

Federal Court



Cour fédérale

**Date: 20100212**

**Docket: T-430-09**

**Citation: 2010 FC 147**

**Ottawa, Ontario, February 12, 2010**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**SIYANTHAN XAVIER**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA  
AND THE MINISTER OF TRANSPORT,  
INFRASTRUCTURE AND COMMUNITIES**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] Mr. Siyanthan Xavier is a former employee of Air Canada Cargo at Pearson Airport. In February 2009, the Minister of Transport cancelled Mr. Xavier's transportation security clearance (TSC), preventing him from working at the airport. The Minister's action resulted from criminal charges being laid against Mr. Xavier. Those charges were later withdrawn.

[2] Mr. Xavier argues that the Minister acted unfairly, rendered an unreasonable decision and failed to give adequate reasons. He asks me to order the Minister to reconsider. I agree that the Minister acted unfairly and must, therefore, allow this application for judicial review. It is unnecessary to address the other issues Mr. Xavier raised.

## II. Analysis

### 1. Factual background

[3] Mr. Xavier applied for and was granted his TSC in April 2007. He began working for Air Canada Cargo shortly thereafter. In December 2007, Mr. Xavier was stopped by a police officer for a traffic violation on airport property. A police officer searched his car. Mr. Xavier was subsequently charged with possession of stolen property and possession of falsified credit cards.

[4] The manager of security and investigations for the airport authority sent an e-mail to the chief of security screening stating that he had received information that Mr. Xavier had been charged. Further inquiries revealed that Mr. Xavier had also been charged with fraud in 2003 but the charges had been withdrawn.

[5] Subsequently, Mr. Xavier was sent a letter informing him that his TSC was under review and requesting him to submit a written statement about the charges. The letter was returned because the Applicant had moved without providing the airport a forwarding address. In February 2008, the TSC Advisory Board determined that Mr. Xavier's security clearance should be suspended. A letter informing him of the suspension was sent to Mr. Xavier and, again, it was returned.

[6] In March 2008, Mr. Xavier, not having received the misdirected letters, inquired about the suspension of his TSC. He was told to submit a statement regarding the charges and that the matter would be reconsidered by the Advisory Body. Mr. Xavier submitted a statement but the Advisory Board upheld the suspension.

[7] In December 2008, the outstanding criminal charges against Mr. Xavier were withdrawn. He was invited to provide another written statement. His file was returned to the Advisory Body for reconsideration and, in January 2009, the Advisory Board recommended that the TSC be cancelled. On February 20, 2009, a letter was sent to Mr. Xavier informing him that the Minister had cancelled his TSC on the recommendation of the Advisory Board. As a result, he lost his job.

2. Did the Minister act unfairly?

[8] The Minister maintains that Mr. Xavier was given an opportunity to make submissions to the Advisory Body before it recommended cancellation of his TSC to the Minister. Accordingly, Mr. Xavier had an opportunity to participate in the proceedings leading to the loss of his TSC. I disagree.

[9] There were three items before the Advisory Body not disclosed to Mr. Xavier. The first was the e-mail sent just after Mr. Xavier was charged. That e-mail not only informed the chief of security screening of the charges, but suggested that there was a connection between the charges and Mr. Xavier's job: "Information provided suggests that there is a connection to the subject's airport employment".

[10] Second, the Advisory Body had before it information from the Canadian Police Information Centre (CPIC) about Mr. Xavier's 2003 criminal charges that had been withdrawn.

[11] Third, the Advisory Body was provided a report from the airport intelligence unit. That report referred to the following allegations against Mr. Xavier:

- he was found in possession of 25 forged credit cards, various sets of identification, and a significant amount of cash in U.S. and Canadian dollars;
- police officers noticed him trying to hide something under the floor mat;
- two credit cards were found on the floor of the vehicle;
- more credit cards and other forms of identification were found in a hidden compartment behind the ashtray.

[12] As mentioned, Mr. Xavier did make submissions to the Advisory Body. He stated that he had been stopped for a traffic violation and the police had found someone else's wallet in his car. Not having received disclosure of the other information put before the Advisory Body, he never had an opportunity to address the allegation that he was found with numerous credit cards, various sets of identification, and a large sum of cash. Nor did he have a chance to answer the suggestion that he had tried to hide materials under the floor mat of his car and had hidden a large number of credit cards in a secret compartment. Finally, he was unaware of the suggestion that his alleged criminal conduct was somehow related to his job.

[13] The Minister suggests that the degree of fairness owed to Mr. Xavier is relatively slight, according to the factors outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Further, he suggests that this Court found this to be so in *Irani v. Canada (Attorney General)*, 2006 FC 816 and *Motta v. Canada (Attorney General)* (2000), 180 F.T.R. 292. I note that the latter cases dealt specifically with the granting of a TSC, not the cancellation of one. Further, there were no allegations of misconduct against the applicants and no risk that they would lose their jobs. Here, Mr. Xavier has been accused of serious offences, and was fired. The duty of fairness owed to him was greater than in the cases cited by the Minister. That duty must include, at least, the disclosure to him of information to be put before the Advisory Body and an opportunity to respond to it.

[14] Here, Mr. Xavier would have been aware of the CPIC information and could have provided a response to it if he had wished to do so. However, he would have been unaware of the content of the e-mail and the intelligence report. His written submission to the Advisory Body is not commensurate with the accusations against him. It makes no substantive response to them at all. This was both unfair to him and put the Advisory Body in the awkward position of having to make a decision without meaningful submissions from both parties before it.

### III. Conclusion and Disposition

[15] In my view, Mr. Xavier was treated unfairly by not being given disclosure of the information considered by the Advisory Body. Therefore, he had no chance to address the accusations against him in any meaningful way. I would, therefore, grant this application for judicial review and remit the matter to the Minister for reconsideration.

**JUDGMENT**

**THIS COURT'S JUDGMENT IS that:**

1. The application for judicial review is allowed. The matter is referred back to the Minister for reconsideration.
2. No question of general importance is stated.

“James W. O’Reilly”  
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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-430-09

**STYLE OF CAUSE:** SIYANTHAN XAVIER v. THE ATTORNEY  
GENERAL OF CANADA and THE MINISTER OF  
TRANSPORT, INFRASTRUCTURE AND  
COMMUNITIES

**PLACE OF HEARING:** Toronto, ON.

**DATE OF HEARING:** September 17, 2009

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** February 12, 2010

**APPEARANCES:**

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