

Federal Court



Cour fédérale

Date: 20170718

Docket: T-1383-16

Citation: 2017 FC 696

Ottawa, Ontario, July 18, 2017

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MARK DEL VECCHIO

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Transport has the responsibility to ensure public confidence in civil aviation safety. There exists a corresponding broad discretionary power which empowers the Minister to protect major international airports from illegal activities. One such power is the Minister's discretion to grant or refuse security clearance to sensitive airport areas.

[2] Mr. Del Vecchio's security clearance was not renewed for Pearson International Airport in a decision dated July 13, 2016. His renewal was refused because of his association with his father who is a full patch member of the Vagabonds Motorcycle gang. In addition, Mr. Del Vecchio failed to disclose in his renewal application his involvement in a domestic incident with his wife and a prior criminal conviction. For the reasons that follow, I will dismiss this application.

II. Background

[3] Mr. Del Vecchio has been an aircraft mechanic since 1992. He owns an aviation maintenance company which operates out of Lester B. Pearson International Airport. During his time as an aircraft mechanic, Mr. Del Vecchio renewed his Transportation Security Clearance at Pearson International Airport several times.

[4] After his December 3, 2009 application, Transport Canada became aware that Mr. Del Vecchio had been charged and convicted of care and control of a vehicle while impaired back in 1993 and also was charged in 2007 with possession of property obtained by crime.

[5] As a result of these activities, Transport Canada advised Mr. Del Vecchio of its concerns and provided him with the opportunity to make submissions prior to them making a decision. Mr. Del Vecchio provided a reply which was then forwarded to the Advisory Board. After reviewing his information, the Advisory Board recommended Mr. Del Vecchio's security clearance be granted which happened on July 9, 2010, and was valid until December 23, 2014.

Mr. Del Vecchio felt he had been given a fair chance to explain himself and the circumstances surrounding the criminal charges and continued to operate his business.

[6] In September of 2014, Mr. Del Vecchio submitted an application for renewal of his security clearance. As part of this application, he indicated that he had never been convicted in Canada or elsewhere of an offence for which a pardon had not been granted. Mr. Del Vecchio's security clearance was renewed until September 26, 2019.

[7] On July 6, 2015, Transport Canada was provided with a Law Enforcement Records Check [LERC] from the RCMP. This report showed that: Mr. Del Vecchio had been previously convicted for care and control in 1993; that police attended his home to investigate a domestic dispute; that a vehicle registered to Mr. Del Vecchio had been parked out front of a full patch member of the Vagabonds which is a motorcycle gang involved in criminal activities .

[8] On August 20, 2015, Transport Canada sent a procedural fairness letter to Mr. Del Vecchio indicating concerns had been raised about his security clearance which would be reviewed. He was encouraged to provide information which could clarify these concerns.

[9] Mr. Del Vecchio provided written submissions to Transport Canada explaining that he did not intend to mislead the Minister regarding his conviction and that the Vagabonds member in question is his father. Mr. Del Vecchio denied having any ties to the Vagabonds himself.

[10] On January 26, 2016, the Advisory Board met to consider Mr. Del Vecchio's application. The Advisory Board considered Mr. Del Vecchio's submissions finding them dismissive and

lacking in personal accountability. The submissions did not dispel the Advisory Board's concerns and it recommended that Mr. Del Vecchio's security clearance be canceled.

[11] On July 13, 2016, the Director General, Aviation Security, made the final decision to cancel Mr. Del Vecchio's security clearance. In the decision, it was noted that airport security can be vulnerable to security clearance holders with association to full patch members of a motorcycle gang. The Vagabonds were known to be a "Support Club" of the Hells Angels and known to use intimidation, violence and manipulation to achieve criminal goals. It was noted the vulnerability to airport security by security holders having associations with individuals that are full patch members. It was further noted that Mr. Del Vecchio misled the Minister regarding the existence of his criminal conviction. The Director General, on behalf of the Minister, canceled Mr. Del Vecchio's security clearance.

[12] Mr. Del Vecchio raises the following issues:

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

III. Standard of Review

[13] 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*]).

[14] Because of the highly specialized nature of the security clearance granting 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 (*Varadi v Canada (Attorney General)*, 2017 FC 155 at para 24; *Shabbir v Canada (Attorney General)*, 2014 FC 1020 at para 28).

[15] Any issues of procedural fairness should be addressed on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). The level of procedural fairness is higher where the decision is to cancel security clearance with a detrimental impact on long term employment (*Pouliot v Canada (Minister of Transport, Infrastructure and Communities)*, 2012 FC 347 at para 10 [*Pouliot*]).

IV. Analysis

[16] The statutory framework governing this decision is found at section 4.8 of the *Aeronautics Act*, RSC 1985 c A-2 [the Act], which reads as follows:

Security Clearances

Granting, suspending, etc.

4.8 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.

Habilitations de sécurité

Délivrance, refus, etc.

4.8 Le ministre peut, pour l'application de la présente loi, accorder, refuser, suspendre ou annuler une habilitation de sécurité.

[17] The definition of security clearance is found under subsection 3(1) of the Act:

security clearance means a security clearance granted under section 4.8 to a

habilitation de sécurité Habilitation accordée au titre de l'article 4.8 à toute

person who is considered to be fit from a transportation security perspective;

personne jugée acceptable sur le plan de la sûreté des transports.

[18] Restricted areas within an airport are only accessible to persons holding a Restricted Area Identity Card [RAIC]. A person can only be issued a RAIC if they also hold a security clearance. The Minister's discretion to grant or refuse a security clearance to any person is guided by the Transportation Security Clearance Program Policy [TSCP Policy].

[19] The aim of the TSCP Policy is to prevent unlawful interference with civil aviation. Public confidence in civil aviation is of critical importance to the Minister in making any decision. One way of ensuring safety is to restrict access to designated areas of an airport. If the Minister reasonably believes, on a balance of probabilities, that a person may be prone or induced to commit an act that may unlawfully interfere with civil aviation or assist or abet any person in committing such an act then the Minister may deny them security clearance (TSCP Policy, I.4).

[20] The TSCP Policy requires a security clearance renewal every five years. Similar to the originating process, if the application for renewal raises any concerns, an Advisory Board is convened to review the application.

[21] As part of this process, the Minister must rely on information provided from law enforcement agencies such as the RCMP (*Sidhu v Canada (Attorney General)*, 2016 FC 891 at para 19; *Henri v Canada (Attorney General)*, 2014 FC 1141 at para 40 [*Henri FC*], affirmed 2016 FCA 38). The Minister can rely on information provided by the RCMP without verifying or investigating the content of those reports. This information can be relied upon even it is hearsay

and not cross-checked (*Mangat* at para 54; *Henri FC* at para 40). The onus is on the person wishing to obtain security clearance to address the Minister's concerns.

A. *Breach of Procedural Fairness*

[22] Mr. Del Vecchio argues that the process of cancelling his security clearance was not procedurally fair because there was little regard for his efforts to provide further information to the Minister.

[23] First he argued his co-worker, who is an engineer and lawyer, contacted the Advisory Board but was not allowed to discuss the file without consent from Mr. Del Vecchio himself. No direction was given about the process of getting consent.

[24] Then he submits that his assistant contacted the Advisory Board on November 12, 2015, following up on his letter from September 21, 2015. The Certified Tribunal Record indicates that a member of the Advisory Board attempted to contact Mr. Del Vecchio on November 19, 2015, but was unable to reach him. No further effort to contact him was made nor is there a record of what the telephone call was about. He argues it was a breach of procedural fairness for the Advisory Board to move forward without further contact with the Applicant.

[25] Mr. Del Vecchio's expectation was that they would contact him to request additional information if they had concerns and if they did that the Minister should have raised those questions prior to making a final determination. As a result, Mr. Del Vecchio argues he did not have a meaningful opportunity to respond to the case against him which breached procedural fairness.

[26] I find that Mr. Del Vecchio was entitled to be informed of the facts alleged against him and to be provided with an opportunity to respond, both of which occurred. There was no breach of procedural fairness as it was a fair and open procedure. The letter of August 20, 2015, outlined the contents of the LERC report which the Minister received from the RCMP. As a result, Mr. Del Vecchio knew everything the Minister did and was encouraged to provide written submissions in response. Mr. Del Vecchio took advantage of the opportunity, responding in his letter of September 21, 2015.

[27] Mr. Del Vecchio suggests that further opportunities to respond should have been provided. Including that as someone called him that the Advisory Board should not have proceeded until they reached him as he has now extrapolated that the call was that the Advisory Board just needed a clarification that he would have given and would not have had his clearance taken away. However, neither the Advisory Board nor the Minister is under any obligation to conduct further research nor provide or seek out further particulars (*Lorenzen v Canada (Transport)*, 2014 FC 273 at para 51). Mr. Del Vecchio seeks an opportunity to refute or respond to conclusions reasonably arising from his conduct, an argument expressly rejected by this Court (*Pouliot*, at para 14). I find no breach of procedural fairness.

B. Reasonableness

[28] Mr. Del Vecchio goes on to argue that since he had disclosed his criminal conviction on a previous security clearance renewal, he thought the Minister knew of this conviction and he did not need to disclose it again. He had already provided written submissions explaining his care and control conviction to the Advisory Body in 2010 and was subsequently granted security

clearance. He thought that the Minister was only asking of any new convictions which had not been previously disclosed. It was argued that it is unreasonable to conclude that Mr. Del Vecchio misled the Minister when his previous conviction had already been disclosed to the Advisory Board.

[29] As for the domestic incident of 2007, Mr. Del Vecchio suggests that he honestly addressed this concern in his letter of September 21, 2015. He did not live in the Peel region so it was not the Peel police that attended his home; rather the Toronto police attended his home. He never intended to hide this information. Rather, he was confused by the facts as mentioned by the Minister.

[30] Mr. Del Vecchio argues that the Advisory Board was unreasonable because at no point has Mr. Del Vecchio denied that his vehicle was parked in front of his father's residence. Further it was submitted to the Advisory Board that Mr. Del Vecchio has never been involved in a biker gang or been endorsed through tattoos or patches. The Applicant argued that the Minister's conclusion is unreasonable because it assumes he is knowledgeable of the Vagabonds by mere association. He states that there is no evidence of any acts of intimidation or threats against Mr. Del Vecchio and the Minister unreasonably assumed that his father would use these methods against him. Had the Minister asked the right questions, he would have been able to clarify the details about his relationship with his father. The Applicant submits it was unreasonable for the Minister to cancel his security clearance without providing an opportunity to respond.

[31] The Minister does not need to demonstrate that acts of intimidation or threats will happen, rather that they may happen. The reason for this standard is due to the forward looking

and inherently speculative nature of predicting future risk. This is entirely discretionary and when weighing a security clearance privilege against public safety, the Minister is entitled to err on the side of safety.

[32] The Minister expressed three concerns in its procedural fairness letter to Mr. Del Vecchio: 1) his criminal record which he omitted; 2) the domestic incident; and 3) his association with his father, a full patch member of the Vagabonds.

[33] Even though Mr. Del Vecchio did not intend to mislead the Minister, he did so with the full knowledge that it could lead to a cancellation of his security clearance. Since Mr. Del Vecchio failed to disclose his convictions on his application form, it was reasonable for the Minister to question his trustworthiness and suitability to retain his security clearance.

[34] Mr. Del Vecchio's association with his father alone is grounds for cancelling his security clearance. Personal involvement with organized crime is not required just association (*Fontaine v Canada (Transport, Safety and Security)*, 2007 FC 1160 at paras 18 & 21-22; *Kaczor v Canada (Minister of Transport)*, 2015 FC 698 at paras 32-33 & 36).

[35] Finally, the domestic incident demonstrates a clear disrespect for authority. When police asked Mr. Del Vecchio to leave his residence to allow things to calm down he told police that he would not leave and that if the police wanted to remove him they would have to call in the "swat team" or put a "bullet in his head and+ take him out in a coffin." Such a lack of respect for the law affects an applicant's future propensity and possibility of committing or aiding and abetting

another to commit an act that may unlawfully interfere with civil aviation (*Salmon v Canada (Attorney General)*, 2014 FC 1098 at para 79). He was provided with the opportunity to explain this situation and simply stated that he did not recall Peel police responding. It was open to the Advisory Board to find this explanation dismissive and insufficient as it appeared the response was related not to the fact the police attended but as to which police department it was that attended.

[36] Once all of these concerns had been presented to Mr. Del Vecchio, the burden shifted to him to explain them which he failed to do resulting in a reasonable cancellation of his security clearance. The misrepresentation of a prior conviction alone could have been overlooked given the express disclosure of this matter in Mr. Del Vecchio's immediate past renewal. However, when taken in combination with his association with a known biker gang member and his refusal to acknowledge (until this judicial review) the domestic incident of 2007, the Minister's decision is entirely reasonable.

[37] It is not sufficient that Mr. Del Vecchio disagrees with the Minister's decision or that his reading of the facts is preferable to the Minister's. The forward looking nature of the Minister's discretion is meant to restrict persons who may be susceptible to threats and intimidation. Based on the reasons provided, the Minister acted reasonably within his discretion.

[38] The discretion given to the decision makers is broad as they are responsible to ensure public confidence in civil aviation safety and protect major international airports from illegal activities. On the other hand the decisions they make are very important to the individual as it

can concern their employment and business interests. Yet Parliament knowing the effect on the individual gave this decision maker this wide discretion.

[39] My job is not to step in and make the decision but only to be satisfied as to the existence of justification, transparency and intelligibility within the decision-making process, and find that the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 47-48). I find it meets this test and dismiss the application.

[40] Costs will not be awarded and the parties will bear their own.

JUDGMENT in T-1383-16

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;
2. No costs are awarded.

"Glennys L. McVeigh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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