

Federal Court



Cour fédérale

Date: 20160119

Docket: T-798-15

Citation: 2016 FC 54

Vancouver, British Columbia, January 19, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

TRUNG KIEN HOANG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review of a Canadian Human Rights Commission [CHRC] decision, dated April 8, 2015, wherein the CHRC dismissed the Applicant's complaint against the Minister of Transportation; and, held pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act] that further inquiry is not warranted. In his complaint, the Applicant alleged that he was discriminated, on the basis of his family status, by

the Minister of Transportation when the Minister of Transportation denied the Applicant's application for security clearance, which was required for his employment as a Station Attendant with Air Canada at the Vancouver International Airport.

[2] The Applicant, Trung Kien Hoang (age 25), is a Canadian citizen. He was born in Hong Kong in 1990, immigrated to Canada with his parents in December 1991; and, obtained Canadian citizenship in 1995.

[3] In September 2010, Air Canada hired the Applicant as a Station Attendant, contingent, or conditional on the Applicant applying for a Transportation Security Clearance [TSC] from Transport Canada. On October 19, 2010, the Applicant applied for a TSC; and, on the same day, he was issued a temporary Restricted Area Identification Card. On October 23, 2010, the Applicant began to work for Air Canada.

[4] In a letter dated February 1, 2012, Transport Canada informed the Applicant of adverse information received from the Royal Canadian Mounted Police [RCMP]; this information raised concerns in regard to his suitability for obtention of a TSC. In its letter, Transport Canada encouraged the Applicant to provide additional information, outlining the circumstances surrounding the adverse information, and, to provide any other relevant information or explanation, including any extenuating circumstances.

[5] The Applicant responded to the letter on March 4, 2012, by email, in which he stated that he currently did not have a relationship with his father as they have not spoken for years; it is

false to call his brother a convicted drug dealer since although his brother had been formally charged, he had been proven innocent; and, furthermore, he explained the circumstances of his arrest on January 16, 2009. The Applicant concluded his letter by stating that he is not a criminal and does not have any criminal intentions.

[6] On April 27, 2012, the Applicant was informed that his TSC application was rejected. As a result of this negative result, the Applicant was terminated from his employment at Air Canada.

[7] On May 25, 2012, the Applicant filed a notice of application to the Federal Court against the decision by the Minister of Transportation. The parties agreed on a consent basis, to have the Minister render a new decision.

[8] On February 11, 2013, the Applicant was informed that his TSC application was again rejected.

[9] The Applicant did not seek judicial review of the Minister's decision; instead, the Applicant filed on August 16, 2013, a complaint to the CHRC wherein he alleged discrimination by the Minister of Transportation on the ground of family status.

II. Impugned Decision

[10] In a decision dated April 8, 2015, the CHRC dismissed the Applicant's complaint and held that further inquiry is not warranted. Specifically, the CHRC held that there is nothing to

suggest that the manner in which the Minister considered the identity of the Applicant's family members was discriminatory:

Given that the practice itself is not alleged to be discriminatory, the issue is whether the manner in which it was applied to the complainant may be considered discriminatory. Even though the Minister considered the identity of the complainant's family members, which, as stated above, is a reasonably necessary practice, there is nothing to suggest that the manner in which the Minister did so was discriminatory. On the contrary, the evidence indicates that the respondent does not strictly apply a rigid rule where, if a member of an applicant's family was involved in crime it would automatically be considered fatal to the application. The complainant's application was given individual assessment. When the criminal antecedents of his family members were discovered, he was afforded an opportunity to provide an explanation. The complainant was also provided an opportunity to appeal the decision.

Furthermore, the information regarding the complainant's family was not the sole basis of the Minister's decision as alleged by the complainant. As set out in the Assessment Report, the Minister also had concerns regarding the complainant's own conduct.

(Affidavit of Trung Kien Hoang, Applicant's Record, Decision of the Commission, pp 164-165)

[11] In arriving at its conclusion, the CHRC reviewed the Applicant's submissions (Complaint Form and submission to the Assessment Report). The CHRC held that the Applicant's complaint is to be dismissed because of the aforesaid reasons and the reasons set out in the Assessment Report, dated January 23, 2015. The CHRC held in the Assessment Report that further inquiry was not warranted for the following reasons.

[12] The CHRC recognized that the Applicant's family status, namely his relationship with his father and brother, was a factor on which Transport Canada relied on to reject the Applicant's security clearance application. As a result, the CHRC found that there was *prima facie*

discrimination; and, proceeded to the second part of the analysis: whether the Minister had a *bona fide* justification by which to reach the decision that the Applicant would be denied his security clearance as a result of the *prima facie* discrimination for valid reason.

[13] The CHRC found that Transport Canada provided a *bona fide* justification to dismiss that Applicant's complaint. The CHRC examined four issues in determining whether the Minister had a *bona fide* justification:

- 1) Was the request for a security clearance and the security clearance carried out pursuant to an established policy?
- 2) Was the policy created for a legitimate security-related purpose related to the job in question?
- 3) Is the policy based upon an honest and good faith belief that it is necessary to fulfill the legitimate security purpose in the context of the job in question?
- 4) Is the policy or standard reasonably necessary to meet the legitimate security purpose in the context of the job in question?

[14] Firstly, the CHRC held that the evidence gathered reveals that the request for security clearance and the security clearance itself, is carried out pursuant to section 4.8 of the *Aeronautics Act*, RSC 1985, c A-2. This section give the Minister the power to grant, refuse, suspend or cancel a security clearance; thus, the security clearance request and the security clearance were carried out pursuant to an established policy.

[15] Secondly, the CHRC held that the evidence suggests that the practice was created for a legitimate security related purpose; as the evidence supports the practice was created pursuant to the Minister's mandate to serve the public through the promotion of a safe, secure, efficient and environmentally responsible transportation system in Canada. The practice is therefore in place to mitigate the risk posed by individuals who may be a threat to aviation or marine transportation.

[16] Thirdly, the CHRC held that nothing in the evidence suggests that the policy is based upon anything other than an honest and good faith belief.

[17] Fourthly, the CHRC held that the Minister's practice was reasonably necessary to ensure, to the extent possible, that airport employees are not prone or induced to assist or abet any person to commit an act that may unlawfully interfere with civil aviation. It is essential for the Minister, in conducting the Minister's mandate of safety and security of Canada's transportation infrastructure that the Minister conducts background checks on individuals having access to restricted areas of an airport.

[18] Given that the Applicant was responsible for loading and unloading luggage to and from commercial aircraft; it was reasonable to assume that the Minister is required to obtain and consider any and all information available, including associates and family members, when evaluating an individual's suitability for the job. By retaining the Applicant in his employment, the risk of unlawful interference with civil aviation, either real or perceived was there.

[19] As a result, pursuant to subparagraph 44(3)(b)(i) of the Act, the CHRC held that further inquiry was not warranted.

III. Issues

[20] The Court considers the following issues to be central to this application for judicial review:

1. Is the CHRC's decision that no further inquiry is warranted reasonable?
2. Did the Minister fail to meet the requirements of procedural fairness?

IV. Legislation

[21] The following legislative provisions apply.

Section 4.8 of the *Aeronautics Act*:

Granting, suspending, etc.

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.

Délivrance, refus, etc.

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

Transportation Security Clearance Program Policy [TSCP Policy]:

I.4 – Objective

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

1. is known or suspected to be involved in activities directed

I.4 – Objectif

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:

1. connue ou soupçonnée d'être mêlée à des activités relatives à

toward or in support of the threat or use of acts of serious violence against persons or property;	une menace ou à des actes de violence commis contre les personnes ou les biens;
2. is known or suspected to be a member of an organization which is known or suspected to be involved in activities directed toward or in support of the threat or use of acts of serious violence against people or property;	2. connue ou soupçonnée d'être membre d'un organisme connu ou soupçonné d'être relié à des activités de menace ou à des actes de violence commis contre les personnes ou les biens;
3. is suspected of being closely associated with an individual who is known or suspected of	3. soupçonnée d'être étroitement associée à une personne connue ou soupçonnée
<ul style="list-style-type: none"> • being involved in activities referred to in paragraph (1); 	<ul style="list-style-type: none"> • de participer aux activités mentionnées à l'alinéa (1);
<ul style="list-style-type: none"> • being a member of an organization referred to in paragraph (2); or 	<ul style="list-style-type: none"> • d'être membre d'un organisme cité à l'alinéa (2); ou
<ul style="list-style-type: none"> • being a member of an organization referred to in subsection (5) hereunder. 	<ul style="list-style-type: none"> • être membre d'un organisme cité à l'alinéa (5).
4. the Minister reasonably believes, on a balance of probabilities, may be prone or induced to	4. qui, selon le ministre et les probabilités, est sujette ou peut être incitée à:
<ul style="list-style-type: none"> • commit an act that may unlawfully interfere with civil aviation; or 	<ul style="list-style-type: none"> • commettre un acte d'intervention illicite pour l'aviation civile; ou
<ul style="list-style-type: none"> • assist or abet any person to commit an act that may unlawfully interfere with civil aviation. 	<ul style="list-style-type: none"> • aider ou à inciter toute autre personne à commettre un acte d'intervention illicite pour l'aviation civile.
5. is known or suspected to be or to have been a member of or a participant in activities of criminal organizations as defined in Sections 467.1 and 467.11 (1) of the Criminal Code of Canada;	5. est connu ou soupçonné d'être ou d'avoir été membre d'une organisation criminelle ou d'avoir pris part à des activités d'organisations criminelles, tel que défini aux articles 467.1 et 467.11 (1) du

6. is a member of a terrorist group as defined in Section 83.01 (1)(a) of the Criminal code of Canada.

Code criminel du Canada;

6. est membre d'un groupe terroriste, tel que défini à l'alinéa 83.01(1)(a) du Code criminel du Canada.

V. Parties Submissions

[22] The Applicant submits that the Minister's decision is unreasonable as the CHRC allegedly made four palpable and overriding errors.

[23] Firstly, the CHRC misapplied and improperly considered the test for establishing a *bona fide* justification. Namely, the CHRC limited its analysis to the Minister's broad mandate without considering the specific issue as to whether there was a *bona fide* justification to reject the Applicant's TSC application, because of his family members. More specifically, the CHRC did not discuss the Minister's assumptions in regard to the Applicant's potential for criminal activity, as a result of his estranged father's actions and his brother's alleged criminal activity.

[24] Secondly, the CHRC mischaracterized its jurisdiction. The CHRC states that it was not its role to review the Minister's decision with respect to reasonableness or correctness of the decision to reject the Applicant's TSC application. Thus, the CHRC is clearly expressing a refusal to investigate the merits of the Applicant's complaint. This was unreasonable as the CHRC is unduly limiting its jurisdiction.

[25] Thirdly, the CHRC relied on evidence that was not properly before it, as the CHRC accepted the Minister's claim, with no such evidence, that the Minister decides as whether to

grant a security clearance to an applicant with family members who are involved in criminal activities, or have a criminal record.

[26] Fourthly, the CHRC unreasonably found that discrimination on the prohibited ground was only a factor in the Minister's decision. This is in contradiction with well-established jurisprudence.

[27] Subsequently, the Applicant submits that the CHRC breached procedural fairness by failing to meet a minimum threshold of thoroughness in its investigation by omitting to contact the Applicant's mother.

[28] Conversely, the Respondent submits that the CHRC did not breach its duty of procedural fairness as the Applicant had the opportunity to make representations to the CHRC after the Assessment Report was rendered and before the CHRC rendered its decision. The investigation by the CHRC was thorough and the investigator was not obligated to interview the Applicant's mother.

[29] Subsequently, the Respondent submits that the CHRC's decision is reasonable.

[30] The Respondent submits that the CHRC properly applied the test set out by the Supreme Court of Canada to determine whether a *bona fide* justification applied as in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 SCR 3 [Meiorin] and in *British*

Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)

[1999] 3 SCR 868 [*Grismer*]; and, in the process, reasonably held that the Minister met the *bona fide* justification to reject the Applicant's security clearance: i) the standard is rationally connected to the performance of the job; ii) the standard is adopted in an honest and good faith belief that it is necessary; and, iii) the standard is reasonably necessary to accomplish its purpose or goal.

[31] Finally, the Respondent submits that the role of this Court is not to judicially review the Minister's decision to reject the sought security clearance; rather, it is to review the CHRC's decision to dismiss the Applicant's complaint of discrimination. Nonetheless, the Respondent submits that the Minister's decision to deny the security clearance was reasonable as the Minister, reasonably, was not convinced that the Applicant would not pose a potential threat to aviation security.

VI. Standard of Review

[32] The CHRC has a broad discretion to dismiss complaints where it is satisfied that further inquiry is not warranted pursuant to subparagraph 44(3)(b)(i) of the Act (*Walsh v Canada (Attorney General)*, 2015 FC 230 at para 19 [*Walsh*]) as "the Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report" (*Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FCR 113).

[33] The first issue is whether the CHRC properly applied the legal test regarding a *bona fide* justification which is a mix of fact and law determination. The standard of review of reasonableness is applicable wherein a mix of fact and law determinations are reached by the CHRC under subparagraph 44(3)(b)(i) of the Act (*Walsh*, above at para 22; *Mohawks of the Bay of Quinte v Canada (Attorney General)*, 2014 FC 527 at para 14 [*Mohawks of the Bay of Quinte*]). Conversely, the standard of review of correctness is applicable to an alleged breach of procedural fairness at the post-investigation stage (*Mohawks of the Bay of Quinte*, above at para 14).

VII. Analysis

A. *Is the CHRC's decision that no further inquiry is warranted reasonable?*

- (1) Did the CHRC misapply and improperly consider the test for establishing a *bona fide* justification?

[34] At the first stage of a discrimination complaint, the onus is on the complainant to establish that the practice is *prima facie* discriminatory (*Grismer*, above at para 20).

[35] In its decision, the CHRC held that “[e]ven though the Minister considered the identity of the complainant’s family members, which, as stated above, is a reasonably necessary practice, there is nothing to suggest that the manner in which the Minister did so was discriminatory” (Applicant’s Record, Decision of the Commission at p 164). Conversely, in the Assessment Report, it held that “[b]ased on the evidence gathered, the complainant’s family status, namely his relationship with his father and his brother, was a factor in the respondent’s decision to deny

his application for security clearance” (Applicant’s Record, Assessment Report, para 20, at p 152).

[36] Even though there is a slight contradiction between the decision and the Assessment Report, both the Applicant and the Respondent agreed that the CHRC correctly found that the Applicant’s family status was a factor in the Minister’s decision not to issue a security clearance. Given that a *prima facie* case of discrimination has been established, the onus was on the Minister to demonstrate, on the balance of the probabilities that he had a *bona fide* justification:

[20] Once the plaintiff establishes that the standard is *prima facie* discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a BFOR or has a *bona fide* and reasonable justification. In order to establish this justification, the defendant must prove that:

- (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
- (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
- (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

(*Grismer*, above at para 20)

[37] The Applicant submits that the CHRC misapplied the *bona fide* justification test as it failed to consider whether the refusal of the Applicant’s TSC application, because of the identity of his family members, was supported by a *bona fide* justification. Instead, the CHRC limited its analysis to the Minister’s broad mandate and importance of the Minister’s general role in an assessment of a person for a TSC application.

[38] The Court rejects this argument. The CHRC reasonably considered whether the Minister had a *bona fide* justification in accordance with the test set out by the Supreme Court in *Grismer* and *Meiorin*.

(a) *Purpose of the standard*

[39] At the first step of the *bona fide* justification analysis, the Minister had to show that the purpose of the standard was rationally connected to the Minister's function (*Grismer*, above at para 23). At this stage of the process, the focus must be on the general purpose of the standard and not on the validity of the particular standard that is at issue (*Meiorin*, above at para 59). Firstly, the CHRC stated that the Applicant's TSC application was carried out pursuant to an establish practice, namely, section 4.8 of the *Aeronautics Act*. Secondly, the CHRC relied on the Minister's submission to establish that the Minister's mandate is to serve the public through the promotion of a safe, secure, efficient and environmentally responsible transportation system in Canada. The Minister accomplishes this mandate, in part, by means of the Transportation Security Clearance Program [TSCP]. In order to accomplish the Minister's mandate, the Minister requires sufficient, reliable and verifiable information from an applicant and law enforcement organizations to establish the applicant's identity and to determine whether he or she poses a threat to civil aviation or marine transportation. As a result, the CHRC held that the practice was created for a legitimate security related purpose.

[40] This conclusion by the CHRC is reasonable as it is in accordance with the jurisprudence of this Court with regard to the aim of the TSCP and the requirements for a comprehensive background check:

[4] The aim of the TSCP Policy is to prevent unlawful interference with civil aviation by requiring classes of persons to hold a security clearance. Individuals who apply for a security clearance are subject to a comprehensive background check, including a fingerprint based criminal records check with the Royal Canadian Mounted Police (RCMP) and a review of relevant files of law enforcement agencies, including intelligence gathered for law enforcement purposes.

(Meyler v Canada (Attorney General), 2015 FC 357 [Meyler])

(b) *Good faith*

[41] At the second step of the test, the Minister must demonstrate that the Minister adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its said purpose, with no intention of discriminating against an applicant (*Meiorin*, above at para 60). At the second step, the analysis shifts from the general purpose of the standard to the particular standard itself. The CHRC found that the purpose of the TSCP is to reduce the risk of security threats by preventing unlawful interference with civil and marine transportation by conducting background checks on airport and marine workers who have access to restricted areas. The CHRC held that the Minister adopted the TSCP policy in an honest and good faith belief that is necessary to accomplish its purpose, as there was no evidence to suggest otherwise.

[42] Since there was no evidence that the Minister did not adopt the TSCP policy with anything but an honest and good faith belief that it was necessary for the accomplishment of its purpose; that is the prevention of unlawful acts of interference with civil aviation by assessments in regard to the granting of clearances to persons who would meet the standards as set out in the

TSCP; it, therefore, was reasonable for the CHRC to find that the second step of the test had been met by the Minister.

(c) *Standard is reasonably necessary*

[43] At the third step, the Minister has to demonstrate that the standard is reasonably necessary for the accomplishment of the TSCP. In doing so, the Minister must demonstrate that it is impossible to accommodate the request of the Applicant – namely, that the allegations against his father and brother, not be considered in his TSC application – without imposing undue hardship upon the Minister for the said purposes explained in that regard.

[44] The essence of the Applicant's complaint to the CHRC was that the Minister's denial of his security clearance is based on the alleged behavior of both his father and brother; thus, he was discriminated on the basis of his family status. Given the Applicant's complaint, at the third step, the issue of contention is whether the Minister has demonstrated that it is reasonably necessary, in assessing the suitability of an applicant, to obtain a TSC, wherein family members of an applicant were convicted, or accused, or that there had been allegations against them, for participating in drug trafficking.

[45] As mentioned previously, the aim of the TSCP policy is the prevention of unlawful acts of interference with civil aviation by assessments as to the granting of clearances to persons as to whether they meet the standards set out in the TSCP (TSCP Policy, Part I.1). In assessing whether an individual shall be granted a security clearance, the Minister will hold a comprehensive background check, which includes a fingerprint based criminal records check

with the RCMP; and, a review of relevant files of law enforcement agencies, including intelligence gathered for law enforcement purposes (*Meyler*, above at para 4). Contrary to the submissions of the Applicant, this Court has held that exclusive reliance on reports from the RCMP is sufficient for the purposes of the verification process necessary for a security clearance (*Fontaine v Canada (Transport, Safety and Security)*, 2007 FC 1160 at para 75 [*Fontaine*]; *Brown v Canada (Attorney General)*, 2014 FC 1081 at para 65; *Henri v Canada (Attorney General)*, 2014 FC 1141 at para 40).

[46] As defined at Part I.4 of the TSCP policy, the objective of the TSCP is to prevent uncontrolled entry into a restricted area of airports to certain individuals, specifically, as provided at Part I.4(4) of the TSCP policy to individuals who 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 (*Clue v Canada (Attorney General)*, 2011 FC 323 at para 15; *Kaczor v Canada (Minister of Transport)*, 2015 FC 698 at para 30). It is on that ground that the Minister rejected, in a decision dated February 11, 2013, the Applicant's TSC application:

A review of the information on your file, including the facts that your father received a 9 year jail sentence for his role in a conspiracy to traffic a schedule I substance, that your brother was arrested in possession of crack cocaine and heroin in 2008, and that you were the sole occupant of a vehicle which officers noticed smell[s] of marijuana and located a small baggy of marijuana, raised concerns. The consideration of all of these factors together led me to believe that, on a balance of[f] probabilities, you 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. I also considered your written statements as well as the information presented in your affidavit, nonetheless, I still had concerns regarding your potential to be suborned. [Emphasis added.]

(Applicant's Record, Transport Canada Decision, dated February 11, 2013, pp 121-122)

[47] Access to restricted areas of an airport is a privilege, not a right (*Fontaine*, above at para 59). In order to determine if an individual warrants obtaining that privilege, the Minister must take into consideration sufficient, reliable and verifiable information regarding the Applicant's character and propensities (*Salmon v Canada (Attorney General)*, 2014 FC 1098 at para 82), as the TSCP policy is forward looking (*MacDonnell v Canada (Attorney General)*, 2013 FC 719 at para 29). It is understood that a rejection of a TSC application has a negative impact on the employment prospects of a TSC applicant; nonetheless, in the balancing of interests, the interest of the public must take precedent to those of a TSC applicant:

[15] Moreover, both the purpose of the Act and the nature of the question deal with protecting the public by preventing acts of unlawful interference in civil aviation. Although the Minister's decision directly affects the applicant's rights and interests, it is the interests of the general public that are at stake and that take precedence over the applicant's ability to have his TSC to be able to work as a pilot. The purpose of the Act emanates from a larger problem that encompasses the interests of society as a whole, not just those of the applicant.

(*Rivet v Canada (Attorney General)*, 2007 FC 1175 at para 15)

[48] This Court has held that simple association with individuals involved in drug related crimes is sufficient for the Minister to exercise the Minister's discretion to cancel a security clearance (*Rossi v Canada (Attorney General)*, 2015 FC 961 at para 23; *Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59 at para 25).

[49] As specified previously, the issue of contention is whether the Minister has demonstrated that it is reasonably necessary, in assessing the suitability of the Applicant to obtain a TSC, to determine whether family members of an applicant were convicted, or accused, or whether there were allegations against them, of participating in drug trafficking.

[50] At the third step, in the Assessment Report, the CHRC held that it was reasonable to assume that the Minister is required to obtain and consider any and all information available, including associates and family members, when evaluating an individual's suitability for the job; and, that it was reasonable for the Minister to have legitimate concerns about the Applicant's suitability for a security clearance:

37. There is no dispute that the behavior of the complainant's family members, namely his father and his brother, were factors in the respondent's decision to refuse his application for security clearance. [...] At issue then, is whether the respondent can justify its rationale for its consideration of the complainant's family members in its decision to deny the complainant's application.

38. [...] Conducting background checks on individuals working in an airport setting is an integral component of ensuring the integrity of restricted areas of an airport and the security of the airport in general. The evidence gathered reveals that the respondent individually assesses each applicant for security clearance [...] Based on all of the evidence gathered during this assessment, the respondent's practice is reasonably necessary to ensure, to the extent possible, that airport employees are not prone or induced to assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

39. Finally, the nature of the job in which the complainant was employed, needs to be examined. As a station attendant, the complainant was responsible for loading and unloading luggage to and from commercial aircrafts. It is therefore reasonable to assume that the respondent is required to obtain and consider any and all information available, including associates and family members, when evaluating an individual's suitability for the job. In this particular case, it is reasonable that the respondent would have legitimate concerns about the complainant's suitability, given both

his father and his brother's contact with the law with respect to narcotics. By retaining the complainant in his employment, the risk of unlawful interference with civil aviation, either real or perceived, was there. On a balance of probabilities, the respondent concluded that the risk was sufficient enough that it could not justify the issuance of a security clearance to him.

[Emphasis added.]

(Applicant's Record, Assessment Report, paras 37-39, pp 154-155)

[51] The Applicant argues that the CHRC erred by omitting to consider whether the refusal of the Applicant's TSC application due to the criminal antecedents of both his brother and his father were supportable as a *bona fide* justification. This argument must be rejected. In its Assessment Report at paragraph 39, the CHRC states that "[i]t is therefore reasonable to assume that the [Minister] is required to obtain and consider any and all information available, including associates and family members, when evaluating an individual's suitability for the job". The CHRC did consider whether there was a *bona fide* justification to take into consideration information regarding allegations against the Applicant's father and brother.

[52] Furthermore, this conclusion is reasonable as the Minister must take into consideration sufficient reliable and verifiable information to determine whether an individual may pose a risk to airport security. In determining, if the Applicant should be granted a security clearance, the Minister had the right to take any factor which the Minister considers relevant into account (*Fontaine*, above at para 78). Since simple association with individuals involved in drug related crimes is sufficient for the Minister to exercise the Minister's discretion to reject a security clearance application, the Minister has to determine whether a security clearance applicant is

associated with such an individual or individuals, no matter whether they are family members or friends.

[53] It was also reasonable for the CHRC to state in its decision that the Minister does not necessarily strictly apply the rule; it is only subsequent to an assessment of the entirety of the facts that a determination is reached, if a member of an applicant's family was involved in a crime, whether it would then be considered fatal to the application. No proof of the contrary was submitted by the Applicant. The Applicant was informed in February 2012 by the Minister that adverse information had been uncovered raising concerns about his suitability to obtain a security clearance. He was afforded an opportunity to provide additional information to which he responded. Only after reviewing the Applicant's submission did the Minister reject the Applicant's security clearance. All of which demonstrated that a determination was made only after an assessment of all of the facts had been brought forward.

[54] In light of the foregoing, the Court finds that the CHRC's decision, which includes the Assessment Report, reasonably assessed whether the Minister provided a *bona fide* justification.

- (2) Did the CHRC err in finding that discrimination on the prohibited ground was only one factor?

[55] The Applicant submits that the CHRC erred by remedying the Minister's determination by referencing other factors that may have been considered. The Court rejects this argument. The CHRC properly followed the *Grismer/Meiorin* test. Firstly, the CHRC held that there was *prima facie* discrimination on the basis of family status, as the relationship between the Applicant and

his father and brother was a factor in the Minister's decision to deny the TSC application.

Secondly, the CHRC held that the Minister established a *bona fide* justification for the Minister's determination on the basis of the assessment of all the facts. The CHRC was limited to that role as it could not depart from its jurisdiction in respect of the Minister's consideration of a series of factors for the Minister's determination in regard to a TSC application.

B. *Did the Minister fail to meet the requirements of procedural fairness?*

[56] The duty to investigate of the CHRC requires that it address the essential or fundamental aspect of a complaint (*Besner v Canada (Correctional Services)*, 2008 FCA 191 at para 9). In the present case, the fundamental aspect of the complaint was whether the Minister's practice of considering the identity of an applicant's family member, when assessing an application for TSC, was a discriminatory standard on the basis of family status. If so, was such practice justified as reasonably necessary?

[57] The Applicant submits that the CHRC breached procedural fairness by failing to contact the Applicant's mother as she would have been able to provide crucial evidence as to the Applicant's relationship with his father and brother; and elucidate the activities of his father and brother. As a result of this alleged error, the CHRC, according to the Applicant, would have overly narrowed its analysis to the extent that it had not considered whether the Minister's determination of the potential threat of the Applicant as posed to civil aviation, due to certain of his family members, was reasonable or not.

[58] The Applicant has misunderstood the role of the Assessment Report and the CHRC's decision. The CHRC had to evaluate whether the Minister had: i) a discriminatory standard; and, if so, ii) whether it could be justified. Its role was not to review the Minister's decision that 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. The Applicant could have sought judicial review of the Minister's decision before this Court but decided otherwise; it decided to take its complaint to the CHRC rather than to have it judicially reviewed before this Court without bringing it to the CHRC.

[59] Moreover, the investigator stated in the Assessment Report, dated January 23, 2015, that the Applicant requested that his mother be interviewed for the purpose of the assessment; but, the investigator chose not to do so, given that the purpose of the assessment was not to reassess the Applicant's suitability for security clearance. The Applicant provided a Response to the Assessment Report, dated February 13, 2015, in which he did not address the fact that the Applicant's mother had not been interviewed. If the Applicant was of the opinion that his mother's testimony was important evidence that had to be considered by the CHRC before it rendered its decision, he should have raised it in his Response to the Assessment Report. Furthermore, this Court has held that when a party receives a comprehensive investigation report, such as an Assessment Report, and is given an opportunity to critique its content, the fact that the CHRC did not interview each and every witness that the Applicant would have liked it to do, is not, in and of itself, fatal (*Mohawks of the Bay of Quinte*, above at paras 16-17; *Slattery v Canada (Human Rights Commission)*, [1994] 2 FCR 574 at para 57).

[60] Finally, the Applicant did not provide indications as to why the investigator would have failed to address a fundamental aspect of his complaint by not interviewing his mother. It remains unclear what the Applicant's mother could have provided in further information in respect of the relationship between the Applicant and his father and brother, than the Applicant himself could have done.

[61] As a result, the Court finds that the CHRC did not breach its duty of procedural fairness.

VIII. Conclusion

[62] Consequently, the application for judicial review is dismissed, with no costs ordered due to the significance of the issues.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed,
with no costs ordered due to the significance of the issues.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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OF CANADA

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APPEARANCES:

Andres Barker FOR THE APPLICANT

Michele Charles FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kent Employment Law FOR THE APPLICANT
Vancouver, British Columbia

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Vancouver, British Columbia