

Federal Court



Cour fédérale

Date: 20170718

Docket: T-258-13

Citation: 2017 FC 698

Ottawa, Ontario, July 18, 2017

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

JOHN CHAMBERS

Applicant

and

TRANSPORT CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of a decision dated January 9, 2013, by Transport Canada which refused John Chambers' security clearance application at Lester B. Pearson International Airport. John Chambers worked for eight months at the Toronto Airport while he was waiting for his security clearance.

[2] He chose to represent himself and Mr. Chambers cross-examined the Transport Canada affiant, filed written submissions, and appeared on his own behalf at this hearing.

[3] I understand that for financial reasons it is often difficult for individuals to obtain legal representation. But in the future in these unique, complex matters having legal counsel would be helpful as it appears that self-representation has not been in his best interest in the past.

[4] For the reasons that follow, I will grant the application for judicial review.

II. Background

[5] Mr. Chambers applied for a Transportation Security Clearance on May 24, 2012. As part of this application process, Transport Canada received a Law Enforcement Record Check [LERC] from the RCMP on August 17, 2012. The LERC indicated that Mr. Chambers had been arrested in 1992 and charged with drug offences as a result of a police investigation into drug traffickers operating out of Pearson International Airport. Within the LERC it was alleged that Mr. Chambers, on separate occasions, sold 113.9 grams of cocaine, a piece of rock heroin, and two samples of heroin to an undercover police officer. After a long delay – because Mr. Chambers could not retain a lawyer – the matter went to trial and on January 29, 1997 and Mr. Chambers was found guilty. On February 4, 1999, the conviction was successfully appealed and on November 8, 1999, all charges were stayed. Mr. Chambers made a successful application to have his file closed and his fingerprints destroyed.

[6] Based on information in the LERC report, Transport Canada issued a procedural fairness letter to Mr. Chambers on September 14, 2012, advising him of their concerns. Mr. Chambers was invited to provide further information to support his application prior to a hearing by an Advisory Board which would recommend to the Minister whether his security clearance should be granted.

[7] On October 16 and 24, 2012, Mr. Chambers submitted a letter dated October 6, explaining the events contained in the LERC report as well as character references. In the materials filed and at the hearing, Mr. Chambers was unyielding that he did not sell drugs to the undercover officers and that the charges were all a big mistake.

[8] On December 12, 2012, the Advisory Board met to discuss Mr. Chambers' application. In its record of discussion, the Advisory Board stated that Mr. Chambers' had no criminal record. The Advisory Board noted the 20 year period of time since Mr. Chambers' narcotics charges, the seriousness of those charges, the types of drugs involved, and the underlying circumstances such as the origin of the narcotics from Pearson International Airport. The Advisory Board also commented that these would have been controlled buys as part of the investigation when the sales by Mr. Chambers were made to an undercover police officer.

[9] A separate bullet point in the Advisory Board discussion says "The Applicant was in jail for approximately 2 years from 1997-1999". In the next bullet point the Advisory Board found on a balance of probabilities that he "may be prone or induced to commit an act, or to assist or abet another person to commit an act that may unlawfully interfere with civil aviation." They

considered the written statement by Mr. Chambers but found it failed to address key concerns and the Advisory Board recommended the refusal of Mr. Chambers' application.

[10] On January 9, 2013, the Director General, Aviation Security made the final decision on behalf of the Minister of Transport. The decision cited Mr. Chambers' sale of narcotics to an undercover police officer and the investigation into narcotics through the Pearson International Airport as reasons for refusing his application. Mr. Chambers' letter and references did not address the concern about the seriousness of the incident and quantity of drugs involved.

[11] The Minister's delegate accepted the recommendation to not grant the security clearance.

III. Issues

[12] The issues that must be determined on judicial review are:

- A. Was the Minister's decision procedurally fair?
- B. Was the Minister's decision reasonable?

IV. Preliminary

[13] The Respondent requests that the style of cause be amended to remove "Transport Canada" and replace it with "The Attorney General of Canada". I agree with the Respondent.

[14] Materials that were filed by Mr. Chambers which were not before the decision maker will not be taken into account when deciding this judicial review.

V. Standard of Review

[15] The applicable standard of review to the Minister's discretionary decision is that of reasonableness (*Mangat v Canada (Attorney General)*, 2016 FC 907 at para 17 [*Mangat*]; *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 16 [*Henri*]).

[16] Any issues of procedural fairness should be addressed on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

VI. Analysis

[17] Access to restricted areas is a privilege as air safety is an issue of national and international importance. Pursuant to the *Aeronautics Act* RSC 1985, c. A-2 [the Act] and the *Canadian Aviation Security Regulations*, SOR/2000-111, the Minister of Transport is responsible for safety in Canadian airports including the power to grant security clearances for individuals at designated airports. Only holders of a restricted area identity card [RAIC] can gain access to restricted areas in an airport. To obtain a RAIC the Minister, pursuant to section 4.8 of the Act, has the discretion to grant, refuse, suspend or cancel a security clearance.

[18] The Minister relies on the guidelines contained in the Transportation Security Clearance Program policy [TSCP policy]. The TSCP is forward looking as the decision maker must predict on a balance of probabilities whether an applicant may be; prone to or be induced to commit an act that may unlawfully interfere with civil aviation. The Minister, when exercising their discretion, can consider any factor they believe is relevant including criminal charges or

prosecutions whether they proceed or end in conviction. The Minister can look at the underlying factors when determining whether an applicant may pose a present or future danger to air safety.

[19] The program is administered by a Director of Security Screening Programs and the process is that when the Application comes in to the security screening program it is first determined if it is a proper application that is verifiable and includes the fingerprints from the pass control office or the site. Then applicants are subject to background checks that can include but are not limited to finger printing, criminal record check with RCMP, CSIS indices check, check of other law enforcement agencies including intelligence gathered and a Canadian Police Information Centre check.

[20] When the director “believes there is sufficient information available to consider whether the applicant’s suitability is consistent with the aim and objective of the Program” then they must convene an advisory body. The advisory body makes a recommendation to the Minister to either cancel or refuse the security clearance. The body may consider any relevant factor and then lists a number of factors they considered. A procedural fairness letter is sent to the applicant where he/she is encouraged to address the concerns identified that relate to suitability for security clearance. The individual may provide any relevant information or explanations or extenuating circumstances. Once all of the information is gathered, the Advisory Board meets to deal with multiple files and on each file makes a recommendation to the Minister to either cancel or refuse the applicant’s security clearance.

[21] The Minister (or their delegate) then makes the final determination of whether a security clearance shall be issued or refused. Notice of that decision with the reasons of the refusal is sent to the individual and to the airport security manager.

[22] In this case the Minister's delegate made the decision to refer Mr. Chambers' application to an Advisory Board as there were concerns in the Law enforcement Record Check (LERC). Mr. Chambers in an October 16, 2012 letter offered his explanation of the events and denied he ever sold drugs and explained that he did not have legal representation at the trial which the conviction was later overturned by the Court of Appeal.

[23] The Advisory Board met on December 12, 2012, and recorded the key points in the Record of Discussion (see above paras 8 & 9).

[24] The recommendation was to refuse the security clearance as there was reason to believe on a balance of probabilities that Mr. Chambers 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.

[25] The Minister's delegate accepted the recommendation to not grant the security clearance and the Applicant was informed of the decision on January 13, 2013.

[26] Mr. Chambers argued that the recommendation contained factual errors and for that reason this application should be granted. Mr. Chambers submitted that two major factual errors

relied on by the decision maker made the decision unreasonable as well as procedurally unfair as he was not given the opportunity to address the errors.

[27] He points out that the record of recommendation states that his arrest was one of 11 people involved when in fact he was arrested and taken to a gym with approximately 60 people on Jarvis Street in Toronto. The other factual error that he argues made the decision procedurally unfair was that he was never jailed for two years.

[28] The statutory scheme gives the Minister wide discretion (*Henri*, at para 24). The FCA instructed that the level of procedural fairness does require that a person be informed of the facts that are alleged and be given the chance to respond (*Henri* at para 27; *Farwaha v Canada (Minister of Transport, Infrastructure and Communities)*, 2014 FCA 56).

[29] The Advisory Board does not have to confirm information contained in the LERC. Mr. Chambers was provided the LERC that contained what he now says was false information regarding his arrest. Mr. Chambers could have addressed how many people he was arrested with as well as the specifics of what happened surrounding his arrest in the written response he provided.

[30] In this case he was informed of the facts and given the chance to respond to the circumstances of his arrest and he did in fact provide the Advisory Board with a response. For that reason, I find any inaccuracies surrounding his arrest to meet the level of procedural fairness required.

[31] By contrast, the other factual error Mr. Chambers was not informed of or given the opportunity to address. The error is found in the record of discussion of the Advisory Board in a separate bullet point that stated that Mr. Chambers was in jail for 2 years in 1997 (see para 9 above). The LERC does not say he was incarcerated for two years. The Respondent's affiant says Transport Canada does not validate the information received from the RCMP as they are not an investigative body. However, in this case the factual error regarding jail time did not arise in the LERC and only shows up in the Advisory Board's recommendation.

[32] Mr. Justice Rennie (as he then was) said "...Where what is at issue is a simple application for clearance or a permit made by a person who has no existing right to that clearance or permit, the requirements imposed by the duty to act fairly are minimal. The Minister must render a decision that was not 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 at para 13; *Pouliot*, at para 9).

[33] The Minister in making their decision relies on the recommendations of the Advisory Board. The recommendation from the Advisory Board contains the critical factual error regarding the time Mr. Chambers spent being incarcerated that could have been persuasive in making a negative decision. In the recommendation and the reasons for the refusal it does not say what weight was attributed to a particular factor though this fact was in its own separate bullet point. This fact could have lead the Advisory Board to infer that a lengthy time, such as two years spent in prison, would expose a person to many individuals that would be negative

influences and could have connections to the drug trade. In fact, he was only held in remand (jail) for 90 days pending his appeal.

[34] The error was not in the LERC which was provided to the Applicant and that is where the concerns were found that he could address in the material he filed. Mr. Chambers did not address that he had not been in jail for two years as it was not in the information that he was given.

[35] During cross examination, the Respondent's affiant indicated that it may have been the Advisory Board's interpretation of the LERC. I have reviewed the LERC and I cannot find that it could reasonably be concluded from the information in the LERC that Mr. Chambers was incarcerated for two years. It was not a reasonable interpretation or fair that Mr. Chambers was not told that the recommendation contained a concern was he spent two years in jail so that he could address it in his response.

[36] Even though the procedural fairness that is afforded these decisions is low, the decision cannot be based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before him/her. I find that the procedural unfairness was breached in this case because the decision was based on a recommendation that included the erroneous fact that was made without regard to the material before it and Mr. Chambers was not given an opportunity to respond to that particular erroneous fact.

[37] I will not deal with the issue of whether the decision was reasonable as this particular breach of procedural fairness is such that the matter should be re-determined. Mr. Chambers will

be given the opportunity to address the inaccurate facts in the record of discussion after which a new Advisory Board meeting will be held to then provide its recommendation to the new decision maker.

[38] The decision is quashed and the matter is sent back to be re-determined by a different decision maker. Mr. Chambers is to be given the opportunity to file additional evidence before the matter is re-determined.

[39] No costs are awarded as none were sought

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended by removing "Transport Canada" and replacing it with "The Attorney General of Canada";
2. The application is granted to be re-determined by a different decision maker
3. No costs are awarded.

"Glennys L. McVeigh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-258-13

STYLE OF CAUSE: CHAMBERS V TRANSPORT CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 21, 2017

JUDGMENT AND REASONS: MCVEIGH J.

DATED: JULY 18, 2017

APPEARANCES:

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FOR THE APPLICANT,
ON HIS OWN BEHALF

Wendy Wright

FOR THE RESPONDENT

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FOR THE RESPONDENT