

Federal Court



Cour fédérale

Date: 20100303

Docket: T-1104-09

Citation: 2010 FC 247

Vancouver, British Columbia, March 3, 2010

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

MASAN NOOR KAHIN

Applicant

and

**HER MAJESTY THE QUEEN
IN RIGHT OF CANADA AS REPRESENTED BY
THE MINISTER OF TRANSPORT,
INFRASTRUCTURE AND COMMUNITY and
THE ATTORNEY GENERAL OF CANADA**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision made by the Director, Security Screening Programs, Transport Canada, as set out in a letter to the Applicant dated June 11, 2009, wherein the Applicant's application for security clearance at Vancouver International Airport was refused. For the reasons that follow I find that the application is dismissed.

[2] The Applicant is a Somali native having been born and raised in Somalia. Because of the war in Somalia he fled and was granted asylum in South Africa where he lived for more than ten years. Circumstances in South Africa were such that the United Nation High Commissioner for Refugees resettled the Applicant in Canada where he has become a permanent resident.

[3] Shortly after arriving in Canada the Applicant started working for a company known as Swissport which performs services at Vancouver International Airport. He was engaged as what is known as a ramp agent and was granted temporary access to certain restricted areas in Vancouver Airport to perform his duties. He was required to obtain security clearance in order to gain permanent employment. He made such an application about nine months after arriving in Canada. Ultimately, he failed to obtain security clearance and was dismissed from his job.

[4] The initial application for security clearance was made by the Applicant filling out a pre-printed form. One of the questions asked on the form was “What have you been doing for the last five years? – School, employment, unemployment etc.” In answer, the Applicant said that he had been working with Swissport, attended a local academy in British Columbia, was previously unemployed and previously worked for Metro Home Centre/Metro Fuel in Pretoria, South Africa from February 2001 until June 2007. Transport Canada sent a letter to the Applicant dated June 18, 2008, requesting further information. The letter said:

This is further to your application for a transportation security clearance at the Vancouver International Airport. A preliminary review of your file indicates that it does not contain sufficient, reliable and verifiable background information to enable Transport Canada to fully assess the factors relevant to your application. In particular, as you have been out of Canada for a total of 4 years and

3 months during the five-year period prior to your application, we will require original supporting documentation that enables us to verify the information you provided about your residency and employment outside Canada, and an original police certificate from South Africa that provides us with the required five years of criminal information.

*You are encouraged to provide documents or written representations for consideration by a Review Panel, which will determine whether they are sufficient, reliable and verifiable. In order for your information to be considered, it must be received by Transport Canada by **July 18, 2008**. Please send your information to: Transport Canada ABPB (attention: Marlene Préseault), Room 1531, 330 Sparks Street, Ottawa, Ontario, K1A 0N5.*

*Should you wish to discuss the matter further please contact Marlene Préseault by telephone at (613) 949-0232 or by e-mail at: SecurityScreeningRequests/information@tc.gc.ca
To obtain more information concerning the Transportation Security Clearance Program, consult our website at: <http://www.tc.gc.ca/tsc>*

[5] The Respondents submitted an affidavit of Marlene Préseault, a Superintendent of Case Management with Transport Canada in which she testifies that another officer at Transport Canada had a telephone conversation with the Applicant in which it is alleged that the Applicant was told about the types of documents that were required. This conversation is said to have taken place after June 18, 2008. I do not accept this evidence as it is hearsay and no evidence is before me as to why it was necessary to put in evidence this way instead of through the person who actually made the phone call. Respondents' counsel took the position that it was not necessary to rely on the phone call to demonstrate that the Applicant was aware as to the documentation required, the letter of June 18, 2008 was sufficient.

[6] The record shows that the Applicant's submissions following the June 18, 2008 letter included a letter from an organization known as Somali Refugee Forum in South Africa in which the Applicant is described as Assistant Secretary, a handwritten note as to the Applicant's address in South Africa and a letter from Foremost Service Station stating that the Applicant had worked for them "for a number of years as a petrol attendant."

[7] Unbeknownst to the Applicant, Transport Canada sent an e-mail to Metro Home Centre asking that they verify the Applicant's employment with them, including information as to when he started and when he left. An e-mail response identified Metro Home Centre as owner of Foremost Service Station and said that the Applicant had worked there for a "number of years" but that they were unable to confirm when he commenced work and when he left.

[8] The Applicant's request for security clearance was sent to an internal review panel in Transport Canada. On June 11, 2009, the Applicant was sent a letter, the decision at issue here, refusing security clearance. The letter said:

This is further to your application for a transportation security clearance at Vancouver International Airport. Please be advised that the Minister of Transport, Infrastructure and Communities has refused your clearance based on the information in your file and the recommendation from the Review Panel.

The Minister is of the opinion that you did not provide sufficient, verifiable and reliable information. Specifically, of the five (5) years of information required under the Transportation Security Clearance Program, information provided in your application and in the documents you submitted for a period of 4 years and 4 months, is insufficient. This period of time reflects the time you spent in South Africa, where information cannot be verified under the arrangements

available to Transport Canada. Specifically, you did not provide sufficient information pertaining to your residency to cover the entire period under review and, of the information provided, Transport Canada was unable to assess its reliability. Transport Canada also noted discrepancies with the information you provided on the transportation security clearance form and the additional information provided.

You have the right to apply for a review of this decision through the Federal Court of Canada within thirty (30) days of receipt of this notice.

[9] The Applicant has brought this application for judicial review. Essentially, his counsel's argument is that the Applicant was denied procedural fairness therefore the decision must be set aside. The alleged lack of procedural fairness comprises:

- failure to disclose clearly, at the outset, the nature and extent of the documentation that the Applicant was to provide
- failure to disclose the e-mail correspondence between Transport Canada and Metro Home Centre
- failure to provide the Applicant an opportunity to provide further information and documentation and an opportunity to address the perceived discrepancies as described in the letter of June 11, 2009.

[10] Respondents' counsel argues that the jurisprudence indicates that the level of procedural fairness requires to be afforded a person such as the Applicant is minimal and that the Applicant, particularly being in receipt of the letter of June 18, 2008, was sufficiently aware as to what was required. The e-mails are irrelevant.

[11] There are a surprising number of cases dealing with persons employed at airport facilities and security clearance issues. I suspect that is because letters refusing clearance conclude, as the letter here of June 11, 2009 does, with an invitation to seek judicial review in the Court. Those cases, as referred to me by counsel, are:

- *Irani v. Canada (Attorney General)*, 2006 FC 816
- *Singh v. Canada (Attorney General)*, 2006 FC 812
- *Motta v. Canada (Attorney General)* (2000), 180 F.T.R. 292
- *DiMartino v. Canada (Minister of Transport)*, 2006 FC 635
- *Xavier v. Canada (Attorney General)*, 2010 FC 147

[12] Counsel for the parties before me agreed that since the issue is procedural fairness, the appropriate standard of review is correctness.

[13] The present case is similar to that of *Motta*. The Applicant here has only been employed, indeed only in Canada, for a few months and has not yet received any security clearance that would enable him to continue his employment at the airport. Justice Pinard in *Motta* at paragraph 13 described the procedural fairness to be afforded in such circumstances as minimal:

[13] In the case at bar, we are dealing with a simple application for clearance or a permit made by a person who has no existing right to that clearance or permit and is not accused of anything. As the Minister's refusal to grant access clearance does not involve the withdrawal of any of the plaintiff's rights, the latter can have no legitimate expectation that he will be granted clearance (see Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage) et al. 1997 CanLII 5142 (F.C.), (1997), 132 F.T.R. 89, and Cardinal v. Alberta (Minister of Forestry, Lands and Wildlife), December 23,

1988, Edmonton 8303-04015, Alta. Q.B.) In the circumstances, therefore, I consider that the requirements imposed by the duty to act fairly are minimal and that, after allowing the plaintiff to submit his application in writing as he did, the Minister only had to 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. As no evidence was submitted that the decision duly made by the Minister pursuant to the powers conferred on him by the Act and Regulations was without basis, this Court's intervention is not warranted.

[14] A similar finding of minimal requirements was made in *Irani* (para. 21) and *Singh* (para. 20).

[15] *DiMartino* and *Xavier* present a different set of circumstances. In those cases a security clearance was revoked on the basis of police reports of criminal activity. In those cases the Court required that the individual be afforded an opportunity to see the case against him and make submissions because the allegations as to impropriety came from third persons.

[16] In the present case, the decision was based on information and documents submitted by the Applicant. The Applicant had not yet been given security clearance and had been working at the airport only a few months. I find this case to be similar to the *Motta* group of cases. Only minimal procedural fairness needs to be extended. I find the letter of June 18, 2008, to be sufficient in that regard.

[17] I therefore dismiss this application. No party asked for costs and none will be given.

JUDGMENT

For the reasons provided,

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed; and
2. No Order as to costs

“Roger T. Hughes”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1104-09

STYLE OF CAUSE: MASAN NOOR KAHIN V. HER MAJESTY THE
QUEEN et al.

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: March 1, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** HUGHES J.

DATED: March 3, 2010

APPEARANCES:

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