

Federal Court



Cour fédérale

Date: 20130321

Docket: T-1030-12

Citation: 2013 FC 294

Ottawa, Ontario, March 21, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

DINO PELES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review challenging a decision by the Director General of Aviation Security [the Director], on behalf of the Minister of Transport, Infrastructure and Communities [Transport Canada], to cancel the applicant's transportation security clearance [TSC], thereby preventing his continued employment at the Lester B. Pearson International Airport.

I. Background

[2] For purposes related to his employment at the Lester B. Pearson International Airport, the applicant was granted an airport security clearance in 2006 and it was renewed in 2011. Each security clearance is valid for five years.

[3] On November 22, 2011, after the applicant's security clearance was renewed, Transport Canada sent the applicant a letter informing him that the TSC Advisory Body [the Advisory Body] would be reviewing his security clearance because adverse information had been made available that raised concerns as to his suitability to retain a clearance. Officers of the Peel Regional Police Service found the applicant in the passenger seat of a vehicle on June 6, 2009, with \$2,500 in cash in two clear plastic bags, as well as 471 grams of marijuana, which has a street value of approximately \$4,710. The applicant was subsequently charged with possession of a controlled substance for the purpose of trafficking.

[4] Transport Canada also had information of an incident on February 19, 2010, where Peel Regional Police Service officers observed the applicant getting out of his vehicle to get into the passenger seat of another vehicle, and after speaking with the applicant and the driver of the other vehicle, the officers observed a clear plastic bag filled with what appeared to be marijuana. Further searches by the police revealed two cell phones on the applicant and approximately 14 grams of marijuana. The applicant was subsequently charged with possession of a controlled substance for the purpose of trafficking. The letter noted that on March 10, 2011, the charge was withdrawn.

[5] The letter invited the applicant to provide additional information outlining the circumstances of the information noted in the letter and provide any other relevant information or explanation to Transport Canada, including any extenuating circumstances.

[6] On January 12, 2012, the applicant's lawyer provided a one-page letter to Transport Canada, explaining that the charges laid against the applicant in June 2009 were withdrawn by the Crown on October 7, 2011. As for the charges of February 19, 2010, the lawyer stated that the applicant had accepted a diversion and the charges were withdrawn. The lawyer enclosed copies of the Court Information for the charges and stated that his client had no prior criminal record.

[7] On April 27, 2012, the Director sent the applicant a letter informing him that the Minister of Transport, Infrastructure and Communities [the Minister] had cancelled the applicant's security clearance, based on the information outlined in the aforesaid letter of November 22, 2011, the letter and documents provided by the applicant's lawyer on January 12, 2012, the Advisory Body's recommendation to cancel his clearance, and the TSC Program Policy. The Director believed that, on a balance of probabilities, the applicant "may be prone or induced to commit an act, or to assist or abet another person to commit an act, that may unlawfully interfere with civil aviation".

II. Issues

[8] The present application for judicial review raised the following issues:

- A. Was there a breach of procedural fairness in the process leading up to the impugned decision?

B. Did the Advisory Body err in finding that the applicant's security clearance should be cancelled?

III. Standard of review

[9] The applicable standard of review with respect to whether the applicant's right to procedural fairness has been breached is correctness (*Clue v Canada (Attorney General)*, 2011 FC 323 at para 14 [*Clue*]; *Rivet v Canada (Attorney General)*, 2007 FC 1775 at para 16).

[10] The administrative decision to cancel an airport security clearance is reviewed on the standard of reasonableness (*Fradette v Canada (Attorney General)*, 2010 FC 884 at para 17; *Clue*, above, at para 14).

IV. Analysis

[11] As a preliminary objection, the respondent submits that the applicant's affidavit, sworn August 23, 2012, subsequent to the decision of the Minister that cancelled the applicant's security clearance and not before the Minister at the time of the decision, is inadmissible (*Ontario Assn of Architects v Assn of Architectural Technologists of Ontario*), 2002 FCA 218 at para 30, leave to appeal refused, [2002] SCCA 316).

[12] While additional evidence may be admitted in limited circumstances, I agree with the respondent that this is not such a case. The evidence of the applicant, filed late, did not relate to questions of procedural fairness or jurisdiction, and was available prior to the Minister's decision, yet not relied upon before the Minister, without any explanation.

[13] I find that the applicant's affidavit is not admissible.

A. *Was There a Breach of Procedural Fairness in the Process Leading up to the Impugned Decision?*

[14] The applicant submits that he was unable to submit character evidence "at an earlier stage" for purposes of the Minister's review.

[15] The applicant's right to procedural fairness in the process leading up to the impugned decision extended to (1) knowing the case he had to meet; and (2) being given a meaningful opportunity to make representations (*DiMartino v Canada (Minister of Transport)*, 2005 FC 635 at para 36; *Pouliot v Canada (Minister of Transport, Infrastructure and Communities)*, 2012 FC 347 at para 11).

[16] The applicant was advised by Transport Canada of the information the Advisory Body would consider, and was given an opportunity to make representations, which his lawyer did on his behalf on January 12, 2012 (*Russo v Canada (Minister of Transport, Infrastructure and Communities)*, 2011 FC 764 at paras 56-63).

[17] There was no breach of procedural fairness.

B. *Did the Advisory Body Err in Finding that the Applicant's Security Clearance Should be Cancelled?*

[18] The applicant submits that the Minister's decision was not reasonable, because the charges against him were withdrawn with respect to both incidents of June 5, 2009 and February 19, 2010.

[19] The applicant further argues that his record of employment has been impeccable, his education is specifically tailored to airport-related jobs, and that if his TSC is not restored it will negatively impact both his and his mother's quality of life, as she is financially dependent on the applicant.

[20] However, while cancellation of the applicant's security clearance prohibits him from working in some areas of the airport, he can work in non-secure areas or outside the airport.

[21] It is not necessary that a criminal conviction be made in respect of underlying criminal charges in order for allegations to be relevant to the Advisory Body's decision to cancel the applicant's security clearance. The analysis of Justice Robert Barnes in *Clue*, above, at para 20, is pertinent:

Mr. Clue's complaint that the allegations against him could not be relied upon by the Director because they had not been proven against him in a criminal proceeding is without merit. The decision not to prosecute Mr. Clue for the handgun incident is explained in the record as a lack of evidence sufficient to meet a criminal standard of proof. For purposes of revocation of a TSC [Transportation Security Clearance] the standard of proof is much lower and requires only a reasonable belief, on a balance of probabilities, that a person may be prone or induced to commit and act (or to assist such an act) that may unlawfully interfere with civil aviation. This provision involves an assessment of a person's character or propensities ("prone or induced to") and it does not require evidence of the actual commission of an unlawful act: see *Fontaine*, above, at para 78, 81 and 83. What the Director is called upon to do is to examine a person's behaviour to determine if, on balance, it supports a reasonable belief that a person may in the future be inclined to act unlawfully in the context of aeronautical safety...

[Emphasis added]

[22] The applicant made no effort to challenge the underlying facts for the charges made against him, involving significant quantities of cash and drugs, even though he was given the opportunity to do so by the Advisory Body. Counsel for the applicant argues that the Minister should have checked with the prosecutor to ascertain why the charges against the applicant were withdrawn. It begs the question why the applicant did not offer any evidence to Transport Canada to explain why the charges were withdrawn, if such evidence could have been persuasive. The decision of the Advisory Body was therefore reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicant's application for judicial review is dismissed.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1030-12

STYLE OF CAUSE: Dino Peles v. Attorney General of Canada

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 19, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** MANSON J.

DATED: March 21, 2013

APPEARANCES:

A.J. Bikerton

FOR THE APPLICANT

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FOR THE RESPONDENT

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