

Federal Court



Cour fédérale

Date: 20160829

Docket: T-1932-15

Citation: 2016 FC 977

Ottawa, Ontario, August 29, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DAYTON GEORGE CLARKE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Clarke asks the Court to set aside a decision of the Minister of Transport dated November 15, 2015, cancelling his Transportation Security Clearance [TSC] at Pearson International Airport. He has held a TSC since 2007, and requires it in order to be able to perform his employment as a station attendant for Air Canada.

[2] It is not disputed that Mr. Clarke has no criminal record and that he has never been charged with any offence in Canada or Jamaica, where he previously resided.

[3] On December 17, 2014, Transport Canada, Security Screening Programs received a RCMP Law Enforcement Records Check report [LERC Report] [the Initial LERC Report] regarding Mr. Clarke's suspected involvement in drug smuggling at Pearson Airport. A few days later the RCMP sent a revised LERC Report to Transport Canada [the Second LERC Report] and a request to use it rather than the Initial LERC Report and to shred the Initial LERC Report.

[4] Transport Canada was puzzled by the request and emailed the RCMP asking it if they meant to "remove the statement 'during the past 7 years' in paragraph 1" and asking what the meaning of this change was. The RCMP responded saying that "it looks weird but the RCMP Unit that provided the information wanted it that way." As explanation, the response stated:

The investigations did not cover the whole 7 years. It spanned over 'several years' sometime in the past 7 years. They did not want the applicant to know exactly when he was under investigation, so the year span was purposely generalized.

The first sentence of the first numbered paragraph in the Second LERC Report reads: "Over several years, during the past 7 years, Toronto Airport Detachment Drug Enforcement Unit (TADEU) conducted various investigations in which the applicant was one of the primary subjects of investigation and intelligence."

[5] The Record indicates that the Second LERC Report was the only one considered by the Advisory Body established under the Transportation Security Clearance Program [TSCP] and the decision-maker of the impugned decision.

[6] On February 12, 2015, officials of Transport Canada wrote a letter to Mr. Clarke to advise him of the concerns raised in the Second LERC Report and to warn him of the possibility that his security clearance would be reviewed by the Advisory Body, and that it was at risk of being revoked. He was directed to provide further information to the Advisory Body “outlining the circumstances surrounding the above noted associations and incidents, as well as to provide any other relevant information or explanation, including any extenuating circumstances within 20 days of receipt of this letter.”

[7] This letter outlines the incidents of concern and sets out that TADEU believes that Mr. Clarke is “a ‘door’ at the airport, facilitating the movement of drugs with the assistance of co-workers.” It details three separate investigations and Mr. Clarke’s association with two individuals identified as “Subject A” and “Subject B.”

[8] Mr. Clarke responded by letter dated March 25, 2015 stating that the “accusations are baseless and inaccurate.”

[9] After review of the Second LERC Report and Mr. Clarke’s response, the Advisory Body recommended that the Minister cancel his security clearance. The Minister’s delegate rendered the final decision and issued her decision on October 29, 2015, cancelling his security clearance.

[10] Mr. Clarke submits that the decision under review was procedurally unfair because (1) the Minister destroyed relevant documentary evidence, (2) failed to provide him with sufficient

disclosure, and (3) failed to provide him with sufficient reasons for the decision. He further submits that the decision is unreasonable based on the evidence before the decision-maker.

[11] There is no dispute that Mr. Clarke was entitled to receive procedural fairness.

[12] There is no dispute that the Initial LERC Report was shredded by the Minister. Mr. Clarke submits that this was a “highly relevant” and indeed a “critical” document because it initiated the process of reviewing his security clearance. He argues that its “destruction considerably and irretrievably prejudiced [his] ability to respond to the serious allegations leveled against him.” I am not persuaded of that.

[13] The Second LERC Report, not the Initial LERC Report, was the document reviewed and considered by the Advisory Body and the decision-maker. Further, the difference between the two amounts to no more than a very few words regarding the time frame of the investigations referenced in those reports.

[14] Mr. Clarke further submits that he was not provided with sufficient disclosure, and notes specifically that the Minister did not disclose “any of the documents which were in its possession other than two photographs.” He notes that the 11 undisclosed documents were placed before the Advisory Body and submits that “this non-disclosure and obfuscation significantly hampered [his] ability to meaningfully respond to the allegations against him.”

[15] I agree with the Minister that the jurisprudence of this Court establishes that the duty of procedural fairness owed to Mr. Clarke does not go so far as to require that all of the documents collected must be disclosed. Rather, the duty requires that the Minister inform Mr. Clarke of the facts alleged against him and his right to make representations. In short, he is entitled to know the case against him, but not necessarily the means by which that case may be established.

[16] The fairness letter sent to Mr. Clarke was almost a verbatim copy of the Second LERC Report contents; it can hardly have been more detailed.

[17] Here, there is no evidence that Mr. Clarke did not know the case against him; indeed, he responded to the fairness letter in some detail. Furthermore, once he was in possession of the Second LERC Report and the other 10 undisclosed documents, he provided no evidence that there was other information or a different response that he would have provided to the Advisory Body. Instead, all the Court has is his affidavit attesting that it would have offered him an opportunity to “make a meaningful response” or “assisted me in identifying what it was I was doing on those particular occasions” and similar general observations. In order to succeed in this submission more in the way of more specific and detailed response was required of Mr. Clarke. This is especially the case since he never stated in his response that the information provided was too general or lacking in detail sufficient for him to respond.

[18] I am not persuaded that the reasons provided for the decision are insufficient such that Mr. Clarke does not know why his security clearance was revoked or whether to review the

decision. The reasons provided by the Minister are fulsome and more than meet the legal requirement in cases such as this.

[19] The last attack on the decision is its reasonableness. Mr. Clarke's activities over a number of years and over a number of occasions and with numerous persons raised a reasonable suspicion that he was a "door" at Pearson Airport. Further, in these observations he is associating with multiple individuals who were engaged in criminal activities. The fact that he has no criminal record himself and has never been charged with a crime does little to offset this evidence because the criminal test is so much higher than that which applies when revoking security clearance. The latter test is whether "the Minister reasonably believes, on the balance of probabilities [that an individual] may be prone or induced to unlawfully interfere with civil aviation; or assist or abet any person to commit an act that may unlawfully interfere with civil aviation" [emphasis added]. This Court has affirmed that allegations of drug crime and associations with organized crime are threats to aviation: See *Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59, [2013] FCJ No 44 and *Salmon v Canada (Attorney General)*, 2014 FC 1098, 92 Admin LR (5th) 123.

[20] For these reasons, this application must be dismissed.

[21] Counsel proposed that costs of \$2,500 be awarded to the successful party.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with costs payable to the Respondent of \$2,500.00.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1932-15

STYLE OF CAUSE: DAYTON GEORGE CLARKE v ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: ZINN J.

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APPEARANCES:

Carlin McGoogan

FOR THE APPLICANT

Lars Brusven

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Du Vernet, Stewart
Barristers & Solicitors
Mississauga, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT