

Federal Court



Cour fédérale

Date: 20200309

Docket: T-2003-18

Citation: 2020 FC 342

Toronto, Ontario, March 9, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

COLLEEN RITCHIE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Colleen Ritchie seeks judicial review of a decision by the Director General of Aviation Security [DG], acting as the authorized delegate of the Minister of Transport [Minister], to cancel her transportation security clearance.

[2] Ms. Ritchie's security clearance was cancelled because of two incidents. In 2014, she and an acquaintance were charged with shoplifting. The charges against Ms. Ritchie were later withdrawn. In 2015, during a routine traffic stop, Ms. Ritchie was found driving a car owned by her son. Her son was said to be "known to the Toronto Guns and Gangs Unit to be involved in illegal firearms and drugs". Ms. Ritchie also appeared to be living at the same address as her son.

[3] The information provided to the Minister's delegate lacked specificity, particularly in relation to Ms. Ritchie's son. The general assertion that he was "known to" the police did not constitute reasonable grounds to believe that his mother may be prone or induced to commit, or assist or abet another person to commit, an act that may unlawfully interfere with civil aviation. The association with a person who may or may not have been convicted of shoplifting offences also lacked an adequate factual foundation.

[4] The decision to cancel Ms. Ritchie's security clearance was insufficiently supported by discernable facts. It was therefore unreasonable. The application for judicial review is allowed.

II. Background

[5] Ms. Ritchie is 59 years old. She worked at Toronto Pearson International Airport as a Security Screening Officer through GardaWorld, a registered security organization. Ms. Ritchie required a security clearance as a condition of her employment (*Transportation Security Clearance Program Policy* [Policy]; *Aeronautics Act*, RSC 1985, c A-2 [Act], ss 4.3; *Canadian Aviation Security Regulations, 2012*, SOR/2011-318).

[6] Ms. Ritchie was first granted a security clearance in 2005. Her clearance was renewed in 2010, and remained valid until September 7, 2015. Her clearance was again renewed on August 10, 2015, and remained valid until August 10, 2020.

[7] However, on August 15, 2016, Transport Canada received a Law Enforcement Records Check Report [LERC Report] from the Royal Canadian Mounted Police [RCMP]. The LERC Report described two incidents of concern:

- (a) On March 17, 2014, Ms. Ritchie was charged with shoplifting at a Winners Department Store pursuant to s 334(b) (theft under \$5,000) and s 354 (possession under \$5,000) of the *Criminal Code*, RSC, 1985, c C-46. Ms. Ritchie was observed handing a pair of shoes to another individual, who concealed them in her purse together with a second pair of shoes. They left the store without paying and were arrested. The charges against Ms. Ritchie were later withdrawn.

- (b) On May 5, 2015, during a routine traffic stop, Ms. Ritchie was found driving a vehicle owned by her son, who was said to be “known to the Toronto Guns and Gangs Unit to be involved in illegal firearms and drugs”. A police check revealed that Ms. Ritchie shared an address with her son in Innisfil. Ms. Ritchie told the police that she had recently moved to Brampton. However, one month later she indicated in her application to renew her security clearance that she was still living at her son’s address in Innisfil.

[8] On February 17, 2017, Transport Canada sent Ms. Ritchie a letter advising her of the concerns raised in the LERC Report. She was specifically asked to address “the circumstances surrounding the above noted criminal charges, incidents, and association, as well as to provide any other relevant information or explanation, including any extenuating circumstances”. She was invited to respond within 20 days.

[9] Ms. Ritchie responded on February 24, 2017. She said she was unaware that her acquaintance was engaged in shoplifting. She noted that the charges against her were withdrawn, and York Regional Police had taken the unusual step of destroying her fingerprints. This was confirmed by a letter from the police. Ms. Ritchie did not identify the individual she was with or explain how they were acquainted.

[10] With respect to the traffic stop, Ms. Ritchie said she had begun to complete the forms for the renewal of her security clearance in March 2015, but moved to Brampton in April. She had not yet updated her address with Transport Canada when she was stopped by the police. Ms. Ritchie did not address the concern that she was driving her son’s car, or the allegation that her son was known to be involved in illegal firearms and drugs.

III. Decision under Review

[11] On November 8, 2017, the Transportation Security Clearance Advisory Body [Advisory Body] considered Ms. Ritchie’s response. It recommended cancelling her security clearance. The Advisory Body noted that Ms. Ritchie had failed to address the nature of her association with the

other person charged with shoplifting, the nature of her association with her son, or her son's alleged involvement in illegal firearms and drugs. The Advisory Body also noted that the incidents were recent and occurred while Ms. Ritchie held a valid security clearance.

[12] The Advisory Body therefore concluded, on a balance of probabilities, that it had reasonable grounds to believe Ms. Ritchie 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 DG accepted the Advisory Body's recommendation. It informed Ms. Ritchie on October 10, 2018 that her security clearance was cancelled.

IV. Issues

[13] As a preliminary issue, the Attorney General of Canada objects to portions of Ms. Ritchie's affidavit on the ground that they contain evidence and opinions that were not before the Minister's delegate. Counsel for Ms. Ritchie agrees that this information cannot be relied upon to challenge the reasonableness of the decision under review, but says it may provide useful context for the arguments based on procedural fairness. To the extent that the new evidence and submissions relate to the fairness of the process, they may be admitted for this limited purpose.

[14] The remaining issues raised by this application for judicial review are:

A. What is the standard of review?

B. Was the DG's decision procedurally fair?

C. Was the DG's decision reasonable?

V. Analysis

A. *What is the standard of review?*

[15] The Minister's decision to cancel a security clearance is subject to review by this Court against the standard of reasonableness (*Henri v Canada (Attorney General)*, 2016 FCA 38 [*Henri*] at para 16; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10). The Court will intervene only if it is satisfied "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47; *Haque v Canada (Attorney General)*, 2018 FC 651 [*Haque*] at para 55).

[16] Procedural fairness is a matter for the Court to determine. The standard for determining whether the decision-maker complied with the duty of procedural fairness is generally said to be correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34, citing *Mission Institution v Khela*, 2014 SCC 24 at para 79). The ultimate question is whether the applicant knew the case to meet, and had a full and fair chance to respond.

B. Was the DG's decision procedurally fair?

[17] Ms. Ritchie says she was owed a heightened duty of procedural fairness, given her 17-year unblemished employment history. She also complains that she was not fully informed of the case she had to meet, and was “lulled into a false sense of security” by the approximately 20-month delay between her response to the letter of concern and the decision to cancel her security clearance.

[18] The duty of procedural fairness owed to an individual who holds a security clearance is well established (*Henri* at paras 23-29). While cancelling a security clearance attracts a higher level of procedural fairness than an initial refusal, the duty remains at the low end of the spectrum (*Haque* at para 62).

[19] In *Haque*, Justice John Norris found that the duty of procedural fairness was met in circumstances similar to those of Ms. Ritchie. The applicant was informed of areas of concern, and given an opportunity to respond. In this case, the Advisory Body provided Ms. Ritchie with all the information in its possession pertaining to the two incidents, and shared all details contained in the LERC Report. The Advisory Body had no obligation to apprise Ms. Ritchie of deficiencies in her response to the concerns raised, or to give her a further opportunity to address any outstanding concerns (*Henri* at paras 34-35; *Russo v Canada (Transport)*, 2011 FC 764 at para 56).

[20] Ms. Ritchie notes that she was permitted to continue working for almost two years after she responded to the letter of concern. While this may raise questions about the seriousness of the risk Ms. Ritchie was believed to pose to aviation security, the lengthy delay did not render the ultimate decision unfair or give rise to a duty to give Ms. Ritchie a further opportunity to respond (*Lorenzen v Canada (Transport)*, 2014 FC 273 at para 35). The DG's decision was procedurally fair.

C. *Was the DG's decision reasonable?*

[21] The Minister or his delegate has “a great deal of discretion” to grant or refuse to grant, or suspend or cancel security clearances (*Henri* at para 24; Act, s 4.8). The Minister's discretion is guided by the Policy. The Policy's objectives include the prevention of uncontrolled entry into an airport's restricted area by an individual who “the Minister reasonably believes on a balance of probabilities may be prone or induced to commit ... or assist or abet any person to commit an act that may unlawfully interfere with civil aviation” (Policy, s I.4(4)).

[22] Ms. Ritchie argues that the Minister's decision was unreasonable because it was based on unproven criminal charges (citing *Imerovik v Canada (Attorney General)*, 2016 FC 940 [*Imerovik*] at para 17). In *Imerovik*, Justice Robert Barnes remarked that “[w]ithout background information, the existence of unproven criminal charges is, of course, of no import”. Ms. Ritchie notes that the DG did not know whether her acquaintance was ever convicted of shoplifting, the precise allegations that were made against her son, or whether he had a criminal record.

[23] In *Haque*, Justice Norris said the following about the revocation of security clearances based on associations with persons who have criminal records:

[104] No doubt someone's association with an individual with a criminal record can be probative of that person's suitability for holding a [security clearance]. However, the significance of any such association will depend on the individual circumstances of the case, including: the nature of the offences in the record; the nature of the relationship between the two individuals; whether the associate had the record at the time the applicant was associating with him or her; whether the applicant knew about the record at the time; and whether the association continued after the applicant learned of the criminal record and, if so, why. Care must therefore be taken to examine all the circumstances before drawing any conclusions.

[105] The Director General's simple statement that, among other things, the applicant's association with two individuals with criminal records raised concerns about his "judgment, trustworthiness and reliability" is lacking in transparency as it gives no indication as to whether she considered the particular circumstances of this case. Looking behind her reasons to the information in the [certified tribunal record] only increases the opacity of the decision.

[24] The circumstances of this case are even more opaque. The DG expected Ms. Ritchie to account for her association with the other individual who was charged with shoplifting offences, but it is unclear if that person was ever convicted. More troubling was the DG's insistence that Ms. Ritchie account for her association with her son, who was said to be "known to the Toronto Guns and Gangs Unit to be involved in illegal firearms and drugs". No particulars were provided to the Advisory Body, the DG, or Ms. Ritchie of the precise allegations against her son. Nor was the nature of his alleged involvement in illegal firearms and drugs disclosed. It is unclear whether he was ever charged with or convicted of an offence.

[25] Ms. Ritchie lost her security clearance based on two vague allegations regarding her associations with two individuals who were said to have some kind of criminal history. However, no details of their criminal histories were known to the DG, and it remains unclear whether either of them had criminal records.

[26] As Justice Yvan Roy observed in *Forget v Canada (Transport)*, 2017 FC 620, decisions that concern security clearances at airports:

[74] [...] all show a measure of specificity in the facts supporting the refusal or cancellation of the security clearance that is not present here [citations omitted].

[75] The case under review does not have that measure of precision. In fact, it boils down to a letter from the RCMP that lacks in specificity. It is the Minister who must have the reasonable suspicions required under paragraph 509(c). Instead, the only information made available is generic in nature. The RCMP may have its reasons to be suspicious of the applicant, but it is the Minister who must have the reasonable grounds to suspect. This is not a matter that can be delegated. The RCMP letter is mere affirmation. The letter of November 26, 2013, does not reveal grounds: it discloses conclusions without indicating how the conclusion is reached....

[76] As was seen earlier, the standard of reasonable suspicions requires that there be discernible facts in order to reach beyond mere suspicions or hunches. These discernible facts were not disclosed to the decision-maker. That absence makes the finding of the Minister, through his delegate, that there are reasonable grounds to suspect that the applicant is in a position in which there is risk she be suborned to commit an act that might constitute a risk to marine transportation security, to be unreasonable. The discernible facts are not there.

[27] Similar considerations arise in this case, although the threshold for the Minister's decision is higher: reasonable grounds to believe. The information provided to the Minister's

delegate lacked specificity, particularly in relation to Ms. Ritchie's son. The general assertion that the son was "known to" the police did not constitute reasonable grounds to believe that his mother may be prone or induced to commit, or assist or abet another person to commit, an act that may unlawfully interfere with civil aviation. The association with a person who may or may not have been convicted of shoplifting offences also lacked an adequate factual foundation.

[28] The decision to cancel Ms. Ritchie's security clearance was insufficiently supported by discernable facts, and was therefore unreasonable.

VI. Conclusion

[29] The application for judicial review is allowed, and the matter is remitted to the Minister for redetermination. Costs are awarded to Ms. Ritchie in the all-inclusive lump sum of \$3,500.00.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, and the matter is remitted to the Minister for redetermination.
2. Costs are awarded to Ms. Ritchie in the all-inclusive lump sum of \$3,500.00.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2003-18

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PLACE OF HEARING: TORONTO, ONTARIO

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