

Federal Court



Cour fédérale

Date: 20180226

Docket: T-1231-16

Citation: 2018 FC 216

Ottawa, Ontario, February 26, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

SHELDON SHEROME BYFIELD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision made by the Director General of Aviation Security on behalf of the Minister of Transport (the “Delegate”) to refuse to grant airport security clearance to the Applicant, pursuant to the *Aeronautics Act*, RSC 1985, c A-2 [*Aeronautics Act*].

II. Background

[2] The Applicant, Sheldon Sherome Byfield, was employed as a baggage handler at the Lester B. Pearson International Airport in Toronto (the “Airport”) beginning in October 2014 and he applied to Transport Canada for security clearance on October 2, 2014, which was a mandatory requirement for his position.

[3] During the screening process, Transport Canada received a Law Enforcement Records Check (the “LERC Report”) from the Royal Canadian Mounted Police (“RCMP”). The LERC Report contained the following information:

- In May 2010, Peel Regional Police investigated a theft from a residence where the Applicant and three other individuals were invited to stay overnight. During their stay, the group stole: \$20 in cash; \$1,000,000 in Dong (Vietnamese money worth \$58.00 CDN); an earring worth \$50; a bracelet worth \$1200; an iPod worth \$250; a laptop worth \$1200 and two credit cards that were used to purchase several items of unknown value such as clothing, headphones and glasses. Following the investigation, the Applicant was arrested and admitted to having stolen the items and used the credit cards. He also provided the identification of the others involved. The Applicant was charged with: Theft under \$5000; and Possession, Use and Traffic of a Credit Card. In September 2010, charges were withdrawn for reasons unknown.
- In September 2010, the Applicant was seen with two individuals being dropped off by a party bus at a mall returning from a club in Toronto;
 - The first individual:
 - Was with the Applicant in two of the events mentioned above; and
 - In 2012, was convicted of Possession of a Scheduled Substance.
 - The second individual:
 - Was with the Applicant in one of the events mentioned above;
 - In 2011, after being charged with Fraud Under \$3000 (3 counts), Possession of a Credit Card (12 Charges) and Unauthorized Use of a Credit Card (2 counts), the charges were all withdrawn;
 - In April 2012, after being charged for Failing to Attend, the charge was withdrawn;
 - In September 2012, after being charged with Obstruction, Fraud Under \$5000, Failing to Attend Court (2 counts), Failing to Comply with a Recognizance (2 counts), the charge of Obstruction was withdrawn and the other charges stayed;

- In December 2014, was charged with Mischief over \$5000 and Breach of Recognizance, which were still before the Court, and the individual was currently under a peace bond, as of the date of the LERC Report.

[4] On June 1, 2015, Transport Canada sent a letter to the Applicant advising him of concerns regarding his suitability to obtain a security clearance. The letter described the information contained in the LERC Report. It also encouraged the Applicant to provide additional information about the circumstances of the incidents described in the LERC Report, or to provide any other relevant information or explanation, including extenuating circumstances, within 20 days.

[5] On June 10, 2015, the Applicant responded to Transport Canada with an email explaining that:

- Although he and three others were arrested for items that were stolen from a residence, he was only charged with Theft and Possession of a laptop. He was not charged with theft or possession of credit cards or money;
- He was present when the items were taken and the laptop was left at his residence by the person that took it;
- The charges of Theft and Possession were withdrawn as he took responsibility for the laptop being in his possession since it was left at his home;
- He was 18 years old at the time of the incident and for the last 5 years he has enrolled in college, been gainfully employed and has not been involved in any criminal activity; and
- The two individuals mentioned in the LERC Report were not close friends of his. They were acquaintances he met while travelling on the party bus to downtown Toronto. He was not aware of their subsequent involvements with the police and had not been in their company since 2010. In that year, the he and the two subjects were competitors in the club promoting business. On that particular evening, the individuals were not part of his promotion team and a conflict between them and someone else caused police to attend the scene.

[6] On November 24, 2015, Transport Canada's Transportation Security Clearance Advisory

Body (the “Advisory Body”) recommended refusing the Applicant’s security clearance. The Advisory Body noted:

- The details of the LERC Report;
- A criminal record check showed the Applicant had two withdrawn charges from 2010 for Theft Under \$5000 and Use and Traffic of a Credit Card;
- The theft incident occurred when the Applicant was 18 and they questioned whether enough time had elapsed to demonstrate a change in his associations and behaviour;
- Although the incident was dated, it raised serious concerns regarding the Applicant’s judgement, trustworthiness and reliability;
- There were discrepancies between the LERC Report and the Applicant’s submissions, notably where the Applicant stated he was only present when the theft occurred whereas the LERC Report stated he admitted to theft;
- They found it difficult to believe that anyone would accept responsibility for a theft unless they were guilty of the crime;
- A vulnerability to airport security is created by security clearance holders having associations to individuals who are involved in serious criminal activities;
- They had a reason to believe, on a balance of probabilities, that he may be prone or induced to commit an act, or assist or abet an individual to commit an act that may unlawfully interfere with civil aviation; and
- They considered the Applicant’s written submission; however, that submission did not provide sufficient information to dispel its concerns.

[7] On June 24, 2016, the Delegate refused the Applicant’s security clearance. She noted:

- The Applicant had been involved in an incident of theft and admitted to using stolen credit cards;
- The Applicant was associated with two individuals who had either criminal convictions or charges;
- The vulnerability to airport security created by security clearance holders having associations to individuals who are involved in serious criminal activities;
- The information contained in the LERC Report raised concerns regarding the Applicant’s judgement, trustworthiness and reliability;
- She had reason to believe, on a balance of probabilities, that the Applicant may be prone or induced to commit an act, or assist or abet an individual to commit and act that may unlawfully interfere with civil aviation; and
- She had considered the Applicant’s submission but it was not sufficient to address her concerns.

III. Issues

[8] The issues are:

- A. Was the Applicant afforded procedural fairness?
- B. Was the Delegate's decision reasonable?

IV. Standard of Review

[9] The standard of review for questions of procedural fairness is correctness; the standard of review for the Delegate's decision is reasonableness (*Henri v Canada (Attorney General)*, 2016 FCA 38 [*Henri*] at para 16).

V. Analysis

A. *Was the Applicant afforded procedural fairness?*

[10] The Applicant submits that he was never afforded an opportunity to give his point of view and participate in the discussions that led to the refusal of his security clearance.

[11] The Respondent submits that in an application for a security clearance, the procedural safeguards available to the Applicant are limited to the right to know the facts alleged against him and the right to make written representations about those facts. There is no right to be heard in an oral hearing or interview. The Applicant's submissions show he was aware of the incidents that caused Transport Canada concern, and was provided a meaningful opportunity to respond.

[12] I agree with the Respondent. The procedural safeguards available to the Applicant in this case were limited to the right to know the facts alleged against him and the right to make representations about those facts. Those procedural guarantees do not include the right to a hearing (*Henri* at paras 27, 28 and 35).

[13] The Applicant was advised in the letter dated June 1, 2015, that there were concerns regarding his suitability to obtain security clearance. The letter set out the details of the LERC Report. The Applicant was afforded an opportunity to respond and did respond via the email dated June 10, 2015. The Advisory Body and Delegate both made it clear that his submissions were considered but insufficient to dispel their concerns.

[14] The Applicant was afforded procedural fairness.

B. *Was the Delegate's decision reasonable?*

[15] The Applicant submits that the Delegate refused his security clearance without addressing the explanations he provided in his written submissions.

[16] The Minister of Transport's (the "Minister") exercise of discretion in granting security clearance has been reviewed by this Court on many occasions. In *Sargeant v Canada (Attorney General)*, 2016 FC 893 [*Sargeant*] at paragraphs 26-29, the Court summarized three principles from the jurisprudence:

- a) Section 4.8 of the *Aeronautics Act* confers on the Minister broad discretion and empowers him to take into account any relevant factor when granting, suspending or cancelling a security clearance.

- b) The Minister, in exercising his discretion under section 4.8, is entitled to err on the side of public safety rather than the interests of the affected individual.
- c) In such matters, the focus is on the propensity of airport employees to engage in conduct that could affect aviation safety. As such, the denial or cancellation of a security clearance requires only a reasonable belief, on a balance of probabilities, that a person may be prone to or induced to commit an act that may interfere with civil aviation. Any conduct which causes the Minister to question a person's judgment, reliability and trustworthiness is therefore sufficient ground to refuse or cancel a security clearance.

[17] In exercising this broad discretion, the Minister or his Delegate is entitled to rely exclusively on a LERC Report (*Singh Kailey v Canada (Transport)*, 2016 FC 52 at para 29). The Delegate is under no obligation to verify or cross-check the accuracy of the information contained in that report (*Sargeant* at para 31). Furthermore, it is not necessary for a criminal conviction to be made in respect of the underlying criminal charge in order for the allegations to be relevant to the Delegate's decision (*Clue v Canada (Attorney General)*, 2011 FC 323 at para 20).

[18] To the extent the case put to the Applicant, if left unanswered, was sufficient to justify revoking his security clearance, the burden was on him to show that the case was unfounded (*Sargeant* at para 34).

[19] In my opinion, the Delegate's decision was reasonable. The Applicant admitted to having been present when the theft occurred, that the laptop was left at his residence by the person that took it, that he was charged with theft and possession of the stolen laptop and that he pleaded guilty to possession. These admissions justify the Delegate's serious concerns regarding his character and therefore it was not necessary for her to address in more detail the Applicant's explanation for having been seen with the individuals mentioned in the LERC Report, or his

claim that the LERC Report incorrectly stated that he had been charged with possession and use of a credit card.

[20] The Applicant claimed that the LERC Report incorrectly stated that he had been charged with theft and use of a credit card. Unfortunately, he did not provide the Delegate with any evidence to support this claim. As noted above, the Delegate was entitled to rely exclusively on the LERC Report and had no obligation to verify the accuracy of the information contained in that report. The burden was on the Applicant to show that the case against him was unfounded.

[21] The Applicant also claimed that the two individuals mentioned in the LERC Report were not close friends of his. They were acquaintances he met while travelling on a party bus to downtown Toronto. He was not aware of their subsequent involvements with the police and had not been in their company since 2010. In that year, he and the two subjects were competitors in the club promoting business. On that particular evening, the individuals were not part of his promotion team and a conflict between them and someone else caused police to attend the scene.

[22] However, this explanation contained inconsistencies. The Respondent points out that the Applicant's security clearance application makes no mention of him being employed in the club promotion industry, and notes that he was unemployed from June 2010 to September 2010, contrary to his written submissions. As well, the LERC Report states that one of those individuals was involved in the theft to which the Applicant admitted taking part in, contrary to the Applicant's written submissions.

[23] More importantly, it was not necessary for the Delegate to address the Applicant's submissions in greater detail. His admissions of involvement in theft and possession justify her belief that he may be prone or induced to commit an act or assist or abet an individual to commit an act that may unlawfully interfere with civil aviation. His submissions, even if accepted, do not dispel the serious concerns regarding his character that his admissions give rise to.

[24] In the area of aviation safety, where wrong decisions can lead to grave consequences, one instance of conduct that calls into question a person's judgment, reliability and trustworthiness may, given the low threshold, be sufficient to justify the revocation of a security clearance (*Sargeant* at para 34). The Delegate may err on the side of public safety and is entitled to deference from this Court.

[25] There were reasonable grounds for the Delegate's concern about the Applicant's trustworthiness, suitability and reliability – her reasons do not lack justification, transparency and intelligibility and her decision falls within a range of possible, acceptable outcomes having regard to the facts and law.

[26] The application is dismissed. The parties agreed that costs should follow the event and be fixed in the amount of \$1900.00. I agree that this amount is appropriate.

JUDGMENT in T-1231-16

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;
2. Costs to the Respondent are fixed in a lump sum in the amount of \$1900.00.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1231-16

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