Federal Court Cour fédérale

Date: 20180517

Docket: T-240-17

Citation: 2018 FC 519

Ottawa, Ontario, May 17, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

HARMINDER SINGH DHESI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Dhesi, is a longshore worker at the Vancouver Fraser Port Authority. His marine transportation security clearance was cancelled in 2015. The Delegate of the Minister of Transport [Delegate] concluded that there were reasonable grounds to suspect there was a risk Mr. Dhesi might commit an act, or assist or abet another to commit an act that might constitute a risk to marine security.

[2] At Mr. Dhesi's request the matter was reconsidered, and the cancellation decision was ultimately maintained. Mr. Dhesi, who represents himself in this matter, now seeks judicial review of the reconsideration decision and asks that this Court restore his marine transport security clearance.

[3] As part of the reconsideration process, an Independent Advisor was retained to review the original decision. The Delegate's reconsideration decision fails to address the Independent Advisor's Report [IA Report], which directly contradicts the Delegate's reconsideration decision. For reasons that are set out in greater detail below, I am of the opinion that the failure to address the substance of the IA Report undermines the transparency and intelligibility of the decision, rendering it unreasonable. The application is granted, the decision is quashed and the matter returned for reconsideration. Mr. Dhesi seeks relief in the form of a directed result. Such relief is exceptional, and the Court's authority to grant it on judicial review should only be exercised in the clearest of circumstances (*Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14). This is not one of those cases.

II. Background

[4] Mr. Dhesi was granted a marine transportation security clearance in 2008. That clearance was renewed in 2013.

[5] In May 2014, Transport Canada received a Law Enforcement Record Check Report [LERC Report] from the RCMP. The LERC Report reflected six encounters Mr. Dhesi had with police between 2008 and 2012. All six encounters involved use or possession of illegal drugs,

and in one case he was charged with assault and mischief. Mr. Dhesi has not denied his use of illegal drugs or that he suffers from addiction, but he reports he has successfully sought treatment. He denies the allegation of assault and mischief, and those charges were stayed. He does not have a criminal record.

[6] On the basis of the information contained in the LERC Report a delegate of the Minister of Transport concluded there were reasonable grounds to suspect that Mr. Dhesi was in a position where there was a risk that he might be suborned to commit, or to assist or abet another person to commit, an act that might constitute a risk to marine security. The Minister's Delegate cancelled Mr. Dhesi's security clearance in 2015.

[7] Mr. Dhesi sought reconsideration of the cancellation decision. As part of the reconsideration process Transport Canada's Office of Reconsideration commissioned a report from an Independent Advisor to review the cancellation decision and provide a recommendation. The IA Report noted that the issue was whether the concerns relied upon by the delegate to cancel Mr. Dhesi's security clearance arose from "objectively discernible facts" that supported a "reasonable grounds to suspect standard." The IA Report reviewed the underlying facts, canvassed the applicable law and concluded:

> There is nothing in this file which would support reasonable grounds to suspect that the applicant might be suborned to commit an act or assist or abet any person to commit an act that might constitute a risk to marine transportation security.
>
> Recommendation
>
> I recommend that the decision to cancel the Applicant's Marine Security Clearance be reconsidered. [Emphasis Added]

[8] The Independent Advisor's recommendation to reconsider the cancellation decision is reflected in a synopsis generated by the Office of Reconsideration, dated October 3, 2016. However, the synopsis is silent in respect of the Independent Advisor's conclusion that "[t]here is nothing in this file which would support reasonable grounds to suspect that the applicant might be suborned to commit an act or assist or abet any person to commit an act that might constitute a risk to marine transportation security."

[9] A document generated to support the reconsideration decision, dated November 25, 2016, states that "[f]ollowing a review by the independent advisor, it is recommended by the Program Review Board that the Minister maintains the decision to cancel the applicant's Transportation Security Clearance in this matter." Neither this document nor an attached briefing note seeking approval of that recommendation from the Delegate, the Assistant Deputy Minister, Safety and Security, flag either the contrary recommendation or conclusions contained in the IA Report.

[10] The Delegate's decision letter, dated January 17, 2017, lists the IA Report among the documents reviewed and considered. The decision letter acknowledges the incidents reflected in the LERC Report are dated but notes they raise concerns relating to judgment, trustworthiness and reliability. The Delegate's decision letter concludes that there are reasonable grounds to suspect, in accordance with paragraph 509(c) of the *Marine Transportation Security Regulations,* SOR/2004-144, that there is a risk Mr. Dhesi would be suborned to commit an act or assist others to commit an act that might constitute a risk to marine transportation.

III. Preliminary Issue – Style of Cause

[11] In oral submissions counsel for the Attorney General noted that the style of cause improperly names the respondent as the Ministry of Transport and that the appropriate respondent in this matter is the Attorney General of Canada.

[12] Rule 303(2) of the *Federal Courts Rules*, SOR/98-106 provides that where no other party is properly named as a respondent the Attorney General of Canada shall be named. The style of cause is amended to reflect the Attorney General of Canada as the respondent.

IV. Issues

[13] In seeking judicial review Mr Dhesi has identified a number of issues relating to, among others, the Delegate's consideration and weighing of the information contained in the LERC report. I need not address these issues as the Delegate's failure to address the conclusions of the IA Report is determinative. The sole issue I need address is:

A. Was it unreasonable for the Minister's Delegate to maintain the security clearance cancellation without addressing the Independent Advisor's conclusion that "[t]here is nothing in this file which would support" the cancellation?

V. Standard of Review

[14] The applicant takes no position on standard of review. The respondent submits that reasonableness applies. I agree. The issue before the Court involves the application of legal

standards to evidence, an issue of mixed law and fact that is reviewable against a reasonableness standard (*Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha*, 2014 FCA 56 at paras 84-86 [*Farwaha*]).

[15] In conducting a reasonableness review it is not the Court's role to reweigh the evidence and come to its own conclusion. Rather a reasonableness review "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether 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 para 47).

[16] Determining the range of possible acceptable outcomes requires a consideration of all relevant factors surrounding the decision being made (*Farwaha* at para 88). In considering the breadth of the range of reasonableness in cases of this nature the Federal Court of Appeal has identified a number of relevant factors (*Farwaha* at para 92). Those factors and the Court of Appeal's additional comments relating to the final factor were recently summarized by Justice René LeBlanc in *Randhawa v Canada (Minister of Transport)*, 2017 FC 556 at paragraphs 16 to 18:

> [16] In *Farwaha*, at para 92, the Federal Court of Appeal set out the following factors as being relevant in considering the "brea[d]th of the range of reasonableness available to the Minister" in deciding whether to grant, refuse, suspend or cancel a Security Clearance application:
>
> > a) The Minister's decision is a matter of great importance to applicants as it affects the nature of their work, their finances and their prospects for advancement;

b) The decision concerns security matters where wrong decisions can lead to grave consequences;

c) Security assessments involve some policy appreciation and sensitive weighing of facts; and

d) The Minister's decision requires assessments of risk based on whether reasonable grounds for suspicion exist.

[17] The Federal Court of Appeal provided these additional comments regarding the last of these four factors:

a) Assessments of risk and whether reasonable grounds for suspicion exist are standards that involve the sensitive consideration of facts and careful fact-finding, tasks that normally entail a broad range of acceptable and defensible decision-making (*Farwaha*, at para 94);

b) Assessments of risk are forward-looking and predictive; by nature, these are matters not of exactitude and scientific calculation but of nuance and judgment (*Farwaha*, at para 94);

c) Contrary to the "reasonable and probable grounds" standard, the "reasonable grounds to suspect" standard is a lesser, looser, judgmental standard based [on] identifying "possibilities", not finding "probabilities" (*Farwaha*, at para 96);

d) While fanciful musings, speculations or hunches do not meet the standard of "reasonable grounds to suspect", the "totality of the circumstances" and inferences drawn therefrom, including information supplied by others, apparent circumstances and associations among individuals can (*Farwaha*, at para 97); and

e) To satisfy that standard, verifiable and reliable proof connecting an individual to an incident, as would be required to secure a conviction or even a search warrant, is not necessary; instead, "objectively discernable facts" will suffice (*Farwaha*, at para 97).

> [18] I would add to this that in assessing the security risks, the Minister, given the substantial importance of marine transportation safety (*Farwaha*, at para 16), is entitled, as he is [in] the context of aviation safety, to err on the side of public safety (*Britz v Canada (Attorney General)*, 2016 FC 1286, at para 35; *Sargeant v Canada (Attorney General)*, 2016 FC 893, at para 28; *Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59, at para 17; *Fontaine v Canada (Transport)*, 2007 FC 1160, at paras 53, 59, 313 FTR 309 [*Fontaine*]; *Clue v Canada (Attorney General)*, 2011 FC 323, at paragraph 14). *Rivet v Canada (Attorney General)*, 2007 FC 1175, at para 15, 325 FTR 178).

VI. Analysis

[17] A decision-maker benefits from a presumption that it has considered all the evidence before it.

[18] Generally speaking a decision-maker need not refer to each piece of evidence to satisfy a reviewing Court that the evidence has been considered (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 16, 1998 CanLII 8667 (TD) [*Cepeda*]). However, “the more important the evidence that is not mentioned specifically and analyzed in the agency’s reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact “without regard to the evidence”” (*Cepeda* at para 17 citing *Bains v Canada (Minister of Employment and Immigration)* (1993), 63 FTR 312, 20 Imm LR (2d) 296 (TD).

[19] In this case the Office of Reconsideration retained an Independent Advisor to review the cancellation decision and the evidence upon which that decision was based. The IA Report concluded that there was nothing in the file which would support reasonable grounds to suspect

Mr. Dhesi might be suborned. The IA Report's conclusion unambiguously and directly contradicts the Delegate's conclusion.

[20] The failure of the decision letter to address the substance of the IA Report opens the door to an inference that the substance of the IA report was not considered. It also places this Court in the position, on judicial review, of being unable to assess the reasonableness of the Delegate's decision. The absence of any consideration of the directly contradictory conclusion undermines this Court's ability to understand the basis for the Delegate's determination.

[21] The respondent relies on Mr. Dhesi's pattern of drug use and his interactions with police to argue that it can be implied that Mr. Dhesi had a longstanding association with criminals. The respondent relies on decisions of this Court in *Singh Kailley v Canada (Transport),* 2016 FC 52 [*Kailley*] and *Neale v Canada (Attorney General),* 2016 FC 655 [*Neale*] in submitting there is a connection between an association with drug traffickers and a possible risk of subornment. While this may well be part of the rationale for the Delegate's decision I would note that: (1) this is not evident from a review of the decision; and (2) unlike the situation in *Kailley* and *Neale* where the evidence established a direct relationship between the applicants and individuals connected to serious criminal activity, the link in this case arises by implication based on Mr. Dhesi's having possessed illicit drugs for personal use.

[22] In assessing the reasonableness of a decision reviewing courts "may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome."

(*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15 [*Newfoundland Nurses*]).

[23] In keeping with *Newfoundland Nurses* I have looked to the record. The November 25, 2016 document and attached briefing note which were placed before the Delegate do not flag the IA Report's contradictory conclusion. These documents simply acknowledge that a review by an independent adviser has been completed. Absent more than this simple statement, a reader of the November 25, 2016 document and attached briefing note might conclude the IA Report was consistent with the recommendation to maintain the cancellation of the security clearance. Like the decision letter, the documentation put before the Delegate is bereft of any consideration of the IA Report's conclusion.

[24] As Justice Donald Rennie stated in *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, there are limits to the deference *Newfoundland Nurses* affords to decision-makers:

> [11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[25] *Newfoundland Nurses* does not assist in this case. There are simply no dots on the page.

[26] I am also mindful of the fact that the Delegate's decision relating to future security risks is owed significant deference and take no issue with this. However deference is not a blank cheque. Deference does not insulate a decision from the requirement that it reflect the elements of transparency and justifiability. The absence of these required elements in this case renders the decision unreasonable.

VII. Costs

[27] The parties have agreed that the successful party is to have their costs in the amount of $1800 and I concur.

JUDGMENT IN T-240-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The matter is returned for reconsideration;
3. Costs to the applicant in the amount of $1800 inclusive of disbursements and taxes;
4. The style of cause is amended to show the Attorney General of Canada as the respondent.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-240-17
STYLE OF CAUSE:	HARMINDER SINGH DHESI v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 16, 2018
JUDGMENT AND REASONS:	GLEESON J.
DATED:	MAY 17, 2018

APPEARANCES:

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Jan Verspoor	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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