

Federal Court



Cour fédérale

Date: 20200929

Docket: T-1706-19

Citation: 2020 FC 939

Ottawa, Ontario, September 29, 2020

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

BILLY FITZGERALD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant challenges, by way of judicial review, the decision [Decision] denying his Reliability Status security clearance request. The Decision was made by the Director of Industrial Personnel Security Services, Public Services and Procurement Canada [the Director]. The consequence of the Decision was to also close his Secret and NATO Secret security

clearance requests which, if granted, would have allowed the Applicant to work at a shipyard on navy ships including submarines.

[2] The Applicant argues that the Decision was procedurally unfair and substantively unreasonable.

II. Background

[3] The Applicant is a painter employed by the Victoria Shipyards Co. Ltd. [Victoria Shipyards]. He requires a NATO Secret security clearance to conduct work on navy surface ships and submarines. In 2018 the Applicant requested a Reliability Status determination.

[4] The Reliability Status determination is made in accordance with Canadian government security screening policies. The *Standard on Security Screening* describes the criteria on Reliability Status (in part) as follows:

Security screening for Reliability Status appraises an individual's honesty and whether he or she can be trusted to protect the employer's interests.

[5] The process is investigatory in nature but may include an interview particularly when dealing with enhanced security screening required for NATO clearance. The Standard discusses the nature of the security interview in the following terms:

A security interview, in addition to being a standard component of enhanced security screening, can also be used as a means to resolve doubt or to address adverse information that is uncovered during security screening. A security interview provides an opportunity for the screening official and the individual to discuss

any matters of concern and gives the individual the opportunity to explain the situation before a decision is rendered.

Individuals are to be provided with a statement summarizing the information available to enable them to be reasonably informed of the adverse or missing information, without disclosing any information that could injure national security or endanger the safety of any person, or that would be exemptible under the Privacy Act sections 18, 19, 20 and 21, and subsections 22(1) to 22(3).

[6] The Applicant received e-mail notice of the date of the face-to-face interview with the security investigator. He was informed that:

During the interview, we will be discussing your past, including finances, associates, personal conduct and travels. Most notably we will be discussing your criminal convictions.

[7] Prior to the interview and on February 21, 2019, the Applicant signed the Public Services and Procurement Canada's Security Acknowledgement [Security Acknowledgement] confirming that he had been advised and understood the Security Acknowledgement and that he consented to the interview being recorded.

[8] The Security Acknowledgement expressly explains that it is the government's policy in respect of individuals employed in relation to work relevant to national security that those individuals are deemed "trustworthy, loyal and reliable". In addition, the Security Acknowledgement expressly noted that security screenings may consider whether an individual applicant for security clearance has been convicted of criminal offences or demonstrates "unreliability, dishonesty, untrustworthiness or indiscretion":

In the interest of National Security it is the policy of the Canadian Government that personnel employed in connection with work, the

nature of which is vital to the security of the country, be deemed trustworthy, loyal and reliable. Factors taken into account by the Security Screening Program of the Canadian Industrial Security Directorate when determining such characteristics include, but are not necessarily limited to, whether an individual:

...

- has been convicted of a criminal offence, or offences indicating habitual criminal tendencies.

...

- has demonstrated by act or speech consistent unreliability, dishonesty, untrustworthiness or indiscretion ...

[9] The interview occurred February 21, 2019, in front of two investigators. As noted, the Applicant was “re-explained [*sic*] that the interview was conducted in order to provide him a chance to explain the adverse information contained on his file”.

[10] During the interview the Applicant’s criminal convictions were discussed. He was also asked to confirm that certain individuals were his friends on Facebook and how he knew these people.

[11] The Synopsis contained in the Investigators’ Report contains a useful summary of the information obtained before the interview and put to the Applicant.

[12] In making the Recommendation, the Report confirmed the following facts in its “Synopsis” and “Subject Interview”, none of which is in dispute in this judicial review:

- The Applicant was contacted by telephone and e-mail on January 28, 2019 and was advised of the reasons for the interview which were his criminal convictions and minor adverse finances.
- The Applicant's CRNC results revealed that he had thirteen criminal convictions which were listed as follows:
 - 2000 – Driving with more than 80mgs of alcohol in blood;
 - 2001 – Possession of a scheduled substance, escape lawful custody, mischief;
 - 2002 – Possession of a scheduled one substance for the purpose of trafficking x2;
 - 2005 – Possession of a scheduled one substance;
 - 2008 – Fail to attend court, driving while ability impaired, possession of a scheduled one substance, driving while ability impaired, fail to appear; and
 - 2012 – Fail to comply with recognizance.
- During their open source inquiry, the Investigators applied general phrases to the Applicant. It was identified that he was connected to high-level drug traffickers the "A" and the "B" brothers through his open profile on Facebook. Google searches of their names resulted in multiple public articles detailing their high-level drug trafficking with links to the Mexican Cartels, local narcotics trafficking and the "C" murder.
- An article obtained from the Gangsters out blog details the Victoria and Calgary cocaine trade and the involvement of the "B" brothers and their associates, showing pictures of gang members and their connections to other drug dealers throughout the Victoria BC area.

- Open source articles indicate that “A” is the “biggest player” in the British Columbia drug trade and likely works with the Hell’s Angels Motorcycle Club in bringing drugs in from Mexico.
- Multiple articles were obtained via Google searches validating that the above mentioned individuals have ties to the Hell’s Angels, Norteños Prison Gang and the Mexican Cartels.
- The interview was conducted by Jason Massia and Mo Shayesteh in English on February 21, 2019. The Applicant’s criminal convictions were discussed and he confirmed that he understood the reasons for the interview. The interview was also fully explained to him with respect to its scope and purpose by the Investigators.
- The Applicant has been employed by Victoria Shipyards since 2012 and is a member of the local painters union. The Applicant requires a NATO Secret to conduct work on vessels and submarines at the Victoria Shipyards.

[13] At the interview the Applicant was given opportunities to respond to the concerns about his criminal record, and about friends listed on his Facebook page. He was informed of the concern that these Facebook friends had apparent associations with criminal organizations including the Hell’s Angels. Details of some of these concerns and responses are set forth in the Respondent’s Record.

[14] Following the interview, the Investigators again consulted open source Google searches confirming issues put to the Applicant.

[15] As detailed in the Report, the Investigators assessed the Applicant as dishonest and lacking credibility in the interview. Their security concerns, related to the Applicant's criminal history and associations, were not mitigated.

[16] Of particular concern was that if Reliability Status was granted, the Applicant would have access to military personnel including persons with access to weapons, ammunition and sensitive information. His association with those persons associated with criminal activity and his prior involvement in the drug trade was considered in the context of potential access to Royal Canadian Navy and national information, assets and personnel.

[17] The Investigators concluded, in their recommendation not to grant Reliability Status, that the Applicant did not meet the basic criteria of the Standard in terms of trustworthiness and honesty despite being given an opportunity to do so.

[18] They found that his past engagement in criminal activity and associations with illegal drug distribution reflected negatively on his honesty and reliability and placed him in a potential position of blackmail or coercion. Further, in the discussion of his criminal history and behaviour, he was found to be dishonest and this also reflected negatively on basic reliability.

[19] The Investigators' Report and Recommendation went to the Director for his decision on whether to grant Reliability Status. The Director denied Reliability Status for reasons outlined in the Decision.

[20] The Decision described the opportunity that the Applicant had to explain his drug trafficking convictions, criminal associations and his behaviour and that he had provided minimal and contradictory information.

[21] The Decision further outlined that the Applicant's Facebook profile revealed his association with multiple individuals who, based on publicly available information, had been arrested for drug trafficking and have connections to formal organized crime groups.

[22] The Director concluded that the criminal convictions, criminal associations and involvement in criminal enterprise activities placed his reliability in question and that information exists which show that the Applicant could not be trusted.

[23] The Applicant filed for judicial review of this Decision.

III. Issues

[24] There are two controlling issues:

- a) Was there a breach of procedural fairness in the process particularly in respect of notice?
- b) Was the Decision reasonable?

IV. Standard of Review

[25] The parties accepted, with some reservations from the Respondent, that correctness was the standard in respect of procedural fairness. I concur (See *Mission Institution v Khela*, 2014 SCC 24).

[26] The Court's task is to determine whether the process followed satisfied the level of fairness required. The level or degree of procedural fairness owed in the case of an initial grant of security status is minimal (*Varn v Canada (Attorney General)*, 2017 FC 1132; *Singh Kailley v Canada (Transport)*, 2016 FC 52). The Courts have accepted that in these cases security is paramount and trumps an individual's employment or personal life (*Omar v Canada (Attorney General)*, 2020 FC 408 at para 55).

[27] In respect of the Decision itself, the Courts in *Alakozai v Canada (Attorney General)*, 2019 FCA 316 [*Alakozai*], have held that the grant of a Reliability Status is discretionary and is therefore reviewable on a standard of reasonableness.

V. Analysis

A. *Procedural Fairness*

[28] The Applicant alleges that he was not given adequate notice of the case against him and a meaningful opportunity to respond to the material used in the Decision. He complains particularly that from the term "associates", it was unclear that he would be questioned about his

Facebook profile and friends. He also claims that he had no notice of the post-interview open source material.

[29] The Applicant did not contend that he was entitled to complete disclosure as in line with *R v Stinchcombe*, [1991] 3 SCR 326, but that he was entitled to more than he received.

[30] Bearing in mind the minimal level of procedural fairness owed, it is evident that the Applicant was made aware that they would be discussing his past, including his finances, associates, personal conduct and travels. He knew his criminal past was an issue.

[31] In my view, he was given adequate notice of the subjects to be canvassed. He was not entitled to advance knowledge of every question or document to be put to him. Such a procedure could defeat the purpose of the interview by making it a presentation rather than a question and answer exercise.

[32] The Applicant was not entitled to a second round of interviews after the post-interview open source inquiry. The second open source search merely confirmed the first search; no new material facts or issues arose from it. These circumstances distinguish this case from *Alakozai* where the open source information was new, directly related to the individual and on which he had no opportunity to comment.

B. *Reasonableness*

[33] The Applicant complains about the manner in which the Director reached his decision. He complains that matters of his maturity and the age of the convictions were not considered. He challenges the description of his conduct at the interview as evasive and minimal – that the Investigators found him evasive and dishonest.

[34] There are at least two problems with this aspect of the case – the first is that in reality he challenges the Director’s weighing of the relevant factors. That is a function for the Director, both as to which factors are pertinent and what weight they should be given, so long as his consideration is reasonable.

[35] The second problem is the challenge to the perception of his conduct at the interview. There is no objective evidence such as a video of the interview; there is no evidence from the Applicant challenging the Investigators’ notes of his responses. It is difficult, perhaps impossible, for this Court to hold that the credibility conclusions, based on the interview, were unreasonable. The Investigators were in a much better position than this Court to make a credibility finding.

[36] The Decision dealt with the key issues related to the Applicant such as his criminal record. The Investigators formed their negative credibility findings around the discussion of his criminal history, together with his associations on Facebook.

[37] The Decision is reasonable in that it has internally coherent reasoning and is justified “in the constellation of law and facts relevant to it” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 105).

[38] The Director had before him the Report which stated that the Investigators’ security risk concerns - based significantly on the nature of the criminal history and associations - were not alleviated during the interview.

[39] The Director was mindful of the risk at stake – access to military equipment and personnel. It was not unreasonable to connect the Applicant’s past, his current unreliability and the risk to the military.

[40] Therefore, it was transparent, intelligible and on these facts, justifiable for the Director to conclude that he was not prepared to accept the risk of granting a security clearance to the Applicant. As such, it is a reasonable decision.

VI. Conclusion

[41] I find no basis on which to grant this judicial review. The judicial review will be dismissed with costs.

JUDGMENT in T-1706-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed
with costs.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1706-19

STYLE OF CAUSE: BILLY FITZGERALD v THE ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: HELD BY VIDEOCONFERENCE IN VANCOUVER,
BRITISH COLUMBIA

DATE OF HEARING: SEPTEMBER 21, 2020

JUDGMENT AND REASONS: PHELAN J.

DATED: SEPTEMBER 29, 2020

APPEARANCES:

Bennett Arsenault FOR THE APPLICANT

Shaun Ramdin FOR THE RESPONDENT

SOLICITORS OF RECORD:

Arsenault Aaron Lawyers FOR THE APPLICANT
Barristers and Solicitors
Vancouver, British Columbia

Attorney General of Canada FOR THE RESPONDENT
Vancouver, British Columbia