

Federal Court



Cour fédérale

**Date: 20130827**

**Docket: T-1231-12**

**Citation: 2013 FC 904**

**Ottawa, Ontario, August 27, 2013**

**PRESENT: The Honourable Mr. Justice Annis**

**BETWEEN:**

**MICHAEL ANTHONY SYLVESTER**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant seeks to set aside a decision by Transport Canada on June 7, 2012 which denied him the transportation security clearance necessary to be employed at Toronto's Billy Bishop International Airport.

Transportation Security  
Clearance Program

**Redress**

II.45

When a security clearance is cancelled or an application for a security clearance is refused an application for review may be directed to the Federal

Programme d'habilitation de  
sécurité en matière de transport

**Redressement**

II.45

Lorsqu'une habilitation est révoquée ou qu'une demande d'habilitation est refusée une demande d'examen peut être adressée à la Cour fédérale du

Court of Canada - Trial Division within thirty (30) days of the receipt of the notice of cancellation or refusal.

Canada, Division de première instance, dans les trente (30) jours suivant la réception de l'avis de révocation ou de refus en supposant que la personne visée ne soit pas décrite dans l'alinéa (a).

[2] For the reasons that follow, the application is dismissed.

### **Facts**

[3] Under the *Aeronautics Act*, RSC 1985, c A-2, the Minister of Transport is responsible for developing policies and regulations to promote the security of Canada's aviation system. This department's current aviation security programs include the National Civil Aviation Security Program [NCASP], which articulates the efforts of Transport Canada and other entities to help prevent acts of unlawful interference and keep air travel secure. One element of the NCASP is the Transportation Security Clearance Program [TSCP]. This program prevents access into restricted areas of listed airports by any individual whom the Minister reasonably believes, on a balance of probabilities, may be prone or induced to commit an act that may unlawfully interfere with civil aviation. Section 4.8 of the *Aeronautics Act* authorizes the Minister to grant or refuse to grant a transportation security clearance in order to gain access to such areas.

[4] Mr. Sylvester submitted an application for transportation security clearance on May 5, 2011 in order to work as a ramp attendant for Porter Airlines. Officials at the TSCP's Security Screenings Program [SSP] requested a records check from the RCMP. In January 2012, the RCMP responded with a written report stating that on September 22, 1999, Mr. Sylvester was charged with three counts of theft after contacting an undercover police officer to sell what he described as stolen

clothes. A second individual provided further items of clothing on August 23, 1999 and indicated that a "Mike Sylvester" had stolen them with him while working as a ramp attendant for Canadian Airlines. The applicant met with the undercover agent on August 25, 1999 and collected payment for this second batch of items. The report further stated that on August 30, 1999, Mr. Sylvester arranged to meet an undercover officer to sell him a Sony PlayStation and several boxes of nail polish and that investigation revealed that these items had been stolen from Canadian Airlines by the applicant and another person while the applicant was employed there as a ramp attendant.

[5] The RCMP report noted that the information had been validated by the respective agency and could be shared with the applicant should Transport Canada deem it necessary.

[6] The theft charges were withdrawn for unknown reasons on April 17, 2002.

[7] On March 13, 2012, the Chief of the SSP wrote to Mr. Sylvester to advise him that the SSP had received information which raised concerns about his ability to hold a transportation security clearance and that his application would therefore be referred to the Advisory Body. She laid out the allegations in the RCMP report and encouraged him to provide any additional information on the incidents, including surrounding or extenuating circumstances, and to contact the SSP branch if he had any questions about his clearance. Mr. Sylvester responded with a letter asserting that he had no involvement in the 1999 thefts and providing a court transcript indicating that the reason for the withdrawal of charges was credibility concerns with one witness.

[8] On May 9, 2012, the Advisory Body met and considered Mr. Sylvester's application. It concluded that the police report was strong and credible evidence of his involvement in the 1999 thefts and that it suggested that he might be prone to commit an act unlawfully interfering with civil aviation. It found that his written explanation and supporting documents amounted to mere bald denials and did not provide enough information to warrant recommending to the Minister that he receive a clearance. A Ministerial delegate wrote to Mr. Sylvester on June 7, 2012 to advise him that his application had been denied.

### **Standard of review and duty of fairness**

[9] The applicant was unrepresented and provided no Memorandum of Fact and Law. The respondent nevertheless fully described the standard of review and the content of the duty of fairness in its Memorandum, which was further supplemented by the Court's explanations during the hearing.

[10] The standard of review of the Minister's exercise of discretion on questions of fact pursuant to section 4.8 of the *Aeronautics Act* has been found to be one of reasonableness. This includes the involvement of the Advisory Body charged with making security clearance recommendations. See *Clue v Canada (AG)*, 2011 FC 323 [*Clue*] at para 14; *Russo v Canada (Minister of Transport, Infrastructure and Communities)*, 2011 FC 764 at para 20; and *Fradette v Canada (AG)*, 2010 FC 884 at para 17.

[11] On issues of procedural fairness, the standard of review is correctness (see *Clue*). Previous cases of this court have determined that the level of fairness in cases dealing with the denial or

revocation of security clearance should be limited to the right to know the facts alleged against the applicant and the right to make representations about those facts, without any guarantee of a right to a hearing. See *Pouliot v Canada*, 2012 FC 347 at para 10, citing *Rivet v Canada*, 2007 FC 1175 at para 25.

[12] There was some issue raised by the applicant during the hearing that he was not aware that he was required to provide more detailed answers to the letter of March 13, 2012. I have difficulty accepting this submission inasmuch as the letter specifically requested additional information concerning the very numerous and detailed incidents mentioned therein, including any surrounding or extenuating circumstances. Moreover, during oral argument there was no indication given that the applicant could add any further information of consequence to his response in his reply letter beyond that he knew nothing about the situation because he was not involved in the incidents in question.

[13] I conclude that the applicant was treated in accordance with the standard of fairness applicable to the decision-making process refusing his security clearance.

#### **Issue of reasonableness**

[14] The applicant submits that the decision was not reasonable in as much as he was not convicted and the criminal charges were not proceeded with due to credibility issues involving the Crown's case.

[15] The decision was made pursuant to section 4.8 of the *Aeronautics Act*, which grants a 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.

[16] The TSCP policy specifies factors that the Minister may consider in refusing clearance including evidence in this case when exercising his discretion under paragraph 1.4 of the TSCP policy:

**Objective**

I.4  
The objective of this Program is to prevent the uncontrolled entry into a restricted area of a listed airport by any individual who

[. . .]

4. the Minister reasonably believes, on a balance of probabilities, may be prone or induced to

- commit an act that may unlawfully interfere with civil aviation;
- or
- assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

[. . .]

**Objectif**

I.4  
L'objectif de ce programme est de prévenir l'entrée non contrôlée dans les zones réglementées d'un aéroport énuméré dans le cas de toute personne:

[. . .]

4. qui, selon le ministre et les probabilités, est sujette ou peut être incitée à:

- commettre un acte d'intervention illicite pour l'aviation civile;
- ou
- aider ou à inciter toute autre personne à commettre un acte d'intervention illicite pour l'aviation civile.

[. . .]

[17] In applying the standard of reasonableness, the issues are those of justification, transparency and intelligibility in the decision-making 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 at para 47.

[18] In addition, it has been determined that in exercising a discretion conferred by section 4.8 of the *Aeronautics Act* “the Minister may take any factor he considers relevant into account”. See *Fontaine v Canada*, 2007 FC 1160 at para 78, where the Court also concluded that, where safety is an issue of substantial importance, access to restricted areas is a privilege, not a right. The factors which can be considered include criminal charges which do not result in a conviction; the fact that charges are stayed has been found not to be determinative. See *Thep-Outhainthany v Canada (AG)*, 2013 FC 59 at para 19.

[19] The fact that in the present case the charges were not proceeded upon because of credibility issues does not preclude the Minister from refusing a security clearance. In criminal matters, the onus on the Crown is higher, requiring proof beyond a reasonable doubt for conviction. In this matter, the onus on the Minister requires only a reasonable belief on a balance of probabilities. In addition, the standard is considerably lower, requiring a conclusion only that the applicant may be prone or induced to commit an act that may interfere with civil aviation.

[20] This decision was based upon numerous specific incidents involving the applicant in circumstances where crimes had been committed, with accompanying inculpatory statements by a

co-accused under police supervision which were significant not only because of the detail provided on the extent of the criminal activity, but also because they related to previous conduct at an airport.

[21] It was not unreasonable therefore for Transport Canada to require more of an explanation beyond a broad denial given the risks involved in air transportation security.

[22] The respondent has justified its decision with intelligible and reasonable reasons, and although not satisfactory to the applicant, who considers the dismissal of the charges on credibility grounds sufficient, the decision is nevertheless within the range of acceptable outcomes that are defensible on the facts and law.

[23] Accordingly the application is dismissed.



**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is dismissed.

“Peter Annis”

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Judge

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

**DOCKET:** T-1231-12

**STYLE OF CAUSE:** MICHAEL ANTHONY SYLVESTER v ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 9, 2013

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

**DATED:** AUGUST 27, 2013

**APPEARANCES:**

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