Federal Court  Cour fédérale

Date: 20130123

Docket: T-476-12

Citation: 2013 FC 59

Ottawa, Ontario, January 23, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

MARILYN THEP-OUTHAINTHANY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside a decision of the Minister of Transport, Infrastructure and Communities (the Minister) dated February 7, 2012 denying the applicant transportation security clearance at the Vancouver International Airport. For the reasons that follow this application is dismissed.

Facts

[2] Airport security is governed by the *Aeronautics Act*, RSC, 1985, c A-2 (the *Aeronautics Act*) and the *Canadian Aviation Security Regulations*, 2012 (SOR /2011-318) (the *Regulations*). The *Regulations* provide that individuals who work in the restricted areas of an airport must have a security clearance. Section 4.8 of the *Aeronautics Act* grants the Minister the discretion to grant or refuse that clearance.

[3] The *Transportation Security Clearance Program Policy* (the Security Policy) sets out the process for obtaining security clearance. Applicants must undergo a comprehensive background check that includes a criminal record check and a review of the files of law enforcement agencies. If adverse information is uncovered an advisory body, comprised of government officials, reviews the matter and makes a recommendation to the Minister.

[4] On October 3, 2010, the applicant applied for security clearance as a requirement of her continued employment with Westjet. During her background check the Criminal Intelligence Branch of the Royal Canadian Mounted Police (RCMP) advised that the applicant had been involved in a drug investigation.

[5] While I will discuss the discrepancy in the date of the critical events that underlie the decision to deny the applicant a security clearance, on either December 22, 2006 or May 1, 2007, the applicant and her husband drove to a house in Surrey, British Columbia. The applicant remained outside the house in the passenger seat of her vehicle while her husband went inside to run an errand. At that moment the police were in the process of, or began, executing a search warrant

for the house. By any description, the events that ensued were dramatic. Multiple suspects were arrested, some in the house, some were chased and arrested outside, weapons were drawn, and a dog was shot. The applicant was arrested as well as her husband.

[6] The police subsequently obtained a search warrant for the vehicle. While registered to the applicant's mother the applicant was listed as the principle operator. The police found a hidden compartment in the vehicle containing a substantial amount of cocaine, along with heroin, methamphetamine, ecstasy and a loaded pistol.

[7] The applicant and her husband were charged with four counts of procession for the purposes of trafficking and one count of possession of a loaded prohibited firearm. Her husband pled guilty and the prosecutor stayed the charges against the applicant. She denied, and continued to deny throughout the security clearance process, any knowledge of her husband's criminal activities.

[8] On September 23, 2011, the applicant received a letter informing her that this information raised concerns about her suitability for security clearance. She was invited to provide additional information. She provided a statement and evidence, including positive reference letters along with documents establishing her legal separation from her husband and the *decree nisi*. The separation from her husband began on January 31, 2011.

Decision Under Review

[9] The Minister denied the security clearance based on the recommendation from the Advisory Body. The Advisory Body noted the incident involved a large amount of cocaine and other drugs

along with a loaded prohibited firearm. The Advisory Body concluded that the applicant, in the language of the policy, may be prone or induced to commit an act or assist or abet any person to commit an act that might unlawfully interfere with civil aviation.

[10] The applicant contends however that two errors of law were committed. First, the Minister erred in considering evidence of the stayed charges in the face of her record having been expunged. Second, she contends that it was legally impossible to conclude, on the facts, that the applicant may be prone or induced to commit an act or assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

Issue

[11] This judicial review raises the issue whether the Minister erred in denying the applicant a security certificate. In recognition of the specialized and discretionary nature of this decision the standard of review is reasonableness: *Clue v Canada (Attorney General)*, 2011 FC 323, para 14. Errors of law are reviewable on a standard of correctness.

[12] The applicant contends that, in light of what are characterized as egregious errors in the decision, the decision to deny the recommendation was not, as a matter of law, open to the Minister. In my view, the standard of review remains that of reasonableness, regardless how the factual errors are viewed. Even the most unreasonable of decisions does not transform the standard of review of reasonableness to correctness, in the sense that jurisdiction has been lost in the process. No question of law has been identified, nor has a legal issue or principle been identified which can be extracted from the legal and factual matrix.

Analysis

Preliminary Issues

[13] The applicant has included various exhibits to her affidavit which were not before the Minister [Exhibits A, B, E, I, K, and CC]. The applicant submits that this evidence is admissible because it provides background to the issues before the Court, and otherwise simply confirms evidence already in the record. However, the applicant has provided this evidence for the purpose of challenging certain information in the record before the Minister. In particular, the applicant seeks to demonstrate that the Minister had incorrect information regarding the date of her arrest and whether she tried to flee the police. As this evidence was previously available, it is not, strictly speaking, admissible. It goes beyond the scope of contextual or background evidence which is of assistance to the Court in understanding the issues: *Sha v Canada (Citizenship and Immigration)*, 2010 FC 434. In view of the disposition of this case on the merits, this additional evidence, even if admitted, would not alter the outcome.

[14] Additionally, there is some dispute between the parties as to what constitutes the Minister's reasons. The Minister's letter to the applicant states:

> Please be advised that the Minister of Transport, Infrastructure and Communities, has refused your clearance based on the information in your file and the following recommendation from the Advisory Body:
>
> > "The Advisory Body was unanimous in its recommendation to refuse the transportation security clearance. An in-depth review of the file, including the police report detailing a recent drug-related incident involving the applicant and her husband that included an extremely large amount of cocaine and other drugs, as well as a loaded prohibited firearm, led the Advisory Body to believe, on a balance of probabilities, that she may be prone or induced to commit an act or assist or abet any person to commit an act that my (sic) unlawfully

> interfere with civil aviation. Furthermore, the applicant's written explanation and supporting documentation did not provide sufficient information that would persuade the Advisory Body to recommend issuing a clearance."

[15] While it is brief, it clearly sets out the basis for the Minister's conclusion. The applicant has argued that an Advisory Board document titled "Key Points for Discussion" should also be considered part of the Minister's decision. This document is a summary of the Advisory Board's discussion. In my view, it forms an integral part of the reasons. Indeed, without it, the Minister's letter is arguably conclusionary. The document is, on its face, significant. It is titled "Key Points of Discussion" and the factors listed in the document were "noted" by the Advisory Body in formulating its recommendation. This document also formed part of the record that was before the Minister.

Reasonableness

[16] Section 4.8 of the *Aeronautics Act* grants broad discretion to the Minister:

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

[17] As this Court explained in *Fontaine v Transport Canada Safety and Security*, 2007 FC 1160, air safety is an issue of substantial importance and access to restricted areas is a privilege, not a right.

[18] When applying the standard of reasonableness the Court looks to the existence of justification, transparency and intelligibility in the decision-marking process and whether the

decision falls within the range of acceptable outcomes that are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[19] In exercising his discretion under this section the Minister may consider any factor that he considers relevant: *Fontaine*, para 78. This includes criminal charges that do not result in a conviction and evidence about a person's character or propensities: *Clue* at para 20. The fact that the charges were stayed against the applicant is not determinative. Prosecutions proceed, or do not proceed, for a variety of reasons; hence the absence of a conviction is not determinative. In my view, a proper analogy can be made to inadmissibility proceedings under the *Immigration and Refugee Protection Act*, SC 2001, c 27. The mere fact of criminal charges is not probative but a Court can look at the underlying circumstances. In *Thuraisingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 607 at paragraph 35, Justice Anne MacTavish wrote:

> In my view, a distinction must be drawn between reliance on the fact that someone has been charged with a criminal offense, and reliance on the evidence that underlies the charges in question. The fact that someone has been charged with an offense proves nothing: it is simply an allegation. In contrast, the evidence underlying the charge may indeed be sufficient to provide the foundation for a good-faith opinion that an individual poses a present or future danger to others in Canada.

[20] Secondly, the absence of a criminal conviction cannot be determinative given the different standards of proof which prevail in the two discrete legal contexts. A criminal conviction is sustained on proof beyond a reasonable doubt. Denial of a security clearance requires only a reasonable belief, on a balance of probabilities, that a person may be prone to or induced to commit an act that may interfere with civil aviation.

[21] This disposes of the applicant's submission that the Minister was prohibited from considering her arrest because she had the incident expunged from the Canadian Police Information Centre (CPIC), the federal repository for criminal and non-criminal records. The absence of a criminal record does not purge her name from all and any sources that might be consulted on a background check for civil purposes. As stated above, the Minister may consider any evidence that he considers relevant. The Minister not only relies on the results of a CPIC search, but also the records of the Canadian Security Intelligence Service (CSIS) and the files of various law enforcement agencies. While the applicant's information may have been removed from CPIC, it was still in the RCMP records.

[22] In concluding, it is noteworthy that the Application for Restricted Area Identity Card, Part E requests the applicant's consent. It provides:

> For security clearance purposes under section 4.8 of the *Aeronautics Act* and the Transportation Security Clearance Program for airport workers and pursuant to Part 5 of the *Marine Transportation Security Regulations* for maritime facilities workers (hereinafter "security clearance purposes"), I consent to the disclosure by Transport Canada to the Royal Canadian Mounted Police, the Canadian Security Intelligence Service, Citizenship and Immigration Canada and law enforcement agencies, of any and all information provided by me in support of this application. Without limiting the generality of the foregoing, this includes information relating to my date of birth, education, residential history, employment history, and immigration and citizenship status in Canada. I also consent to the disclosure and use of my fingerprints and facial image for identification purposes.
>
> For security clearance purposes, I hereby authorize Transport Canada to seek, verify, assess, collect and retain any and all information relevant to this application including any criminal records and any and all information contained in law enforcement files, including intelligence gathered for law enforcement purposes, and information with respect to my immigration and citizenship status, as well as any

> and all information that will facilitate the conduct of a security assessment.

[23] The applicant consented to the Minister undertaking the inquiries that lead to his decision. The Minister was entitled under the terms of the Security Policy to consider conduct short of a conviction. Therefore, the question becomes whether this incident could reasonably lead the Minister to deny the applicant a security clearance.

[24] As noted, the standard of proof required to support a reasonable belief that a person may be induced to interfere with the security of civil aviation is lower than what is required for a criminal conviction. The Minister must have reasonable grounds to believe that the applicant *may* be prone or induced to commit an act or assist or abet any person to commit an act that *may* unlawfully interfere with civil aviation: *Clue* at para 20.

[25] In *Fontaine*, the Minister cancelled Mr. Fontaine's security clearance by reason of his past association with individuals who were members of a criminal organization. Mr. Fontaine emphasized that they were childhood friends and that he was not a member of that organization. This Court found that the Minister's decision was reasonable in those circumstances, as these individuals might have a negative influence on him.

[26] In this case, the applicant's husband was implicated in a sophisticated dial-a-dope trafficking operation, and used a car of which she was the principle operator. That car included a secret compartment containing a variety of controlled substances and a loaded, prohibited firearm. While

there may not have been sufficient evidence to convict the applicant, the facts reasonably support a belief she was either closely connected to this activity or wilfully blind to it.

[27] Cocaine and heroin are imported into Canada and the applicant's access to a restricted area of an airport could attract the attention of her husband or his criminal associates. While the applicant is currently seeking a divorce, this evidence was not before the Minister when he reached his decision. At the time of the decision they had been separated for months.

[28] The applicant has argued that the Advisory Board misunderstood certain evidence:

(1) Whether she fled the scene or stayed in her vehicle;

(2) The date of her arrest; and

(3) Whether she changed her name back to her original name in 2007.

[29] The Advisory Board noted that the applicant had said that she remained seated in the car but the RCMP report stated that she had attempted to flee. The Advisory Board did not make a finding of fact regarding whether or not she fled, but it noted the discrepancy.

[30] I accept the applicant's argument that her conduct is a material consideration. Her conduct in fleeing or remaining in the passenger seat constitutes some evidence from which inferences could be drawn as to the extent of her knowledge of her husband's activities and of the contents of the vehicle. However, this factor must be situated in the context of the circumstances as a whole, and that of the other evidence. The secret compartment in the car, the loaded weapon, the absence of an explanation for her actions on the date of the arrest and the seriousness of the crime all provide

ample support for the reasonableness of the conclusion, independent of the discrepancy. Put otherwise, the decision withstands the scrutiny of justification, transparency and intelligibility, whether the applicant fled or remained in the car.

[31] The applicant provided evidence that the police incorrectly stated the date of her arrest. The police report provided to the Minister stated that she was arrested on December 22, 2006 whereas her evidence shows the date as May 1, 2007. Nothing turns on this clerical error. There is no dispute as to what, in general terms, happened.

[32] Finally, while the applicant changed her name on November 17, 2009, the Advisory Board incorrectly stated that this change was "back to her original name" (emphasis added). There is no indication that the Minister's decision was based on this name change. This minor error in the Advisory Board's notes does not render the Minister's decision unreasonable.

[33] The applicant also considers it unreasonable for the Advisory Board to have noted that, as the applicant lived with her husband, she must have known about his criminal activity. The drugs and weapon were found inside the vehicle that was registered with her as the principle operator. She was present with her husband when the search warrant was executed. The amount and variety of drugs recovered demonstrated that her husband had substantial involvement in serious criminal activity. These are grounds to support a reasonable belief that the applicant was either aware of or wilfully blind to her husband's illegal activities, such that the Security Policy criteria were engaged.

JUDGMENT

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

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-476-12
STYLE OF CAUSE:	**MARILYN THEP-OUTHAINTHANY v ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Ottawa, ON
DATE OF HEARING:	December 20, 2012
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