

Federal Court



Cour fédérale

Date: 20181029

Docket: T-1655-17

Citation: 2018 FC 1082

Ottawa, Ontario, October 29, 2018

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

KALIOPI MALAFOURIS

Applicant

and

TRANSPORT CANADA

Respondent

JUDGMENT AND REASONS

[1] Ms. Malafouris' job at the Pierre Elliott Trudeau Airport in Montreal and later at the Pearson International Airport in Toronto required her to have a Transportation Security Clearance. Her application was denied on the basis that she failed to provide sufficient reliable and verifiable information covering the five year period prior to her application. This is a judicial review of that decision.

[2] Security at our airports is of prime national importance. The travelling public is denied access to many areas within. Section 4.8 of the *Aeronautics Act* provides:

The Minister may, for the purpose of the Act, grant or refuse to grant a security clearance to any person or suspend or cancel a security clearance.

[3] The *Aeronautics Act* is fleshed out by the *Canadian Aviation Security Regulations*, 2012, and more to the point in this case, the *Transportation Security Clearance Program*. This Program is not the law but serves as a useful guide to those whose duty it is to advise the Minister as to whether a security clearance should be granted.

[4] For the reasons that follow, I am of the opinion that Ms. Malafouris' application should not even have been processed, much less denied. It follows that her application for judicial review is granted.

[5] I will begin by reciting the facts and then review the Security Clearance Program.

I. The Facts

[6] Ms. Malafouris was employed by Securitas Transportation Aviation Security Ltd. at the Pierre Elliott Trudeau airport in Montreal. It was a requirement of that job that she obtain security clearance. However, while that process is ongoing an airport may issue a Temporary Pass in accordance with the *Regulations*. This pass gives access to some but not all restricted areas. Ms. Malafouris was issued such a pass.

[7] In her application form Ms. Malafouris stated that over the previous five years she had lived in Mexico for two years seven months. Transport Canada requested her to provide further information, including a criminal check by the Mexican Police.

[8] Ms. Malafouris, for various reasons, was of the view that she was unable to provide that documentation within the original delay, and a subsequent extension thereof. She claims that she was not treated fairly because she was not given enough time to gather all the requested material and information. Given the conclusion I have reached it is not necessary to consider whether Transport Canada breached such duty of procedural fairness that it may have owed her.

[9] On September 8, 2017 a Transport Canada Security Screening Officer emailed her:

Si vous ne pouvez pas soumettre les documents nécessaires pour votre application par cette date je vous suggère d'annuler votre application et de demander permission de ré-appliquer lorsque vous aurez tous les documents requis. Malheureusement, il va falloir remettre votre laissez passer temporaire à l'aéroport.

If you cannot provide the necessary documents for your application by this date, I suggest that you withdraw your application and request permission to reapply when you have all the required documents. Unfortunately it will be necessary to surrender your temporary pass at the airport.

(My translation)

[10] Ms. Malafouris surrendered her Temporary Pass at an office at the airport. She honestly believed it was a Transport Canada office and that this surrender had the effect of withdrawing her security clearance application.

[11] However, before she could reapply the TSC Review Panel recommended to the Minister that the pass be denied because "Application deemed unacceptable as the applicant was invited to provide additional information in support of their (sic) application pertaining to the two (2) years and seven (7) months outside Canada during the period under review, but failed to do so."

[12] She was notified on October 2, 2017 that her application was refused.

II. The Transportation Security Clearance Program

[13] Some of the workings of the Program and the *Canadian Aviation Security Regulations* are aptly summarized in the affidavit of Brianna Tuor, Acting Chief in the Security Screening Programs at Transport Canada. In accordance with the *Regulations* certain areas within an airport are designated as restricted and only accessible to those who hold a Restricted Area Identify Card. Such a person cannot be issued such a card unless she holds a Transportation Security Clearance.

[14] In exercising his discretion the Minister generally considers the policy, the purpose of which is to prevent unlawful interference with civil aviation. Its stated objective is to prevent uncontrolled entry to a restricted area by an individual who the Minister may believe to be prone to or induced to commit an act that may unlawfully interfere with civil aviation or assist or to abet others to so unlawfully interfere.

[15] To expand upon Ms. Tuor's affidavit section I.4 of the Program declares that its objective is to prevent uncontrolled access by individuals known or suspected to be involved in activities

in support of the threat of or actual acts of serious violence, or to be a member of criminal organization or terrorists group.

[16] Under the Program an applicant must provide five years of adequate reliable and verifiable information to permit a necessary background check. That check would include but is not limited to a fingerprint-based record verification with the RCMP, a CSIS check and a check of the relevant files of law enforcement agencies.

[17] When Ms. Malafouris' application was received it was first considered by a Security Screening Officer. Ms. Malafouris had stated that of the five previous years she had lived two years and seven months in Mexico. Quite naturally, and reasonably, the Officer required a Mexican Police check and other information.

III. Analysis

[18] Ms. Malafouris mistakenly believed that she had surrendered her Temporary Pass to Transport Canada and that that surrender had the effect of withdrawing her application for a security clearance. However, the temporary pass was issued by the airport, not Transport Canada, and did not have the effect of withdrawing her application. Presumably all she had to do was to have responded to the Screening Officer's email by asking her to consider her application withdrawn.

[19] This case turns on portions of the Program not specifically mentioned by Ms. Tuor.

[20] One of the conditions which applies to clearance applications is found in section 1.3(2):

No application shall be receivable unless the Director of Security Screening Programs is satisfied that all information required by the application has been provided to the Minister and that such information can be verified to the Minister's satisfaction.

(My emphasis)

[21] The Program also establishes a Review Panel. Section I.9 appears to be inconsistent with section I.3 in that it provides that in the case of an applicant who did not meet the conditions set out in section I.3 it is to review all the information provided by the application for the purpose of making a recommendation to the Minister as to whether or not to grant a security clearance. But section II.19.4 says:

No information shall be processed unless the applicant has submitted all information required by the Director, Security Screening Programs.

(-- aucune demande ne sera traitée)

(My emphasis)

[22] The policy does not set out the duties of a Security Screening Officer. The only conclusion to draw is that she was acting on behalf of the Director. As Lord Denning stated in *Selvarikan v Race Relations Board*, [1976] 1 ALL ER 12 at page 19 with respect to an administrative tribunal:

Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.

[23] Section II.34 provides that the Director, Security Screening Programs shall convene a Review Panel to determine whether the information provided by the applicant was sufficient reliable and verifiable.

[24] Finally, Section II.36 provides that if the Minister refuses to grant a security clearance an applicant may submit a new application after five years have elapsed or a “change has occurred in the circumstances that led to the refusal or cancellation.”

[25] Counsel for the Minister was unable to say whether Ms. Malafouris will be permitted to reapply if she has now gathered all the required information, which she says she has. Although beyond the scope of the case before me, the circumstance which led to the refusal was an incomplete record. A complete record would be a complete change of circumstance.

[26] In my opinion, there is only one way to read the Program. To the extent there is any ambiguity it should be read *contra proferentem* as it is Transport Canada’s own unilaterally created document. This is not a case in which deference should be given to a decision-maker considering his or her home statute or related regulations and guidelines, on the basis the decision was reasonable. I repeat, there is only one way to read the Program and that is that Ms. Malafouris’ application should not have even been considered (*Wilson v Superintendent of Motor Vehicles*, 2015 SCC 17, [2013] 3 SCR 300 at para 25).

[27] The cases cited by the Minister: *Sajbbir v Canada (Attorney General)*, 2014 FC 1020 and *Singh v Canada (Attorney General)*, 2006 FC 802, are readily distinguishable. In those cases the applicant took the position that the information provided was adequate, reliable and verifiable.

In this case it is admitted by Ms. Malafouris, and known by those acting for the Director, that the information provided did not cover the required five years.

[28] The purpose of the *Act*, the *Regulations* and the Program is to prevent access to restricted areas by those who may pose a threat to airport security. On the record it is simply impossible to say whether or not Ms. Malafouris would pose a threat.

[29] Given that the negative decision was rendered more than a year ago, it is not inconceivable that Transport Canada may reasonably request an update.

JUDGMENT IN T-1655-17

THIS COURT'S JUDGMENT is that for the reasons given, this application for judicial review is granted. The Minister shall process the application for Security Clearance once the documentation and information requested has been provided. There shall be no order as to costs.

"Sean Harrington"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1655-17

STYLE OF CAUSE: KALIOPI MALAFOURIS v TRANSPORT CANADA

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: OCTOBER 25, 2018

JUDGMENT AND REASONS: HARRINGTON J.

DATED: OCTOBER 29, 2018

APPEARANCES:

Kaliopi Malafouris

FOR THE APPLICANT
(ON HER OWN BEHALF)

Me Lisa Maziade

FOR THE RESPONDENT

SOLICITORS OF RECORD:

- NIL -

SELF-REPRESENTED APPLICANT

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FOR THE RESPONDENT