

Federal Court



Cour fédérale

**Date: 20200324**

**Docket: T-880-19**

**Citation: 2020 FC 408**

**Ottawa, Ontario, March 24, 2020**

**PRESENT: Mr. Justice Russell**

**BETWEEN:**

**MUNIRA OMAR**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] This is an application under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of the decision [Decision] of the Minister of Transport's delegate [Minister's Delegate], dated April 30, 2019, to refuse the Applicant's application for a transportation security clearance pursuant to s 4.8 of the *Aeronautics Act*, RSC 1985, c A-2.

## II. BACKGROUND

[2] The Applicant is a citizen of Canada and resident of Toronto, Ontario. On September 2, 2015, she began working for WestJet at Lester B. Pearson International Airport in Mississauga, Ontario as a “Guest Service Ambassador.” Within eight months, the Applicant was promoted to “Customer Service Agent.”

[3] In order to perform her job with WestJet, the Applicant required a transportation security clearance in order to access restricted areas of the airport and to obtain a Restricted Area Identity Card. The Applicant applied for her security clearance on September 29, 2015, and was granted a temporary pass allowing her to gain access to the restricted areas of the airport.

[4] On November 29, 2017, the Applicant received a letter from Transport Canada informing her that they had received adverse information that raised concerns about her suitability to obtain the requested security clearance and, as a result, her application would be reviewed by the Transportation Security Clearance Advisory Board [Advisory Board].

[5] Specifically, the November 2017 letter referred to contents of a law-enforcement records check from the RCMP, which noted the Applicant’s close association with two individuals of concern and also noted that a search warrant had been executed at her residence while she was present. The letter notes the following:

On June 13, 2013, Police from the Toronto Police Service Drug Squad and the Peel Regional Police, executed a Criminal Code Search Warrant at your residence at 1 Shendale Drive, Apartment 416, Toronto, Ontario. Three (3) individuals residing at the

residence, including you, were present at the time. Once the premises were secured, police of the Service Drug Squad took control of the townhouse unit. The premises were searched. An amount of documents in the name of an individual, who was known to reside with you but was not present, were seized along with a photograph. A cellular phone was also seized.

At least one (1) individual, identified as an immediate family member of yours, was involved with you in the incident reported above and has various convictions for criminal offences ranging from Possession of a Schedule I Substance for the Purpose of Trafficking, Trafficking Schedule I Substance (3 counts), Possession of Prohibited or Restricted Firearm with Ammunition (and other weapon related offences), Assault, Theft under \$5000, Obstruct Peace Officer (2 counts), Aggravated Assault, Unlawfully at Large, Possession of a Scheduled Substance and Public Mischief. This individual is also awaiting disposition for Weapon Trafficking, Conspiracy to Commit indictable Offence (2 counts) and Participating in a Criminal Organization (2 counts). Additionally, another immediate family member of yours is currently incarcerated for Commission of an Offence for Criminal Organization, Conspiracy to Commit an Indictable Offence, Weapon Trafficking (3 counts) and Possession of a Schedule I Substance for the Purpose of Trafficking.

[6] The letter also advised the Applicant that the various grounds on which the Advisory Board may make a recommendation can be found at I.4 of the *Transportation Security Clearance Program Policy [Policy]* and invited the Applicant to respond and to provide additional information and explanation in writing within 20 days of receipt of the letter. The letter was delivered by registered mail to the Applicant on December 4, 2017.

[7] On January 26, 2018, the Applicant responded in writing to Transport Canada's letter by email. In her response, she identified the first individual as being her brother, whom she noted was in custody. The Applicant stated that she had not lived with him since 2008. As regards the search warrant executed in 2013, the Applicant explained that the police raided her home in

search of her brother and that the raid took her by surprise. She also noted inconsistencies in the information provided to the effect that the police did not disclose taking documents or photographs during the search and that no phones were confiscated. Finally, she argued that her brother is in custody and that it is “unfair that [she] pay for [his actions] as well solely based on familial relations. His mistakes are his own and his alone.”

[8] On April 9, 2018, WestJet terminated the Applicant’s employment for failing to obtain the required security clearance to gain access to the restricted areas of the airport.

[9] On August 15, 2018, the Advisory Board met to consider the Applicant’s application. Following a review of the information on file, the Applicant’s written submissions, and the email from her legal representative, the Advisory Board recommended refusing the Applicant’s application for a transportation security clearance.

[10] Following the Advisory Board’s recommendation, the application was provided to the Minister’s Delegate for review and for determination.

### III. DECISION UNDER REVIEW

[11] On April 30, 2019, the Minister’s Delegate refused the Applicant’s transportation security clearance application. The Decision states that it is based on a review of the file by the Minister’s Delegate, notably the information contained in the November 2017 letter, the Applicant’s written submissions, the recommendation from the Advisory Board, as well as the *Policy*.

[12] In essence, the Minister's Delegate found that the Applicant's association with two immediate family members involved in serious criminal activities raised concerns regarding the Applicant's "trustworthiness and reliability" as well as the potential that she could be influenced by her immediate family. As such, the Minister's Delegate concluded that, "on a balance of probabilities, [the Applicant] may be prone or induced to commit and act, or assist or abet any person to commit an act that may unlawfully interfere with civil aviation."

[13] The Minister's Delegate largely based her Decision on the serious nature of the criminal convictions and outstanding charges against the Applicant's brothers, as detailed in the law-enforcement records check from the RCMP. The Minister's Delegate found that this was pertinent because of the vulnerability to airport security that is created by security clearance holders who are closely associated to individuals involved in serious criminal activities, given their access to the restricted areas of airports.

[14] The Minister's Delegate also explicitly considered the Applicant's written submissions. The Minister's Delegate acknowledged the explanation and information provided by the Applicant in her email on January 26, 2018. However, the Minister's Delegate found the explanation and information provided by the Applicant to be insufficient as she did not provide: (1) the identity of the second individual to whom she was immediately related to, nor an explanation of their relationship; (2) sufficient information or evidence that the police report was referring to her brother; (3) sufficient evidence that the police report was erroneous in its findings; and (4) any further information or explanation to help alleviate concerns that she could be influenced by the noted individuals.

IV. ISSUES

[15] The issues raised in the present application are as follows:

1. Should this Court disregard or strike out the evidence contained in the Applicant's Memorandum of Argument that was not before the decision-maker nor introduced by affidavit?
2. Did Transport Canada breach the Applicant's right to procedural fairness?
3. Was the Decision to refuse the Applicant's clearance reasonable?

V. STANDARD OF REVIEW

[16] The memoranda of the parties in this case were provided prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. At the hearing of this matter, the Court asked the parties whether they wished to modify their submissions on the applicable standards of review in this matter. In general, no material modifications were suggested and I have applied the *Vavilov* framework in my consideration of the application.

[17] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual

and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[18] In her Memorandum of Argument, the Applicant says that the standard of correctness applies to this Court's review of the alleged breach of procedural fairness. The Applicant also submits that the standard of reasonableness applies to this Court's review of the merits of the Decision. The Respondent agrees.

[19] Some courts have held that the standard of review for an allegation of procedural unfairness is "correctness" (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]). The Supreme Court of Canada's decision in *Vavilov* does not address the standard of review applicable to issues of procedural fairness (*Vavilov*, at para 23). However, a more doctrinally sound approach is that no standard of review at all is applicable to the question of procedural fairness. The Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated that the issue of procedural fairness:

requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment

of the procedures and safeguards required in a particular situation  
(*Moreau-Bérubé*, para 74).

[20] Concerning this Court’s review of the merits of the Decision, I agree with both parties that the standard of reasonableness applies. Indeed, there is nothing, in this case, to rebut the presumption of the standard of reasonableness. Moreover, this is consistent with the jurisprudence prior to *Vavilov* on this matter. See *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 16 [*Henri*].

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it “bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and “takes its colour from the context” (*Vavilov*, at para 89 citing *Khosa*, at para 59). These contextual constraints “dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt” (*Vavilov*, at para 90). Put in another way, the Court should intervene only when “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). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker’s reasoning process; and (2) untenability “in light of the relevant factual and legal constraints that bear on it” (*Vavilov*, at para 101).



[22] For the sake of clarity, no standard of review is applicable to the question as to whether the alleged new evidence in the Applicant's Memorandum of Argument should be disregarded or struck out.

## VI. STATUTORY PROVISIONS

[23] The following provision of the *Aeronautics Act* is relevant to this application for judicial review:

### **Security Clearances**

#### **Granting, suspending, etc.**

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

### **Habilitations de sécurité**

#### **Délivrance, refus, etc.**

**4.8** Le ministre peut, pour l'application de la présente loi, accorder, refuser, suspendre ou annuler une habilitation de sécurité.

[24] The following provisions of the *Canadian Aviation Security Regulations, 2012*, SOR/2011-318 are relevant to this application for judicial review:

### **Issuance of Restricted Area Identity Cards**

#### **Issuance criteria**

**146 (1)** The operator of an aerodrome must not issue a restricted area identity card to a person unless the person

### **Délivrance des cartes d'identité de zone réglementée**

#### **Critères de délivrance**

**146 (1)** Il est interdit à l'exploitant d'un aéroport de délivrer une carte d'identité de zone réglementée à une personne à moins qu'elle ne réponde aux conditions suivantes :

(c) has a security clearance;

c) elle possède une habilitation de sécurité;

...

...

**Control of Access to Restricted Areas**

**Contrôle de l'accès aux zones réglementées**

**Unauthorized access prohibition**

**Interdiction d'accès non autorisé**

**165** A person must not enter or remain in a restricted area unless the person

**165** Il est interdit à toute personne d'entrer ou de demeurer dans une zone réglementée à moins qu'elle ne soit, selon le cas :

(a) is a person to whom a restricted area identity card has been issued; or

a) titulaire d'une carte d'identité de zone réglementée;

[25] The following provisions of the *Policy* are relevant to this application for judicial review:

**I.1 Aim**

The aim of the Transportation Security Clearance Program Policy is the prevention of unlawful acts of interference with civil aviation by the granting of clearances to persons who meet the standards set out in this Program.

**I.1 Objet**

L'objet du Programme d'habilitation de sécurité en matière de transport est de prévenir les actes d'intervention illicite dans l'aviation civile en accordant une habilitation aux gens qui répondent aux normes dudit programme.

**I.4 Objective**

The objective of this Program is to prevent the uncontrolled entry into a restricted area of a listed airport by any individual who

**I.4 Objectif**

L'objectif de ce programme est de prévenir l'entrée non contrôlée dans les zones réglementées d'un aéroport énuméré dans le cas de toute personne:

3) is suspected of being closely

3) soupçonnée d'être

associated with an individual who is known or suspected of

- being involved in activities referred to in paragraph (1);
- being a member of an organization referred to in paragraph (2); or
- being a member of an organization referred to in subsection (5) hereunder.

4) the Minister reasonably believes, on a balance of probabilities, may be prone or induced to

- commit an act that may unlawfully interfere with civil aviation; or
- assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

### **II.33 Convening the Advisory Body**

The Director, Security Screening Programs shall convene the Advisory Body when:

- 1) the Director, Security Screening Programs believes there is sufficient information available to consider whether the applicant's suitability is consistent with the aim and objective of the Program; or
- 2) the Director, Security Screening Programs has

étroitement associée à une personne connue ou soupçonnée

- de participer aux activités mentionnées à l'alinéa (1);
- d'être membre d'un organisme cité à l'alinéa (2); ou
- être membre d'un organisme cité à l'alinéa (5).

4) qui, selon le ministre et les probabilités, est sujette ou peut être incitée à:

- commettre un acte d'intervention illicite pour l'aviation civile; ou
- aider ou à inciter toute autre personne à commettre un acte d'intervention illicite pour l'aviation civile.

### **II.33 Convocation de l'organisme consultatif**

Le Directeur, programmes de filtrage de sécurité convoquera l'Organisme consultatif:

- 1) lorsque le Directeur, programmes de filtrage de sécurité juge que les renseignements justifient la recommandation du refus ou de la révocation d'une habilitation; ou
- 2) lorsque le Directeur, programmes de filtrage de sécurité suspend une

suspended a security clearance. habilitation.

### **II.35 Cancellation or Refusal**

1) The Advisory Body may recommend to the Minister the cancellation, refusal or upholding of a suspension of a security clearance to any individual if the Advisory Body has determined that the individual's presence in the restricted area of a listed airport would be inconsistent with the aim and objective of this Program.

2) In making the determination referred to in subsection (1), the Advisory Body may consider any factor that is relevant, including whether the individual:

**b)** is likely to become involved in activities directed toward or in support of the threat or use of acts of serious violence against property or persons.

### **II.39 Precautionary Measures**

1) Where at the time an application is reviewed there is a doubt as to the future conduct of the individual, the Advisory Body may recommend to the Minister to:

**a)** reduce the period of validity of a security clearance; and

2) An interview conducted pursuant to paragraph (1) shall

### **II.35 Annulation ou refus**

1) L'Organisme consultatif peut recommander au ministre de refuser ou d'annuler l'habilitation d'une personne ou encore de maintenir la suspension de son habilitation s'il est déterminé que la présence de ladite personne dans la zone réglementée d'un aéroport énuméré est contraire aux buts et objectifs du présent programme.

2) Au moment de faire la détermination citée au sous-alinéa (1), l'Organisme consultatif peut considérer tout facteur pertinent, y compris:

**b)** si la personne est susceptible de participer à des activités directes ou en appui à une menace ou de se livrer à des actes de violence sérieuse contre la propriété ou des personnes.

### **II.39 Mesures de précaution**

1) Lorsqu'il existe, au moment de l'examen de la demande, un doute quant à la conduite ultérieure du candidat, l'Organisme consultatif peut recommander au Ministre de :

**a)** réduire la période de validité de l'habilitation;

2) Toute entrevue convoquée conformément à l'alinéa (1)(b)

include

- a) review of the adverse information against the applicant;
- b) a statement by the inspector or representative advising the applicant that the retention of the security clearance is subject to the applicant's future conduct; and
- c) an undertaking by the applicant to be of good behaviour.

doit inclure :

- a) l'examen des renseignements négatifs obtenus au sujet du demandeur;
- b) une déclaration de l'inspecteur ou du représentant avisant le demandeur que l'habilitation est sujette à sa conduite ultérieure; et
- c) l'engagement du demandeur quant à sa bonne conduite ultérieure.

## VII. ARGUMENTS

### A. *Applicant*

[26] The Applicant argues that Transport Canada's Decision: (1) breached her right to procedural fairness; and (2) was not reasonably based on the evidence before the decision-maker. Consequently, the Applicant asks this Court to quash the Decision and order a writ of *mandamus* directing Transport Canada to grant her transportation security clearance application. Alternatively, the Applicant asks this Court to direct that the application be reassessed by a different decision-maker. The Applicant also requests the costs of this application.

#### (1) Breach of Procedural Fairness

[27] The Applicant argues that Transport Canada breached her right to procedural fairness by: (1) not providing the criteria upon which the Minister's Delegate relied in coming to a

conclusion nor sufficient information to make a more meaningful submission; (2) improperly relying on unreliable and unverified information in a manner that was unresponsive to the Applicant's submissions; (3) failing to provide adequate reasons; and (4) failing to consider the Applicant's eligibility to rely on precautionary measures.

[28] First, the Applicant states that the rules of natural justice and procedural fairness require that an individual be given the opportunity to know the case they must meet. See *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at para 40. The Applicant notes that Transport Canada failed to provide such an opportunity in this case because the Applicant was never provided with the criteria upon which the Minister's Delegate grounded her Decision or the specific names, dates, and descriptions of the items seized during the search of her residence in 2013.

[29] Second, the Applicant notes that the Minister's Delegate failed to investigate the Applicant's claim that the police report was inaccurate or inconsistent. The Applicant states that this is a breach of procedural fairness as the decision-maker failed to be responsive to her submission, citing *Menon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1273 at para 23.

[30] Third, the Applicant argues that her right to procedural fairness was breached by the failure of the Minister's Delegate to provide adequate reasons for her Decision. The Applicant says that because a higher level of procedural fairness is required in this case, due to the impacts on the Applicant's livelihood, it was procedurally unfair for the decision-maker to simply restate the evidence, omit critical components, and restate the conclusion of the Advisory Board. See

*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 233 NR 22 at para 43.

[31] Fourth, the Applicant states that the Minister's Delegate breached her right to procedural fairness by failing to consider whether the Applicant was eligible to rely on the precautionary measures listed in II.39 of the *Policy* in order to obtain her transportation security clearance. Moreover, the interview mandated by II.39 would have permitted the Applicant to clarify and dispel concerns that the Minister's Delegate may have had in response to the Applicant's written submissions. Given that a person's work is one of the most fundamental aspects of their life, the Applicant argues that procedural fairness required the Minister's Delegate to consider potential precautionary measures, as per her discretion to do so.

(2) Reasonableness of the Decision

[32] The Applicant argues that the Decision is unreasonable as it is not supported by the evidence before the decision-maker. Indeed, the Applicant states that there was no evidence to suggest that she was a threat to civil aviation and national security seeing as she has no criminal record, had worked at the airport without incident for several years, and did not attempt to hide the fact that members of her immediate family have criminal records. The Applicant states that there is no reasonable link between her brothers' actions and the risk of her unlawfully interfering with civil aviation.

B. *Respondent*

[33] The Respondent argues that: (1) the new and improper evidence in the Applicant's Memorandum of Argument should be disregarded or struck out; (2) there was no breach of procedural fairness in this case; and (3) the Decision was reasonably based on the evidence before the decision-maker. Therefore, the Respondent asks that this Court dismiss this application for judicial review, with costs.

(1) Evidence in Applicant's Memorandum of Argument

[34] The Respondent argues that large portions of the Applicant's Memorandum of Argument are improper and should be struck or disregarded by this Court because the Memorandum of Argument attempts to introduce, and have the Court consider, new evidence that was not before the decision-maker. The Respondent states that this is not the purpose of judicial review. See *Henri*, at paras 39-42. Moreover, the Respondent states that this new evidence was not properly introduced by way of affidavit. See *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at paras 59-61.

(2) Breach of Procedural Fairness

[35] The Respondent argues that, as confirmed in *Henri*, at paras 21-22 and 35, procedural fairness required that the Applicant be provided with a meaningful opportunity to respond to the evidence against her and for that response to be considered. Although the Applicant argues that an interview was required, the Respondent notes that the Applicant has not provided any basis



for departing from the Federal Court of Appeal's findings regarding the level of procedural fairness owed in this type of case.

[36] With this in mind, the Respondent states that Transport Canada provided the Applicant with precisely what the applicable level of procedural fairness required and, as such, there was no breach of procedural fairness. Specifically, the Respondent states that the Applicant was provided with an opportunity to submit written representations in the November 2017 letter and chose to avail herself of that opportunity on January 26, 2018. These submissions were clearly taken into account by the Advisory Board and explicitly analyzed in the Decision of the Minister's Delegate.

[37] The Respondent also points out that the Applicant was provided with the grounds for the Decision in the November 2017 letter, which refers her to the grounds at I.4 of the *Policy*.

[38] In addition, the Respondent notes that the Applicant was provided with a meaningful opportunity to respond to Transport Canada's concerns. The Respondent says there is no indication that the Applicant was not fully aware of the identities of the individuals referred to in the November 2017 letter. Moreover, a simple reading of the Decision shows that the decision-maker was alert and responsive to the Applicant's submissions.

[39] Third, the Respondent argues that Transport Canada is entitled to rely on information contained in the law-enforcement records check from the RCMP and is under no obligation to verify or cross-check the accuracy of the information received. See *Mangat v Canada (Attorney*

*General*), 2016 FC 907 at paras 54-55 [*Mangat*]; *Byfield v Canada (Attorney General)*, 2018 FC 216 at para 17 [*Byfield*]. In any case, the Respondent states that the Applicant largely confirmed the most important findings stated in the report.

[40] The Respondent says that the adequacy of a decision's reasons, in and of itself, does not provide a stand-alone basis for quashing a decision, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16.

(3) Reasonableness of the Decision

[41] The Respondent also argues that the Decision to refuse the Applicant's transportation security clearance was reasonable in the circumstances. The screening process revealed that the Applicant was associated with two immediate family members involved in serious criminal activity and that she did not provide sufficient explanation or information to alleviate this concern. Access to a restricted area of an airport is a privilege not a right and the *Aeronautics Act* grants the Minister a highly discretionary power when deciding to grant or refuse this privilege. See *Fontaine v Canada (Transport)*, 2007 FC 1160 at para 62.

[42] The Respondent says that the information contained in the law-enforcement records check from the RCMP raised serious concerns as to the Applicant's suitability for a clearance certificate and there is no suggestion that the important aspects of the report were erroneous or should not have been relied on. Indeed, but for minor peripheral inconsistencies, the Applicant confirmed in her written submissions the critical aspects of the report. As such, it was within the discretion of the Minister's Delegate to rely on this report.

[43] The Respondent holds that a criminal conviction is not required in the security clearance context. See *Byfield*, at para 17. Moreover, in *Kaczor v Canada (Transport)*, 2015 FC 698 at paras 33 and 36, this Court found that a prior relationship to members of two criminal gangs gave “rise to a security risk” and provided a “more than ample basis” for the refusal by the decision-maker.

## VIII. ANALYSIS

### A. *Introduction*

[44] The Applicant’s written submissions in this application are rife with contradictions, misstatements of facts and law, attempts to introduce inadmissible evidence that was not before the decision-maker, and conflicting assertions.

[45] For example, in written submissions, the Applicant asserts (para 52):

The Applicant did not have a proper understanding of how best to respond to Transport Canada, she does not understand the process of Judicial Review, and what is involved with the process. As a result, the Applicant failed to provide the significant detail required to help dispel some of the concerns raised.

[46] Notwithstanding this admission, the Applicant makes other submissions that she did provide sufficient information to dispel any concerns about her threat to airport security.

[47] Large portions of her written submissions are improper because the Applicant attempts to introduce matters and exhibits that were not before the Minister’s Delegate when the Decision was made. Moreover, there is no affidavit to support these matters and exhibits. For example, the

Applicant's Memorandum of Argument attempts, for the first time, to provide information about her second brother and, for the first time, attempts to provide additional information about her relationship with her brothers. This is information she could have placed before the Advisory Board when she was asked to respond to airport security concerns. Her failure to do so means that it was not placed before the decision-maker. She cannot now introduce it as part of her written submissions before the Court. Her counsel asserts that the Applicant "does not understand the process of Judicial Review," but I am entitled to assume that counsel does.

B. *Preliminary Issue - Evidence*

[48] It is well-established in this Court that, apart from narrow exceptions, judicial review must proceed on the basis of the evidence that was before the decision-maker. See *Henri* at para 39.

[49] This principle is subject to very limited exceptions, one of which (procedural fairness) is raised in this case. However, although the Applicant says that the Decision was procedurally unfair, she attempts to introduce new facts that have nothing to do with this issue. In addition, the Applicant's statements and documents in question have not been introduced through proper affidavit evidence and the Court cannot simply accept assertions made through counsel that cannot be challenged by way of cross-examination. See *IBM Canada Ltd v Deputy Minister of National Revenue (Customs and Excise)*, [1992] 1 FC 663 (FCA) at para 19.

[50] As is usual in this Court, where an applicant does not file any affidavit evidence to support an application, the Court can only review errors that appear on the facts in the record. See *Turcinovica v Canada (Citizenship and Immigration)*, 2002 FCT 164 at para 14.

[51] Consequently, those portions of the Applicant's written submissions that attempt to introduce new facts and exhibits that were not before the decision-maker are excluded from evidence in this application and will not be considered.

C. *Procedural Fairness*

[52] In her written submissions, the Applicant raises several grounds of procedural unfairness. In the context of transportation security clearances, the Court has determined that procedural safeguards are "limited to the right to know the facts alleged against [the Applicant] and the right to make representation about those facts" before a decision is made. See, for example, *Byfield* at para 12.

[53] The Court has also concluded that there is no right to an interview, and in the present case the Applicant did not request an interview (see *Byfield*, at para 12).

[54] The Applicant argues that she was entitled to a higher level of procedural fairness because of the importance of her work to her life, but the Applicant has not had her security clearance taken away. She wishes to obtain a clearance so that she can occupy certain positions with WestJet. But this is simply one factor to take into account, and in *Henri*, the Federal Court

of Appeal made it clear that the “decision is of great importance both to the individuals affected and to the public interest in safety and security” (at para 27).

[55] The Applicant has provided no real basis for allowing her a higher level of procedural fairness than has been applied in the majority of cases of this nature. And the Court has been very clear that the impact of a refusal or a revocation of a clearance upon an individual’s employment or personal life cannot trump the need for aviation security. See *Bonnick v Canada (Attorney General)*, 2016 FC 1187 at para 18.

[56] In the present case, the procedure followed throughout was totally in accord with the usual procedure in similar cases, and the Applicant was given a full and meaningful opportunity to respond to the evidence that gave rise to safety and security concerns in her case.

[57] The grounds raised in written submissions by the Applicant are as follows:

- a) The Applicant says she was denied procedural fairness because Transport Canada did not indicate the criteria that would be considered by the Advisory Board. The record shows that this is not the case. See the letter of November 29, 2017 to the Applicant from Pauline Mahon, the Acting Chief of Security Screening Programs that explains the process to the Applicant and directs her where to find the grounds the Advisory Board will use to make its recommendations;
- b) The Applicant says she had no meaningful opportunity to respond to the concerns raised because she was not provided with specific names, dates, and a description of the items seized at her residence in July 2013. The Applicant knew everything that Transport

Canada knew, and as subsequent events have revealed, she was fully aware of the identities of the individuals involved and why her association with her brothers gave rise to safety and security concerns. She provided minimal details regarding one of her brothers and offered no response regarding her second brother. The Applicant simply failed to respond adequately to the principal concerns raised;

- c) The Applicant says that Transport Canada failed to conduct its own investigation into her claim that there were inaccuracies in the description of the items seized during the June 2013 search. The jurisprudence is clear that Transport Canada may rely upon the information in the law-enforcement records check from the RCMP. See *Mangat* at paras 54-55; and *Byfield* at paras 17 and 20;
- d) The Applicant says that the Minister provided insufficient reasons for the Decision. The reasons are entirely adequate in this case because they allow the Applicant and the Court to understand why the tribunal made its Decision and permit the Court to determine whether the conclusions are reasonable. In other words, they exemplify sufficient “justification, transparency and intelligibility.” See *Vavilov*, at para 99.

[58] In addition to the above, the Applicant has provided no affidavit to the Court explaining why she did not, or could not, understand the nature of the concerns, the evidentiary basis for those concerns, or why she was not able to respond fully after asking for, and being given, an extension of time to do so. The Applicant simply failed to provide an adequate response to the Court upon which she could be cross-examined by the Respondent.

D. *Reasonableness*

[59] The Applicant argues that the decision-making process lacked justification, transparency and intelligibility. She argues that the Decision is therefore unreasonable.

[60] In my view, the Decision could not be clearer:

- a) The Applicant applied to Transport Canada for a security clearance at Lester B. Pearson International Airport;
- b) The law-enforcement records check from the RCMP indicated that the Applicant did not have a criminal record herself but that she had a close association with two individuals (her brothers) who had extensive criminal records consisting of offences that were extremely relevant to airport security. This gave rise to a concern that the Applicant may be prone or induced to commit an act that could lawfully interfere with civil aviation;
- c) The evidence and concerns were clearly placed before the Applicant in the usual way and she was asked to address those concerns;
- d) The Applicant failed to address the concerns adequately, and, as such, the Advisory Board and the Minister's Delegate continued to have a concern that she could possibly be influenced by her two immediate family members to commit an act that would unlawfully interfere with civil aviation;
- e) The reasons for the concerns and the process followed, and the reasons as to why her response had not addressed these concerns, were fully explained in the April 30, 2019, Decision made by the Minister's Delegate.



[61] The Applicant's written submissions on the unreasonableness of the Decision are, essentially, as follows:

48. As noted above, the Minister does not provide detailed information in his reasons about what evidence before him was determinative or persuasive. Thus, we must examine all the evidence to see if there is anything that would give rise to a reasonable decision that the Applicant posed a risk to the security of aviation transportation. According to the information and details provided to the Applicant, it is difficult to clearly determine that the Applicant posed such a risk. Therefore, the Minister's allegations and concerns, individually or together, are not sufficient to lead to a reasonable belief that the Applicant posed a significant risk.

49. The Applicant does not have a criminal record to speak of. To conclude she is a risk to civil aviation and national security based on the behavior and actions of her brothers, with whom she does not have a relation with other than by blood, would substantially prejudice her ability to continue working in her chosen profession.

[62] These submissions simply disagree with the Decision and say that the evidence does not support the conclusions reached. The Court is not here to re-weigh evidence in order to reach a different conclusion that favours the Applicant. Nevertheless, the only conclusion possible based upon the evidence before the Minister's Delegate, notably the inadequate response of the Applicant, is the conclusion reached by the Minister's Delegate.

[63] The Applicant feels aggrieved because she has no criminal record, she is not responsible for what her brothers have done, and she has little to do with her brothers.

[64] However, the crucial explanation that she has little to do with her brothers was not provided to the Advisory Board. In her response to Transport Canada, the Applicant says there

were “a few inconsistencies in the letter regarding the incident,” notably regarding certain details concerning the June 2013 search of her residence. She also added that “no phones were confiscated” and that “the Toronto Police never disclosed taking any documents or photographs.” But she also said that the information was substantially correct as regards her brothers’ criminal history and confirms the June 2013 search of her residence. She did not say that the information about her second brother was incorrect.

[65] It had to be obvious to any reasonable person in the Applicant’s position that it was her possible relationship and interaction with her two criminal brothers that was the central point of concern to Transport Canada. Yet she chose not to address this issue in any meaningful way. In fact, she does not even mention her second brother who was incarcerated and only raises it before the Court through counsel’s submissions. The main emphasis of her response to Transport Canada was on the importance of a security clearance certificate for her job. She says very little to dispel the concerns that she may be prone to influence from her brothers. I have no evidence before me to assess her present assertions, even if I was in a position to do so. Moreover, as a reviewing Court, I am not here to re-decide a matter on the basis of evidence and submissions that were not placed before the decision-maker in this case.

[66] The irony is that, had the Applicant provided an adequate response to Transport Canada on the obvious issue of concern, she might have been granted a security clearance certificate. The Court has considerable sympathy for the Applicant in this regard. However, the letter from Pauline Mahon of Security Screening Programs dated November 29, 2017, draws the Applicant’s attention to crimes with which her brothers have been involved. These include trafficking,

possession of a restricted firearm with ammunition and other weapons related offences, assault, theft, and weapons trafficking. Offences related to arms and weapons trafficking and organized crime have a significance for airport security and there is no evidence the Applicant did not appreciate the relevance of these criminal activities, particularly given that she was working for WestJet at the time. Ms. Mahon specifically directs the Applicant to where the applicable website and I.4 of the *Policy* for the various grounds on which the Advisory Board may make a recommendation can be found and encourages her to “provide additional information in writing outlining the circumstances surrounding the above noted incident and associations, as well as to provide any other relevant information or explanations, including any extenuating circumstances.” If she had any doubts as to what was required of her, she could easily have asked.

[67] In oral argument, Applicant’s counsel emphasized that the information before the Minister’s Delegate was not sufficient to conclude that, on a balance of probabilities, she posed a risk to aviation. The Applicant has never been charged with any offence herself and, as she pointed out in her response letter of January 26, 2018, her brother did not live with her or with the family since 2008. Counsel argues that it is pure speculation to conclude that the Applicant could be influenced by her brothers.

[68] The Minister’s Delegate specifically refers to these issues in the Decision:

I considered the seriousness of your immediate family members’ criminal convictions and outstanding charges. I have serious concerns that two (2) of your immediate family members have criminal convictions or outstanding charges related to Criminal Organization(s). I also considered the fact that the exploitation of Canadian airport facilities by Criminal Organizations and insider

threats is a current threat to aviation security. Furthermore, I considered the fact that one of your immediate family members has demonstrated disrespect for authority, as they have criminal convictions for Obstruct Peace Officer (2 counts) and Unlawfully at Large.

In addition, I considered your written submission, in which you stated that your family home was raided in search of your brother, who is currently in custody. You also stated that your brother was never a resident of the home, nor had he lived with your family since 2008. You also stated that there were inconsistencies with regards to the items that were seized by police after searching the home.

I considered your explanations regarding your brother; however, I note that you provided no evidence to support these claims. I also note that the police report referred to two (2) individuals of concern, and both of these individuals are your immediate family members who have various criminal convictions. You provided no identity, explanation, or further information regarding your second immediate family member who is also a concern.

Furthermore, I was not convinced that it was necessarily your brother who the police report was referring to as residing with you in 2013. I am of the opinion that you did not provide enough information or evidence that the police report was referring to your brother as residing with you. Additionally, you did not provide enough information or evidence that the police report was erroneous in its findings. Consequently, for the above described reasons, I deferred to the information provided in the police report.

You also stated in your written submission that it is unfair for you to be impacted by your brother's criminal activities solely based on familial relation. I acknowledge that we don't choose our family; however, other than stating your brother is in custody for his crimes, you do not provide further information or explanation to help alleviate my concerns, such as providing evidence that you could not be influenced by the individuals of concern.

Furthermore, you do not provide an explanation or any information regarding the second immediate family member who is also known to have been involved in criminal activities. For these reasons. I found it reasonable to continue to have a concern regarding your association to two (2) immediate family members involved in serious criminal activity, one of which was identified by police as residing with you in 2013.

I also considered the written submission from Mitchell Worsoff dated April 9, 2018, provided on your behalf. However, I note the submission provided no further information regarding the concerns pertaining to your immediate family members. Consequently, for the reasons described above, your written submissions did not provide sufficient information to address my concerns.

Additionally, I considered the vulnerability to airport security that is created by security clearance holders who are closely associated to individuals who are involved in serious criminal activities given their access to the restricted area of the airport. An in-depth review of the information on file led me to reasonably believe, on a balance of probabilities, that you 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. For these reasons, on behalf of the Minister of Transport, I have refused your transportation security clearance.

[69] This Court has found that association alone may be grounds for cancelling (not just obtaining) a security clearance. See *Del Vecchio v Canada (Attorney General)*, 2018 FCA 168 [*Del Vecchio*].

[70] In *Del Vecchio*, the Federal Court of Appeal had the following to say on this point:

[6] As concerns the merits of the Minister's decision, we fully appreciate how significant this decision is for the appellant. However, despite this we must agree with the Federal Court that it was reasonable for the Minister to revoke the appellant's security clearance for essentially the same reasons as those given by the Federal Court. We in particular concur that the risks associated with aviation safety and the membership of the appellant's father as a full patch member in a motorcycle club with ties to criminal activities and other criminal organizations like the Hell's Angels provided ample basis for the Minister to have reasonably believed, on the balance of probabilities, that the appellant may have been prone or induced to commit or to assist or abet another person to commit an act that may unlawfully interfere with civil aviation. The Minister's decision to revoke the appellant's security clearance was therefore reasonable.

E. *Conclusion*

[71] In essence, and with considerable sympathy for the Applicant, I cannot say that the Decision lacked procedural fairness or was unreasonable.

[72] Both counsel agree that the Style of Cause should be amended to show the Attorney General of Canada as the Respondent.

**JUDGMENT IN T-880-19**

**THIS COURT'S JUDGMENT is that**

1. The application is dismissed with costs to the Respondent.
2. The Style of Cause is amended to remove "Her Majesty the Queen" as the Respondent and to show the Respondent as "The Attorney General of Canada."

**"James Russell"**

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-880-19

**STYLE OF CAUSE:** MUNIRA OMAR v THE ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 13, 2020

**JUDGMENT AND REASONS:** RUSSELL J.

**DATED:** MARCH 24, 2020

**APPEARANCES:**

Mitchell Worsoff

FOR THE APPLICANT

Marilyn Venney

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Worsoff Law Firm  
Barristers & Solicitors  
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada  
Toronto, Ontario

FOR THE RESPONDENT