions to the events in question were "serious, not a measured response, out of proportion and excessive

in nature". It further underlined the escalation of threats in Mr. Varadi's emails, culminating in a threat to slit someone's throat in October 2013.

[12] The Advisory Body reached the conclusion that, on a balance of probabilities, Mr. Varadi "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". The Advisory Body noted that it considered the multiple written submissions provided by Mr. Varadi, but that Mr. Varadi did not provide sufficient information to dispel its concerns. The Advisory Body therefore recommended to the Minister to cancel Mr. Varadi's security clearance.

[13] The Director General, acting as the Minister's delegate, then independently reviewed Mr. Varadi's case and decided to cancel Mr. Varadi's TSC for substantially the same reasons as those provided by the Advisory Body. The Decision was communicated to Mr. Varadi in a letter sent on December 4, 2015.

B. *The Decision*

[14] In her Decision, the Director General indicated that she had cancelled Mr. Varadi's TSC based on a review of Mr. Varadi's file, including the information outlined in the January 2015 Notice Letter, Mr. Varadi's multiple submissions, the recommendation of the Advisory Body and the TSC Program Policy.

[15] The Director General referred to the information regarding the four incidents, described them as "incidents involving serious threats and harassment towards public institutions" and

noted that these events raised concerns regarding Mr. Varadi's "judgment, trustworthiness and reliability". The Minister's delegate further noted that the series of emails sent to Air Canada, the Government of Canada and the Sûreté du Québec reflected an "escalation of threats".

[16] In particular, the Director General commented on two problematic emails. First, she mentioned the February 2012 email sent to the president of Pratt and Whitney, and quoted the portion where Mr. Varadi declared that the president should be "hung, shot by a firing squad or better yet decapitated". Second, the Director General referred to the October 2013 email sent through the Air Canada Pilots Association web form, where Mr. Varadi said that the next time an employee from Air Canada does something he does not like, he would most likely explode, and would probably do something that would give him a life sentence in prison.

[17] Then, the Director General mentioned Mr. Varadi's claim that these emails were sarcastic in nature, but she nonetheless considered Mr. Varadi's threats to be graphic and that they should be taken seriously. The Decision further noted that Mr. Varadi's reactions were excessive and well out of proportion to the triggering events. The Director General also observed that "you have admitted that some of your actions are caused just because you get 'mad' on occasion, you have become 'livid', was 'popped off', and you have had homicidal thoughts". The Director General added that, even after being reprimanded and warned of the repercussions of his actions, Mr. Varadi nonetheless continued to send threatening and disturbing emails, claiming that he was angry.

[18] The Minister's delegate consequently concluded that she had reason to believe, on a balance of probabilities, that Mr. Varadi "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", in violation of the objectives of the TSC Program Policy. The additional information Mr. Varadi submitted was not found sufficient to address these concerns. For these reasons, Mr. Varadi's TSC was cancelled.

C. *The legislative and regulatory framework*

[19] The granting or cancellation of security clearance is governed by the Act and its regulations and policies. The relevant procedures and guiding principles of the TSC Program are established by section 4.8 of the Act, sections I.1 to I.8 of the TSC Program Policy and various provisions of the *Transportation Security Clearance Program Standards* dealing with security clearance.

[20] The principles applicable in security clearance cases have been aptly summarized by Mr. Justice Leblanc in *Henri v Canada (Attorney General)*, 2014 FC 1141 at paras 7-9 and in *Sargeant v Canada (Attorney General)*, 2016 FC 893 [*Sargeant*] at paras 26-29. The relevant extracts from *Sargeant* read as follows:

> [26] In security clearance cases, this Court has stated three important principles.
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> [27] First, section 4.8 of the Act confers on the Minister a broad discretion to grant, suspend or cancel a security clearance, which empowers him to take into account any relevant factor (*Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59 (CanLII), at para 19, 425 FTR 247 [*Thep-Outhainthany*]; *Brown v Canada (Attorney General)*, 2014 FC 1081 (CanLII), at para 62 [*Brown*].

> [28] Second, aviation safety being an issue of substantial importance and access to restricted areas being a privilege, not a right, the Minister, in exercising his discretion under section 4.8, is entitled to err on the side of public safety which means that in balancing the interests of the individual affected and public safety, the interests of the public take precedence (*Thep-Outhainthany*, at para 17; *Fontaine v Canada (Transport)*, 2007 FC 1160 (CanLII), at paras 53, 59, 313 FTR 309 [*Fontaine*]; *Clue v Canada (Attorney General)*, 2011 FC 323 (CanLII), at para 14; *Rivet v Canada (Attorney General)*, 2007 FC 1175 (CanLII), at para 15, 325 FTR 178).
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> [29] Third, in such matters the focus is on the propensity of airport employees to engage in conduct that could affect aviation safety which requires a broad and forward-looking perspective. In other words, the Minister "is not required to believe on a balance of probabilities that an individual "will" commit an act that "will" lawfully interfere with civil aviation or "will" assist or abet any person to commit an act that "would" unlawfully interfere with civil aviation, only that he or she "may"" (*MacDonnell v Canada (Attorney General)*, 2013 FC 719 (CanLII), at para 29, 435 FTR 202 [*MacDonnell*]; *Brown*, at para 70). As such, the denial or cancellation of a security clearance "requires only a reasonable belief, on a balance of probabilities, that a person may be prone to or induced to commit an act that may interfere with civil aviation" (*Thep-Outhainthany*, at para 20). Any conduct which causes to question a person's judgment, reliability and trustworthiness is therefore sufficient ground to refuse or cancel a security clearance (*Brown*, at para 78; *Mitchell v Canada (Attorney General)*, 2015 FC 1117 (CanLII), at paras 35, 38 [*Mitchell*]).

[21] The TSC Program Policy further outlines the process to be followed in the case of a TSC refusal, cancellation or suspension, including the affected person's right to be given notice of the allegations and a right to make submissions. The matter is initially referred to the Advisory Body, which in turn makes a recommendation to the Minister or his or her delegate (who, in this case, is the Director General). Upon receipt of the Advisory Body's recommendation, the Minister makes the final determination whether to refuse or cancel an individual's TSC (*Sattar v*

Canada (Transport), 2016 FC 469 [*Sattar*] at para 6; *Salmon v Canada (Attorney General)*, 2014 FC 1098 [*Salmon*] at paras 71-81).

[22] In accordance with section 4.8 of the Act, the Minister is vested with the discretionary authority to grant, refuse to grant, suspend or cancel a security clearance. The Minister exercises this discretion pursuant to the TSC Program Policy. 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 policy. The stated objective of the TSC Program Policy, set out in section I.4, 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".

D. *The standard of review*

[23] The jurisprudence has already determined the applicable standard of review for all the issues raised in Mr. Varadi's application. As a result, there is no need to proceed to a detailed analysis to identify the appropriate standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 62).

[24] It is now trite law that decisions to cancel a security clearance must be assessed on the reasonableness standard of review (*Henri v Canada (Attorney General)*, 2016 FCA 38 [*Henri FCA*] at para 16; *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 [*Farwaha*] at paras 84-86; *Rudd v Canada (Attorney General)*, 2016 FC 686

[*Rudd*] at para 10; *Mitchell v Canada (Attorney General)*, 2015 FC 1117 at para 15, aff'd 2016 FCA 241; *Clue v Canada (Attorney General)*, 2011 FC 323 at para 14). Moreover, because of the highly specialized nature of the TSC cancellation procedure and the particular expertise of the Advisory Body and the Minister who routinely render decisions in this sphere, the Minister is entitled to a large degree of deference (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 13; *Shabbir v Canada (Attorney General)*, 2014 FC 1020 at para 28).

[25] When reviewing a decision on the standard of reasonableness, the analysis is concerned "with the existence of justification, transparency and intelligibility within the decision-making process", and the decision-maker's findings should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). Under a reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, and the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome (*Newfoundland Nurses* at para 17).

[26] Turning to issues of procedural fairness, they are reviewable against a standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 43; *Rudd* at para 11; *Weekes v Canada (Attorney General)*, 2015 FC 853 at para 9). This requires the Court to determine whether the process followed achieved the level of fairness required by the circumstances of the matter

(*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115). Therefore, the question raised by the duty to act fairly is not so much whether the decision was "correct", but rather whether the process followed by the decision-maker was fair (*Aleaf v Canada (Citizenship and Immigration*), 2015 FC 445 at para 21; *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35).

[27] The duty to act fairly has two components: the right to be heard and the right to an impartial hearing. The nature and extent of the duty will however vary with the specific context and the various factual situations dealt with by the administrative body, as well as the nature of the disputes it must resolve (*Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 [*Baker*] at paras 25-26). In any situation, procedural fairness issues do not create substantive rights but instead relate to the process followed by the decision-maker (*Baker* at para 26). Legitimate expectation is one element of procedural fairness.

III. Analysis

A. *The Decision is reasonable*

[28] Mr. Varadi first argues that the Decision is unreasonable and "based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before him" (*Motta v Canada (Attorney General)*, [2000] FCJ No 27 (QL) at para 13). He claims that, as a professional pilot and captain of civil aircrafts, he has never been cited for any safety or security breaches. Mr. Varadi argues that, when put back in their context, the incriminating emails do not constitute evidence that he was any threat to the objectives of the Act or to the

TSC Program. Mr. Varadi further submits that the RCMP's internal notes described his comments as "cynical innuendos".

[29] More specifically, Mr. Varadi complains that the Decision falsely ascribed to him an admission of having homicidal thoughts, and that this assertion is not based on any evidence. Mr. Varadi also contends that the facts were misconstrued in the Decision as the RCMP report erroneously indicated that his comments made to the Sûreté du Québec in October 2010 were in relation to a case where a man was arrested because he had threatened professors, whereas the email was not related to this event. Mr. Varadi further pleads that, while the Minister suggests his emails were sent without reason, the email addressed to the Air Canada Pilots Association in 2013 was in reaction to a pornographic graffiti drawn in the cockpit of an airplane. Mr. Varadi finally takes exception with the comment made by the Advisory Body to the effect that, after the October 2010 event involving Pratt and Whitney, Mr. Varadi committed to keep the peace.

[30] I do not agree with Mr. Varadi's submissions.

[31] The record clearly reveals that Mr. Varadi did make threats to people's lives in his various correspondence. In 2007, his email stated that he had just killed a "bitch" from the Canadian government. In 2010, his email to the Sûreté du Québec contained the words "so fuck off and die". In 2011, his emails to the president of Pratt and Whitney expressly mentioned that he should be hanged, shot by a firing squad or better yet decapitated. And in 2013, his message sent to the Air Canada Pilots Association bluntly affirmed: "[y]ou shit on me, I slit your throat". The Minister's delegate therefore rightly observed, based on the evidence, that Mr. Varadi had

"homicidal thoughts". A simple reading of Mr. Varadi's emails reveals unequivocally that his language was graphic and unambiguous, distinctly referring to the death of their recipient.

[32] At the hearing before this Court, counsel for Mr. Varadi insisted on the reference made by the Director General to Mr. Varadi's "homicidal thoughts", and argued that the Decision erroneously attributed to Mr. Varadi an admission of having such thoughts. I do not share counsel's reading of this extract of the Decision. As noted by the Minister, the observation made by the Director General is not a reference to a written admission by Mr. Varadi and is indeed not quoted as such; it is rather a finding of fact based on Mr. Varadi's emails. Given the express statements repeatedly made by Mr. Varadi to the killing of human beings (such as "fuck off and die", "decapitating" the president of Pratt and Whitney and "slitting the throat"), it was certainly not unreasonable for the Director General to infer from these emails that Mr. Varadi had "homicidal thoughts".

[33] As to the allegations that the context in which Mr. Varadi sent the message to the Sûreté du Québec was not in relation to an arrest of an individual who had expressed his intention to kill former professors, that a valid reason nourished Mr. Varadi's email to Air Canada or that he did truly commit to keep peace after the Pratt and Whitney incident, I am not moved by Mr. Varadi's arguments as I do not find these contextual references to be material and relevant factors in the Decision. No matter what was the context surrounding the messages, the content of the emails remains the same and it is Mr. Varadi's actual statements that were material to the Decision and created the concerns expressed by the Director General. The context in which Mr. Varadi sent his threatening emails did not matter and is not even mentioned in the Decision. In addition, I

observe that Mr. Varadi had ample opportunity to explain the context in which he sent his inflammatory emails, which he did through the dozens of emails he forwarded to Transport Canada and the four phone calls he had with them. It is indeed expressly stated in both the Advisory Body's recommendations and the Decision that Mr. Varadi's submissions and explanations were taken into account.

[34] What is more, Mr. Varadi acknowledged having made the threats he voiced in his various emails.

[35] I am mindful of the fact that Mr. Varadi has no criminal record and has not been associated with any criminal activities. I also note that Mr. Varadi never committed acts that would directly interfere with civil aviation, and that he never had any intention to do so. However, this is not the issue that the Minister's delegate had to decide. It may be that, in Mr. Varadi's mind, his colorful comments, explosive words and strong language were simply an expression of anger and frustration, but the Director General had to determine whether, on a balance of probabilities, these emails gave her reasons to believe that Mr. Varadi may be prone or induced to commit an act that may unlawfully interfere with civil aviation. She found that they did. The Director General expressly acknowledged Mr. Varadi's statement to the effect that his comments were made in a sarcastic manner and as "cynical innuendos", but this was insufficient to alleviate her concerns in light of the tone and terms used in Mr. Varadi's emails.

[36] The standard of reasonableness is concerned with the justification, transparency and intelligibility of the impugned decision and whether it falls within a range of possible, acceptable

outcomes with regard to the facts and law. It requires the Court to show deference to the conclusions of the administrative decision-maker and provides that it is not in the Court's purview to reweigh the evidence and substitute its point of view for that of the administrative decision-maker (*Dunsmuir* at para 47). This is especially true in the context of transportation security clearances where a high degree of deference is owed to the expertise of the Minister in administering the applicable statutory provisions. As the Supreme Court often reminded, deference is in order where a decision-maker acts within its specialized area of expertise (*Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 46).

[37] The reasons are to be read as a whole, in conjunction with the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*] at para 53; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3). In addition, a judicial review is not a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54). The Court should approach the reasons with a view to "understanding, not to puzzling over every possible inconsistency, ambiguity or infelicity of expression" (*Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151 at para 15).

[38] The range of reasonable outcomes takes its colour from the context of the decision (*Dunsmuir* at para 64). In the present case, this context is informed by a number of factors, "including the broad discretion granted to the Minister to take into account any relevant factor, the fact that the Minister need only to reasonably believe, on a balance of probabilities, that one 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 the inherently forward-looking predictive nature of a risk assessment" (*Mitchell v Canada (Attorney General),* 2016 FCA 241 at para 7). In addition, in balancing the interests of the individual affected and the public safety, the interests of the public in aviation safety prevail (*Sargeant* at para 28).

[39] Further to my review of the Decision and of the evidence, I find that it was reasonably open to the Director General to conclude that Mr. Varadi's conduct raised concerns about his judgment, reliability and trustworthiness. Considering that, in an area of such importance as aviation safety, wrong decisions can lead to grave consequences (*Farwaha* at para 92), I am satisfied that the repeated instances of threatening conduct by Mr. Varadi were sufficient to cause the Advisory Body and the Director General to question Mr. Varadi's judgment, reliability and trustworthiness, and to justify the revocation of his security clearance. The findings provide adequate justification and rationality in light of the totality of the evidence before the decision-maker, and in those circumstances, a reviewing court should not substitute its own view of a preferable outcome (*Khosa*, at para 59).

[40] The cancellation of transportation security clearance is a decision "thoroughly suffused by facts, policies, discretion, subjective appreciation and expertise", and the Director General therefore benefits from a wide margin of appreciation within the range of acceptable and rational solutions (*Paradis Honey Ltd v Canada*, 2015 FCA 89 at para 137). There is nothing on the record before me that allows me to conclude that the Decision falls outside of that range.

B. ***The legitimate expectations***

[41] Mr. Varadi also submits that he had a legitimate and reasonable expectation that Transport Canada would not cancel his TSC on the basis of events that took place before 2014 (when his TSC had been renewed for five years). In fact, says Mr. Varadi, the four problematic emails relied on in the Decision were sent from 2007 to 2013, whereas Mr. Varadi's TSC was renewed in both 2009 and 2014. Mr. Varadi claims that "the doctrine of legitimate expectations is sometimes treated as a form of estoppel" and that this doctrine can apply where the government "was aware of such conduct, or that it was relied on with detrimental results" (*Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 [*Mount Sinai*] at para 30).

[42] This is not a correct interpretation and understanding of the doctrine of legitimate expectations.

[43] First, from a factual standpoint, the damaging events were not brought (and could not have been brought) to the attention of Transport Canada before the RCMP report was received in January 2015, because routine checks by the SIBS were only initiated after the 2014 renewal of Mr. Varadi's TSC. This was indeed expressly stated in the January 2015 Notice Letter sent to Mr. Varadi: the RCMP report had revealed adverse information that was not available before then. In other words, no representations were made at any time to Mr. Varadi suggesting that his security clearance could not be revoked based on events that happened before the background check for the renewal of his security clearance in 2014.

[44] Second, nothing in the doctrine of legitimate expectations implies an expectation that facts and events prior to the renewal of security clearance would not be considered by the Minister. The "expectations must not conflict with the public authority's statutory remit" (*Mount Sinai* at para 29). Legitimate expectations cannot otherwise serve to fetter the discretion of a decision-maker who applies the law (*Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 557-558). An important tenet of the doctrine of legitimate expectations is indeed that it cannot operate to defeat a statutory prohibition on the process contended for (*Lidder v Canada (Minister of Employment & Immigration)*, [1992] FCJ No 212 (FCA) at para 28). In no case can a public authority "place itself in conflict with its duty and forego the requirements of the law" (*Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at para 42; *Oberlander v Canada (Attorney General)*, 2003 FC 944 at para 24). Stated otherwise, the doctrine "cannot be used to counter Parliament's clearly expressed intent" to confer an authority to a decision-maker (*Canada (Minister of Citizenship and Immigration) v Dela Fuente*, 2006 FCA 186 at para 19).

[45] Not only was Transport Canada not made aware of the compromising situation of Mr. Varadi until after it received the RCMP report in January 2015, but it would also be contrary to the aim of the TSC Program, which is to ensure security while preventing unlawful acts of interference with civil aviation, to accept that events that took place before the last TSC renewal, but that were unknown at that time, should not be considered by the Minister.

[46] Third, the doctrine of legitimate expectations is part of the rules of procedural fairness. As such, it only provides procedural protections and does not create substantive rights (*Baker* at

para 26). The Supreme Court of Canada, in *Agraira*, recently restated the current status of the doctrine, at paras 94-97 [emphasis in the original]:

> [94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.
>
> [95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:

> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. (D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at §7:1710; see also Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services), 2001 SCC 41, [2001] 2 S.C.R. 281 (S.C.C.), at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504 (S.C.C.), at para. 68.) [Emphasis added.]

[96] In *Mavi*, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):

> Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

[97] An important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights (*Baker*, at para. 26; *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.), at p. 557). In other words, "[w]here the conditions for its application are satisfied, the Court may [only] grant appropriate procedural remedies to respond to the 'legitimate' expectation" (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, at para. 131 (emphasis added)).

[47] The doctrine protects the right to a fair procedure, not the right to a given result. Therefore, Mr. Varadi cannot rely on the doctrine of legitimate expectations to claim a substantive right to a particular outcome in the treatment of his security clearance.

[48] For all those reasons, there is no merit to Mr. Varadi's argument on legitimate expectations, and counsel for Varadi has indeed not pressed this point at the hearing before the Court.

C. ***There was no denial of procedural fairness***

[49] Mr. Varadi further argues that he did not know the reproaches made against him and that, in the process leading to the cancellation of his TSC, the Advisory Body and the Director General breached the rules of procedural fairness. He submits that the lack of information provided by Transport Canada, the RCMP and the Sûreté du Québec made it impossible for him to respond to their allegations regarding the impugned incidents. In order to be able to answer to these, Mr. Varadi claims he should have obtained additional information, such as how the case against him was put together and the information it was based on.

[50] I disagree. I do not share Mr. Varadi's opinion and instead find that there was no breach of the principles of procedural fairness in the treatment of his case.

[51] The nature and scope of the duty of procedural fairness are flexible and will vary depending on the attributes of the administrative tribunal and its enabling statute. The level and the content of the duty of procedural fairness 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 to have them considered by the decision-maker (*Baker* at paras 21-22).

[52] In *Baker*, the Supreme Court of Canada set out five non-exhaustive 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 (*Baker* at paras 23-28). In every case, the requirements refer to the process followed and not to the substantive rights determined by the decision-maker.

[53] The case law has established that where an existing security clearance is being revoked, the duty of fairness, although slightly more than minimal, still resides at the lower end of the spectrum (*Sattar* at para 25; *Meyler v Canada (Attorney General)*, 2015 FC 357 [*Meyler*] at paras 27-28; *Brown v Canada (Attorney General)*, 2014 FC 1081 at paras 84-85; *Pouliot v Canada (Transport)*, 2012 FC 347 at paras 9-10). The duty of procedural fairness thus remains minimal, even though someone whose security clearance has been revoked is entitled to a higher degree of procedural fairness than someone whose application has simply been refused (*Salmon* at para 46).

[54] Disputes over the level of procedural fairness due in the context of a cancellation of a security clearance have been recently considered and settled by the Federal Court of Appeal in *Henri FCA*: procedural fairness demands only that persons in Mr. Varadi's situation be informed of the facts alleged and be afforded "a meaningful opportunity to respond to the evidence against them, and for that response to be considered" (*Henri FCA* at para 35). Although the Federal Court of Appeal recognized that the decision to revoke a security clearance is of "enormous personal importance", especially where a person's employment is dependent on maintaining such clearance, it reminded that this is only one of the factors to be considered in determining the content of the duty of procedural fairness owed to an applicant by the Minister (*Henri FCA* at para 23). It was held that the "nature of the decision and the statutory scheme militate towards reduced levels of procedural fairness", even if the loss of a job can have tremendous consequences (*Henri FCA* at para 25).

[55] Mr. Varadi knew all the facts presented to the Advisory Body and to the Minister's delegate and had ample opportunity to respond to them. He was advised of the allegations against him in the Notice Letter and invited to respond. Indeed, prior to the review of the file by the Advisory Body, Mr. Varadi was informed of all areas of concern, and was encouraged to make written submissions outlining all circumstances surrounding these events and to provide all relevant information including mitigating circumstances. From January to September 2015, Mr. Varadi sent dozens of emails and made several phone calls to ask questions and provide information. There is no doubt that Mr. Varadi was presented with the case against him and provided with sufficient time to provide his response, especially since he benefited from two

extensions of the initially allotted time. His submissions were duly considered by both the Advisory Body and the Director General.

[56] Nothing in the process followed in rendering the Decision therefore suggests that the duty of fairness owed to Mr. Varadi was breached. On the contrary, the procedures designated by the TSC Program Policy were observed. The Advisory Body reviewed the adverse information and Mr. Varadi's submissions and made a recommendation to the Director General. In light of this recommendation and upon review of Mr. Varadi's file, the Minister's delegate made a final determination to cancel Mr. Varadi's TSC.

[57] More specifically, the access to information request made by Mr. Varadi to the RCMP was responded and Mr. Varadi received the documents. Transport Canada indeed waited for him to receive the documents and invited Mr. Varadi to provide any other relevant information. There is no evidence that Mr. Varadi's access to information requests were not answered or that he did not receive all relevant documents. In fact, Mr. Varadi does not refer to any specific document that might be missing. The evidence instead shows that Mr. Varadi received responses to his information and privacy act requests in July 2015, and in an email dated August 10, 2015.

[58] In light of the foregoing, I cannot detect any procedural defect here. As in *Henri FCA*, the whole process was procedurally fair.

[59] The case law cited by Mr. Varadi does not assist him as the decisions he provided essentially relate to situations where the security clearance of the applicant was revoked on the

basis of the applicant's association with criminal activities, as opposed to the applicant's own behaviour. It is in that particular context where applicants had their security clearance revoked because of association that breaches of the duty of procedural fairness arose. Contrary to the situation of Mr. Varadi who himself made serious and lethal threats to other people, the persons whose security clearance was at stake in the judgments relied on by Mr. Varadi had not committed any questionable actions on their own. In fact, it was simply due to their relationships and/or associations that the decision-maker had decided to revoke their security clearance.

[60] In *Rudd*, there were observations that could possibly lead to conclude that the applicant had an indirect connection to the Hell's Angels and a motorcycle club. Similarly, in *Imerovik v Canada (Attorney General)*, 2016 FC 940, the security clearance had been revoked based on the applicant's association with three individuals, namely her son, her husband and a third party with a known gang affiliation. Unlike the present case where Mr. Varadi directly and repeatedly threatened various people with harsh and graphic messages, there was no proof that Mr. Rudd or Ms. Imerovik ever committed any criminal act or engaged in any reprehensible behaviour. They were only found guilty by association. I observe that similar situations occurred in *Sattar*, *Britz v Canada (Attorney General)*, 2016 FC 1286 and *Meyler* where security clearances were revoked due to the applicant's acquaintances with criminals or illegal activities.

[61] Every case involving the revocation or refusal of a security clearance is highly factual and cannot be divorced from its context. In each instance, the role of the Minister is to determine whether there were reasonable grounds to believe that, on a balance of probabilities, a person "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". As the Federal Court of Appeal noted, the statutory scheme clothes the Minister with a great deal of discretion (*Henri FCA* at para 25). Section 4.8 simply provides that 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". While the Court should not show "blind reverence" to a decision-maker's interpretation, it should resist the temptation to intervene and to usurp the specialized expertise that Parliament has opted to confer to an administrative body (*Dunsmuir* at para 48). This is the case here.

D. ***No alternative measure had to be considered***

[62] Finally, as part of his argument on the breach of procedural fairness, Mr. Varadi emphasizes that insufficient consideration was given by the Director General to the impact of the Decision on his life. Mr. Varadi relies on the Supreme Court's statement in *Baker* that "the importance of the decision to the individual or individuals affected" was to be taken into consideration (*Baker* at para 25). Mr. Varadi adds that this criteria was applied in a context of a cancellation of a security clearance before the Federal Court of Appeal (*Henri FCA* at para 23). He further pleads the importance of ensuring "a high standard of justice […] when the right to continue in one's profession or employment is at stake" (*Kane v Bd of Governors of UBC*, [1980] 1 SCR 1105 at 1113).

[63] Mr. Varadi suggests that, considering the significant consequence of the TSC cancellation for him, alternate and more lenient measures should have been considered by the Director General as the Decision puts an abrupt and unexpected end to his career of more than 35

years as a pilot, while affecting his dignity as a person. Mr. Varadi more specifically claims that the TSC Program contains an escalation of sanctions and measures so as to promote procedural fairness, and that other measures having a lesser impact on his life were available but ignored by the Advisory Body and the Director General before cancelling his security clearance.

[64] I disagree.

[65] Despite the able arguments made by counsel for Mr. Varadi, there is no express or implicit obligation to look for the least intrusive and least prejudicial measure in the context of a discretionary decision like the one at stake in this case. In fact, counsel for Mr. Varadi admitted at the hearing before this Court that he could not point to any jurisprudence supporting such a proposition.

[66] Mr. Varadi singled out the "precautionary measures" outlined in section II.39 of the TSC Program Policy. However, these do not apply here as the measures contemplated in that section are intended for applications to obtain a security clearance, not cancellations of an existing security clearance.

[67] I accept that high standards of justice shall govern when a decision impacts the ability of an individual to continue his or her profession. I am also mindful of Mr. Varadi's 35 years of employment without any security incidents and of the prejudice caused by the revocation of his security clearance after a long career as captain of civil aircrafts. I can also understand that, in light of what ultimately unfolded, Mr. Varadi expresses regret and remorse regarding the troubling emails he sent. However, the Director General had no obligation, in the exercise of her

discretion, to consider the precautionary measures singled out by Mr. Varadi. I would add that even the provision cited by Mr. Varadi simply states that the Advisory Body (not the Director General or the Minister) "may" recommend one of the precautionary measures. Here, the Advisory Body did not even consider it appropriate to recommend such measures to the Minister and instead opted for the cancellation.

[68] The approach advocated by Mr. Varadi would also be contrary to the objectives of the TSC Program Policy. It is trite law that a commanding rule regarding discretionary powers is that "discretion should be used to promote the policies and objects of the governing Act" (Sara Blake, *Administrative Law in Canada*, 5th ed; Markham: LexisNexis, 2011 at 100). In the context of a discretionary power, the question is therefore whether the discretion was exercised "'according to law' and in accordance with proper principles reflected in the 'policy and objects of the [governing] Act" (*Oakwood Development Ltd v St-François Xavier*, [1985] 2 SCR 164 at para 16). The scope of discretion always depends "on the purpose and object of the legislation" (*Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at para 19). The objective of the TSC Program Policy is clearly set out at subsection I.1, and it is to prevent "unlawful acts of interference with civil aviation by the granting of clearances to persons who meet the standards set out in this Program". Paragraph I.4(4) further refers to "prevent the uncontrolled entry of […] any individual who […], on a balance of probabilities, may be prone or induced to commit an act that may unlawfully interfere with civil aviation".

[69] In the present case, to give Mr. Varadi a sanction more indulgent than the cancellation of his TSC, after finding that he "may be prone or induced to commit an act that may unlawfully

interfere with civil aviation", would, in my view, have been contrary to the purpose of the TSC Program Policy and to the prevention of unlawful acts of interference with civil aviation and to protect the public.

[70] I therefore find no merit to Mr. Varadi's claim that the Director General did not reconcile her discretion with the particular facts of the case, the availability of less punitive methods of addressing her concerns and Mr. Varadi flawless security history as a pilot for 35 years.

[71] I mention one last point. In balancing public safety and Mr. Varadi's interests from the standpoint of the other considerations put forward in his submissions, it was open to the Director General to give precedence to the interests of the public. Indeed, as recently stated by Mr. Justice Manson in *Sattar*, "the Minister is entitled to err on the side of public safety when balancing it against the Applicant's interests in accessing airport restricted areas – granted as a privilege, not a right" (*Sattar* at para 41). This is what the Director General did in this case.

IV. Conclusion

[72] For the reasons detailed above, the Decision represents a reasonable outcome based on the law and the evidence before the Director General, acting as the Minister's delegate. On a standard of reasonableness, it suffices if the decision subject to judicial review falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. This is the case here. In addition, I do not find any breach of the principles of natural justice, and I am satisfied that Mr. Varadi's basic rights were respected throughout the process followed by the Advisory Body and the Minister's delegate.

[73] I appreciate that the consequences of the decision to revoke the Mr. Varadi's security clearance are very serious. In a sense, it is unfortunate that Mr. Varadi's anger and frustration led him to express the scathing and troublesome homicidal comments he made in the various emails unearthed by the RCMP. However, my role is not to reassess the events that led to the Decision and to reweigh the evidence before the Advisory Body and the Director General. My role is to determine if the administrative process leading to the Director General's Decision and its outcome were reasonable and procedurally fair. Based on my review of the Decision and of the evidence, I cannot say that they were not.

[74] The Attorney General of Canada acting for the Minister is seeking costs on this application. Given that the respondent is the successful party in these proceedings, it will be entitled to an award of costs. However, I find that a lump-sum amount of $1,000, disbursements included, would be reasonable in this case, having regard to all the circumstances of this matter, and upon consideration of the factors set forth in article 400(3) of the *Federal Courts Rules*, SOR/98-106.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs in the amount of $1000 are awarded to the respondent.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2171-15
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