Federal Court  Cour fédérale

Date: 20160802

Docket: T-2006-15

Citation: 2016 FC 891

Vancouver, British Columbia, August 2, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ROBINDER SINGH SIDHU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application made by Mr. Robinder Singh Sidhu for the judicial review of a decision of Ms. Brenda Hensler-Hobbs, Director General, Aviation Security for Transport Canada [Minister's delegate] acting on behalf of the Minister of Transport [Minister], dated November 3, 2015, cancelling the applicant's application for a security clearance at the Vancouver International Airport [Airport].

[2] The applicant began working at the Airport with Canadian Airlines in 1989. He continued with the company after it was taken over by Air Canada, until 2014. During these years of employment, the applicant possessed a security clearance and corresponding Restricted Area Identity Card [RAIC].

[3] The applicant was arrested on June 16, 2014, as part of a larger investigation into an alleged smuggling operation at the Airport. He was interviewed by the police and released without charge. However, on or about June 20, 2014, Transport Canada, Transportation Security Screening Program [Transport Canada] received a Law Enforcement Records Check report, dated June 19, 2014 [the June LERC Report], from the Royal Canadian Mounted Police Security Intelligence Background Section [RCMP SIBS].

[4] The June LERC Report stated that:

- The applicant was arrested and interviewed by the RCMP on June 16, 2014 for his involvement in a smuggling event;
- The RCMP had collected evidence that on September 3, 2013, the applicant used his RAIC access at the Airport to participate in the illegal importation of a drug shipment;
- During his warned statement, the applicant admitted his guilt with respect to the September 3, 2013 smuggling event and indicated that he believed the boxes contained steroids;
- A smuggling charge against the applicant was being recommended to the Crown by the RCMP.

[5] On June 24, 2014, the applicant received a letter from Transport Canada advising him that his security clearance had been suspended pending review due to his arrest and admissions

made during his warned statement. At that time, the applicant was employed as a lead station attendant dealing with cargo.

[6] On July 22, 2014, the Transportation Security Clearance Advisory Board [Advisory Board] recommended upholding the suspension of the applicant's clearance until the outstanding criminal charges had been dealt with by the Courts. On July 31, 2014, the applicant received a letter confirming this recommendation. On January 6, 2015, the applicant's counsel advised Transport Canada that charges were not being laid against the applicant and requested that the applicant's security clearance suspension be reviewed in a timely manner.

[7] On or about January 22, 2015, Transport Canada received a second LERC report [January 22 LERC Report] from the RCMP SIBS which stated:

> - In May 2014, and 18 month joint investigation by the RCMP, Canadian Border Services Agency [CBSA], and the Vancouver Police Department came to an end with the seizure of 37 kilograms of heroin, with an estimated street value of $9 million;
> - The drugs were found hidden within shipped goods arriving from South Asia into Canada through the Airport;
> - Three individuals were arrested and charged with possession for the purpose of trafficking, including an Air Canada employee, not the applicant, who had circumvented security measures, making this an organized crime internal conspiracy;
> - On June 16, 2014, the applicant, an Air Canada Cargo employee, was arrested and interviewed by the RCMP for his involvement in the smuggling operation;
> - The RCMP collected evidence that on September 3, 2013, the applicant used his RAIC to participate in the importation of heroin;

- During his warned statement, the applicant admitted his guilt with respect to the smuggling event, stating that he believed the boxes he had moved contained steroids.

[8] On August 25, 2015, the Advisory Board recommended that the Minister cancel the applicant's security clearance. A review of the applicant's file "led the Advisory Board to believe, on a balance of probabilities, 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". The Minister's delegate concurred with this recommendation and made on behalf of the Minister the impugned decision on November 3, 2015, and which was communicated to the applicant by a letter dated November 10, 2015.

[9] The present case does not raise any particular issue of law and turns on a pure question of fact, or of mixed fact and law. The case law is clear on the broad discretion conferred on the Minister to refuse, suspend, or cancel a security clearance, and which is contemplated by section 4.8 of the *Aeronautics Act*, RSC 1985, c A-2 and the various relevant provisions of the *Canadian Aviation Security Regulations*, 2012, SOR/2011-318 [Regulations] (see *Wu v Canada (Attorney General)*, 2016 FC 722).

[10] The present application must fail. I find that the Decision to cancel the applicant's clearance falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. I basically endorse the arguments made by the respondent in her memorandum of fact and law and which were reasserted at the hearing by her counsel.

[11] At the opening of the hearing, applicant's counsel indicated to the Court that the issue of procedural fairness raised in the applicant's memorandum of fact and law should now be included in the grounds of attack respecting the reasonableness of the impugned decision. Be that as it may, it is clear to the Court, after a careful examination of the totality of the record, that the applicant was afforded procedural fairness. He knew the case he had to meet and was given an opportunity to make submissions. Indeed, on April 7, 2015, the applicant received a letter from Christopher McQuarrie, Chief of Security Screening Programs, stating Transport Canada's concerns, and specifically referring to the allegations that led to the applicant's arrest – namely, that he moved boxes while at work to assist a drug importation conspiracy. The letter also encouraged the applicant to provide additional information or explanation, including any extenuating circumstances, within 20 days of receipt of the letter. Effectively, on April 28, 2015, the applicant provided an affidavit and supporting materials and submissions in response to concerns raised by Transport Canada.

[12] The applicant submits that the reasons invoked for the cancellation of the certificate are not adequate. This claim is unsubstantiated. The Decision must be read in conjunction with the evidence and elements of justification which are found in the record and which support the overall conclusion of the Minister. Moreover, the reasons for cancelling the clearance security certificate are clear and intelligible and there is a rational basis for the Decision. Be that as it may, the applicant further submits that the evidence on record is either contradictory or inconclusive and does not establish willful participation or intent to. This is so because his affidavit clearly contradicts earlier declarations he apparently made to the police. The applicant also submits that the Minister's delegate made a number of material errors, such as associating

him with three "persons of concern" (he only knew Subject "A" which was a co-worker at the Airport), and in finding that he had a telephone conversation with Subject "A" after he had moved the boxes as a "favour". While he admits having had an earlier association with Subject "A", he explained to the Advisory Board that it had only to do with football sport pools. Indeed, Subject "A", his father-in-law and his brother-in-law were all participants in these pools. The applicant explained that Subject "A" did not regularly attend his home. The only times he could recall coming by at his place were to drop some frozen prawns that he had caught. The applicant also explained that "[i]t was fairly common for my co-workers to want to trade shifts to accommodate their schedules" and also that "[i]t's not uncommon for boxes and crates to be left outside door 31", and that it "did not seem unusual" that Subject "A" had called him "telling me that there were boxes outside the warehouse in the area known as door 31 and that I should get them inside".

[13] I have specifically considered the arguments made by the applicant on the merits of the impugned decision and I find that they are either unfounded or not material.

[14] The general allegation made by the applicant that the Minister did not take into account the content of the applicant's affidavit is not supported by the record and must be dismissed. The Record of Decision noted that the information concerning the applicant's involvement in and/or association to individuals involved in a drug smuggling incident raised concerns regarding his judgment, trustworthiness and reliability. It also noted that the June 2014 joint investigation by the RCMP Federal Serious and Organized Crime Unit, CBSA, and Vancouver Police Department seized 37 kilograms of heroin, and that the amount of drugs suggested that the

incident was related to organized crime. The Record of Decision went on to state that two individuals with whom the applicant associates were charged with possession for the purpose of trafficking, while another associate is a convicted criminal who has been incarcerated and is linked to this importation conspiracy. The applicant admitted guilt to the police in being involved with the incident, although he claimed that he thought the boxes contained steroids, which is nonetheless an illegal substance. The applicant had multiple conversations and meetings with an individual involved in the drug smuggling incident immediately before and after the day of seizure, and the applicant was evasive and not forthcoming with police while being questioned.

[15] However, the applicant notes that the impugned decision suggests that the applicant associated with three individuals, while the applicant says his association was limited to Subject "A". The applicant suggests that such erroneous association renders the whole decision unreasonable. I do not agree. It is apparent that the Minister's delegate was simply referring to these associations by reason of their shared involvement in the importation scheme. Further, it is plain from a reading of the reasons on record that this was not a decision that turned on the associations kept by the applicant.

[16] The applicant also takes issue with the statement that he had conversations with an individual involved in the drug smuggling incident after the day of the seizure. He suggests there "was never any evidence that Mr. Sidhu was in contact with Subject 'A' after moving the boxes". This is simply incorrect. As set out in the January 22 LERC Report:

> Police asked you if, when you had placed the boxes back in the secure area, you had to call Subject "A" and tell him the boxes were back? You responded "he may have called me".

[17] I would add here that the sort of line-by-line review of the decision proposed by the applicant is not the appropriate manner to engage in a reasonableness review. It is not the role of this Court to substitute itself to the Minister and reassess the totality of the evidence. What is of central importance in evaluating the decision here at issue is the general finding for the purpose of the Act and Regulations that was made by the Minister's delegate. She was not tasked with deciding on any standard whether the applicant had in fact knowingly participated in the drug importation scheme. Though the applicant denied in his affidavit that he confessed to the police, it was not unreasonable for the Minister's delegate to accept that, as reported by the police, the applicant had confessed to involvement in the smuggling, though he had been under the impression the boxes contained steroids – which are also an illegal substance.

[18] The standard of proof that must be met in order for Transport Canada to revoke a security clearance is outlined in the Federal Court's decision in *Clue v Canada (Attorney General*), 2011 FC 323 at para 20:

> […] For purposes of revocation of a TSC 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. […]

[19] Finally, I note that the case law makes it clear that the Minister is entitled to rely on information received from the RCMP for the purposes of determining whether to cancel a

security clearance (*Henri v Canada (Attorney General)*, 2014 FC 1141 at para 41; affirmed 2016 FCA 38). Although the applicant provided a lengthy contradictory and new explanation for his involvement in the heroin importation scheme, the Record of Discussion of the Advisory Body characterizes the explanations provided by the applicant as highly convenient and a "spin story". These conclusions and inferences are not unreasonable. The fact remains that the applicant did assist criminals in the importation of drugs. Given that reality, when tasked with the forward looking assessment of risk called for by the statutory scheme, it was certainly reasonable for the Minister's delegate to conclude that the applicant may be prone or induced to commit an act that interferes with civil aviation. And, at the very least, even if we accept for the sake of argument that the applicant was only doing a "favour" for a co-worker, what he effectively did was contrary to the security policies and clearly supported the cancellation of his clearance certificate because he was unreliable and lacking judgment. Overall, the decision to cancel the applicant's clearance falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[20] In the case at bar, the applicant submits that, irrespective of the result, no costs should be awarded to the winning party, while the respondent seeks costs in the amount of $2000 in case of dismissal. Costs normally follow the result of the case. I find no special reason to exercise my discretion not to allow costs in favour of the respondent. The claimed amount of $2000 is reasonable in the circumstances.

[21] For all these reasons, the present application shall be dismissed with costs of $2000 in favour of the respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that the present application for judicial review is dismissed with costs of $2000 in favour of the respondent.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Scott R. Wright	FOR THE APPLICANT
Oliver Pulleyblank	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sutherland Jetté Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT