

Federal Court



Cour fédérale

Date: 20211004

Docket: T-5-20

Citation: 2021 FC 1029

Ottawa, Ontario, October 4, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ANDREW FARRUGIA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Andrew Farrugia, is self-represented. He is seeking judicial review of a decision made on December 4, 2019 by a delegate of the Minister of Transport (the Delegate) denying his application for a Transportation Security Clearance (TSC) (the Decision).

[2] The Applicant applied for a TSC as part of his offer of employment with WestJet airlines. Without a TSC, the Applicant could not qualify for a Restricted Area Identity Card (RAIC). Without a RAIC, he could not work for WestJet in the position he had been offered in Waterloo.

[3] The Delegate, who is the Director General, Aviation Security, took note of an incident in January 2016 which led them to believe the Applicant was involved in illegal drug trafficking. The Delegate concluded the Applicant may be prone or induced to commit, or to assist or abet someone else to commit, an act that may unlawfully interfere with civil aviation. As such, the Delegate refused to issue a TSC to the applicant.

[4] The Applicant seeks to have the Decision set aside or referred back for reconsideration. The Respondent seeks an order dismissing this application for judicial review with costs.

[5] For the reasons that follow, I have determined the decision of the Delegate was procedurally fair and reasonable. The application will be dismissed, without costs.

II. **Preliminary Issue - Style of Cause**

[6] The Applicant has named as Respondents the “Attorney General” and other parties.

[7] Pursuant to Rule 303 of the *Federal Courts Rules*, the proper Respondent in this matter is only the Attorney General of Canada. The style of cause is therefore amended, with immediate effect, to show the only Respondent as the Attorney General of Canada.

III. Overview of the Security Clearance Process

[8] The granting of TSCs at designated airports is governed by the *Aeronautics Act*, RSC 1985 c A-2 [the Act] and the *Canadian Aviation Security Regulations*, 2012, SOR/2011-318 [the Regulations]. Persons working in restricted areas of designated airports must obtain a restricted area identity card (RAIC), which can only be issued to a person who has been granted a TSC pursuant to the Regulations.

[9] The Minister may, for the purposes of section 4.8 of the Act, grant or refuse to grant a security clearance to any person or suspend or cancel an existing security clearance.

[10] TSC applications require applicants to provide adequate, verifiable and reliable information covering a period of five years prior to the application being made as well as a fingerprint based criminal records check, a check of relevant files of law enforcement agencies, and a CSIS indices check: Transportation Security Clearance Program Policy [TSCPP] at I.3 and II.19. The TSCPP is located online at: <https://tc.canada.ca/en/programs/non-funding-programs/transportation-security-clearance-program/transportation-security-clearance-program-aviation/table-contents>.

[11] To implement his authority the Minister relies on guidelines in the TSCPP. The TSCPP provides that the Advisory Body shall review information supplied by an applicant and make recommendations to the Minister concerning granting, refusing to grant, suspending or cancelling security clearances.

[12] The objective of the security clearance process is set out in the TSCPP at I.4.4 as being “to prevent the uncontrolled entry into a restricted area of a listed airport by any individual who” . . . “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”.

[13] If concerns arise during the initial review, the security applicant is provided with a letter outlining the concerns and advising them they may make written representations to address the concerns. All the information is then reviewed by the Advisory Body and a recommendation is made to the Delegate.

[14] While the process of determining whether to issue a TSC is ongoing, an airport may issue a Temporary Pass in accordance with the Regulations. The Temporary Pass gives access to some but not all restricted areas: *Malafouris v Canada (Transport)*, 2018 FC 1082 at para 6.

[15] An Advisory Body is convened when the Director of Security Screening Programs believes there is sufficient information to consider whether an applicant’s suitability is consistent with the objective of the TSCPP as set out at sections I.1 and II.33.

[16] Where the Advisory Body determines that an individual’s presence in the restricted area of a listed airport would be inconsistent with the program’s objective to prevent unlawful acts of interference with civil aviation, a recommendation is made to the Minister to cancel or refuse the individual’s security clearance: TSCPP at II.35.

[17] In making the recommendation to refuse a security clearance, the TSCPP provides in subsection II.35.2 that the Advisory Body may consider any factor that is relevant to the determination of whether the individual's presence in the restricted area of the airport would be inconsistent with the aim and objective of the program. It then enumerates various factors, in a non-exhaustive list, including whether the person has been convicted or otherwise found guilty in Canada or elsewhere of an indictable offence or is likely to become involved in activities threatening or using serious violence against property or persons. (My emphasis)

IV. **Background facts and dates**

[18] On January 15, 2016, the Applicant was charged with trafficking a Schedule II substance pursuant to s.5(1) of the *Controlled Drugs and Substances Act* after being found with 164 grams of marijuana during a traffic stop.

[19] On August 2, 2016, the trafficking charge was withdrawn for reasons unknown to Transport Canada.

[20] The Applicant was employed by WestJet as a Customer Service Agent from October 18, 2016 to April 10, 2018.

[21] On November 14, 2016, the Applicant applied for a TSC, for the Region of Waterloo International Airport. He was sponsored by WestJet as a Guest Service Ambassador.

[22] On July 21, 2017, the RCMP Security Intelligence Background Section sent a Law Enforcement Record Check (LERC) report to Transport Canada as part of the Applicant's background check. The LERC outlined the details of the Applicant's arrest on January 15, 2016 for drug trafficking. It indicated that the Applicant was stopped for speeding following which the police officer could smell a strong odour of marijuana and they observed a small plastic baggie with what appeared to be marijuana residue in it. In response to the officer asking if there were other drugs in the vehicle, the Applicant voluntarily produced two clear plastic bags totalling 164 gm of marijuana. The officer searched the vehicle and discovered \$2,240 in cash in the passenger side door pocket.

[23] The Applicant received a letter dated October 25, 2017 from Transport Canada ("the fairness letter"). It informed him that his TSC application was referred to the Transportation Security Clearance Advisory Body [Advisory Body] for consideration and that "adverse information was made available that raises concerns as to your suitability to obtain a clearance". The circumstance of his arrest for trafficking were then outlined in the fairness letter. The Applicant was encouraged to provide additional information in response outlining the circumstances surrounding the trafficking charges and any other relevant information within 20 days of receipt of the letter.

[24] On November 1, 2017, the Applicant called the Advisory Body to ask how he should respond to the letter he received. He was advised that it was his opportunity to address the concerns outlined in the letter providing all information to address them. According to the Note

to File in the underlying record, the Applicant was encouraged to have a look at the Transport Canada website to find out more about the program.

[25] On November 13, 2017, the Applicant provided written submissions and five letters of reference in response to the fairness letter. He stated that the facts presented in the October 25, 2017 fairness letter outlined the incident accurately.

[26] On August 15, 2018, the Advisory Body discussed the Applicant's application. Details of the discussion of the Advisory Body and the reasons for their recommendation are outlined below.

[27] The Applicant accepted a position as a Flight Attendant with Swoop, a WestJet carrier. From October 30, 2018 to February 12, 2020, he was employed in that capacity by Swoop.

[28] On December 4, 2019 the Applicant's application for a TSC was refused by the Delegate. The Applicant received the Decision on December 9, 2019.

[29] While awaiting a decision on his TSC application, the Applicant was issued a temporary clearance pass by the Waterloo airport. The Applicant notes that he was unaware at the time that this pass was issued after the Advisory Body had determined he was a "risk to civil aviation".

[30] The Applicant filed his application for judicial review on January 2, 2020.

V. **The Advisory Body's Discussion and Recommendation**

[31] The Advisory Body's written Record of Discussion indicates it considered the contents of the LERC, the fact that the 164 gm of marijuana is a large amount, more than for personal use, and that the amount of cash in the vehicle was an indicator that the Applicant was involved in drug trafficking.

[32] The Advisory Body also considered the Applicant's written submissions, noting his statement that the facts in the LERC were accurate. They noted that the criminal charge was withdrawn and that the Applicant had been forthcoming and sincerely remorseful with the arresting officer. The Applicant's submissions contained an apology for his behaviour, which he described as out of character. He added that the arresting officer helped him to avoid a criminal record by entering a diversion program and completing 80 hours of community service. He noted the officer would make himself available for an interview and attached the officer's business card.

[33] The Advisory Body considered the five positive character references supplied by the Applicant. The references were from the arresting officer, the Salvation Army store manager, WestJet, the President of the Applewood Hockey Association and his yoga teacher.

[34] The arresting officer's letter was written on official letterhead. The officer's conclusion was "From my encounter with Andrew, he seems to be a very upfront and honest individual."

The letter also contained the officer's contact information expressly for the purpose of reaching him.

[35] The Applicant's employer, WestJet, wrote a brief but enthusiastic letter mentioning the Applicant had been promoted, was a team player, there were 'zero issues' with his performance and his attendance was exemplary. He was said to be reliable and committed to his responsibilities. The others character letters were similarly complimentary.

[36] The Advisory Body expressed concern that the Applicant did not provide an explanation for why he was trafficking in marijuana, but that he said he "made a mistake that was out of character on January 15, 2016". The Advisory Body found that it was reasonable to believe that drug trafficking is more than a simple "mistake", it is a lifestyle. They noted that the Applicant would require a connection to a supplier and would need to have buyers to sell to. The presence of \$2,240 cash in the vehicle suggested to the Advisory Body that the Applicant may have been trafficking in marijuana prior to the date of his arrest.

[37] The positive factors considered were that this was a single incident and no other drugs were involved. That was countered by the fact that at the time of his arrest, and still today, the amount of marijuana the Applicant possessed was illegal.

[38] The Record of Discussion expressed concern that the incident was recent. The Advisory Body questioned whether enough time had elapsed for the Applicant to demonstrate that he had changed his behaviour.

[39] The Advisory Body concluded that the submissions from the Applicant did not provide sufficient information to address all their concerns.

[40] Their in-depth review led the Advisory Body to “reasonably believe on a balance of probabilities, that the applicant may be prone or induced to commit and act, or assist or abet any person to commit and act that may unlawfully interfere with civil aviation.”

VI. **The Decision**

[41] The Decision was made by the Delegate after receipt of the Advisory Body Summary of Discussion and a review of the file, including the Applicant’s submissions.

[42] The Decision stated that the information regarding the Applicant’s involvement in criminal activities related to drug trafficking raised serious concerns about his judgment, trustworthiness, and reliability. It noted that the charge of trafficking a Schedule II substance was later withdrawn, but found that the large amount of marijuana alongside the cash located in the vehicle suggested the Applicant was involved in trafficking drugs.

[43] The Decision found it was reasonable to have concerns regarding the Applicant’s involvement in drug trafficking given that the restricted area of an airport is a privilege which requires a high level of integrity and trust.

[44] The Decision considered the Applicant's written submissions and positive character references but noted that no explanation was provided for why the Applicant was trafficking marijuana.

[45] It was found to be reasonable to believe that drug trafficking is more than a simple mistake. The Delegate believed "it is a lifestyle, as drug trafficking is an organized, premeditated, and somewhat sophisticated act". In addition, it was noted that while no other drugs were involved, at the time of the incident possession and/or trafficking of marijuana was illegal.

[46] The Delegate also questioned whether enough time had elapsed since the incident to demonstrate that the Applicant had changed his behaviour. It was concluded that the information on file led the Delegate to reasonably believe, on a balance of probabilities, that the Applicant 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. As a result, the Applicant's application for a TSC was refused.

VII. Issues

[47] The Applicant raises a number of issues involving both the process of arriving at the Decision and the outcome.

[48] In essence, the Applicant alleges that the process was procedurally unfair and the Decision is unreasonable.

[49] The Applicant states that the process failed to provide him with the right to be heard and he did not have a meaningful opportunity to respond. He also states there was undue delay in the process and his right to liberty of the person was violated. He adds that he did not have a fair and impartial decision-maker nor did he receive adequate reasons.

[50] The Applicant concludes his objections by saying that errors of policy and errors of fact were made in arriving at the Decision.

[51] I find there are two issues in this application:

1. Whether there was a breach of procedural fairness in arriving at the Decision.
2. Whether the Decision is reasonable.

[52] The specific allegations raised by the Applicant will be discussed within these two issues.

VIII. **Standard of Review**

A. *Procedural Fairness*

[53] The presumption of reasonableness does not apply to an issue involving a breach of natural justice: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

[*Vavilov*] at para 23.

[54] In fact, whether the duty of procedural fairness has been met does not require a standard of review analysis, although it is often referred to as a correctness review. The ultimate question

to be answered by a reviewing Court is whether an applicant knew the case to be met and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [CPR] at para 56.

[55] The Federal Court of Appeal has confirmed in security clearance matters that “[t]he nature of the [Minister’s] decision and the statutory scheme militate towards reduced levels of procedural fairness”: *Henri v Canada (Attorney General)*, 2016 FCA 38, [Henri] at para 25, leave to appeal denied September 15, 2016, SCC No. 36944.

B. *Reasonableness Review*

[56] The Supreme Court of Canada in *Vavilov* has restated how a reviewing court is to conduct a reasonableness review by confirming that when the merits of an administrative decision are judicially reviewed, the applicable standard of review is presumed to be reasonableness: *Vavilov* at para 23.

[57] While the reasonableness presumption is rebuttable in certain circumstances, none of those exceptions apply in this matter.

[58] The well-known administrative law requirement that the reasons must demonstrate a decision is transparent, intelligible and justified remains alive and well: *Vavilov* at para 15.

[59] The focus of reasonableness review has been sharpened in *Vavilov* by confirming that both the reasoning process and the outcome of a decision are to be considered in assessing whether a decision is reasonable: *Vavilov* at para 86.

[60] Finally, “a reasonable decision is one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker.” When that requirement is met, a reviewing court is required to defer to the decision: *Vavilov* at para 85, my emphasis.

[61] The standard of review for the refusal of the Applicant’s security clearance in all matters not involving procedural fairness is presumptively, reasonableness. It has not been rebutted by any of the circumstances of this matter.

IX. **There was no breach of procedural fairness**

A. *The applicant’s participatory rights*

[62] The nature of an applicant’s participatory rights when applying for a TSC were recently reviewed by Justice John Norris in *Haque v Canada (Attorney General)*, 2018 FC 651 [*Haque*].

[63] Justice Norris considered whether the level of procedural rights was different for a first time applicant for a TSC as opposed to someone who already has a TSC but it is being revoked, cancelled or suspended. He concluded that the issue had become less important as the Minister of

Transport is now extending the same participatory rights to both prospective and existing TSC holders.

[64] Those rights, as set out in *Haque* at para 64 are:

Under current practice, the following participatory rights are extended to both prospective and existing TSC holders:

- Both are informed to the extent that the law permits of the information that has raised concerns about their suitability to hold a TSC;
- Both are informed of the criteria for determining one's suitability for a TSC;
- Both are given the opportunity to make written representations and provide information addressing the areas of concern;
- In both cases, any written representations or information provided by the individual are considered by the Advisory Body before it makes a recommendation to the Minister or his delegate; and
- In both cases, the written representations or information provided by the individual are considered by the Minister or his delegate before a final decision is made.

[65] Whether these rights were provided to the Applicant will be examined below when considering his stated grounds for alleging procedural unfairness.

B. *The Applicant's grounds for stating he did not receive his participatory rights*

[66] The Applicant raises several grounds to substantiate his allegation that he did not receive the basic elements of procedural fairness. To that end, he says:

1. He was not heard nor did he receive a meaningful opportunity to respond;

2. He was subjected to undue delay when the Decision was not released in a timely manner;
3. His right to liberty of the person was severely affected over the sixteen month period between the Advisory Body's recommendation and the release of the Decision; as, during that time, he could have obtained new meaningful work and made decisions regarding his career; he also was psychologically and emotionally affected by the loss of his employment which he had held for four years.
4. Given the evidence he submitted, the conclusion in the Decision suggests that he did not have a fair and impartial decision-maker.
5. His legitimate expectation was that there would be some procedural protection given his four years free of disciplinary action while employed in the airline industry;
6. He did not receive adequate reasons; and,
7. The Decision contained errors of fact and of policy.

C. *The Applicant was heard and did receive a meaningful opportunity to respond*

[67] I will begin by reviewing whether the Applicant received the benefit of the participatory rights outlined by Justice Norris in *Haque*.

[68] Evidence that the Applicant received those rights by way of disclosure of the case to be met and the opportunity to respond and be heard is found in the contents of the Certified Tribunal Record (the CTR). In addition to the Decision, the CTR contains the documents that

were before the Advisory Body and the Delegate. The CTR includes the fairness letter and four notes to file recording questions asked by the applicant and the responses given to him. The CTR also contains the TSCPP, the Applicant's application for a TSC, the LERC report, the Applicant's written submissions, the character reference letters, the Advisory Body's Record of Recommendation and Record Discussion, and a one-page Case Management Case Summary dated August 15, 2018 which notes that the criminal charges had been withdrawn.

[69] In the fairness letter the Applicant was informed of the information that raised concerns about his suitability to hold a TSC. This was done by advising the applicant that adverse information had come to their attention and then detailing the information contained in the LERC.

[70] The Applicant was informed of the criteria for determining his suitability for a TSC by being referred to the TSCPP, provided with the URL for online access and advised specifically that the grounds on which his application could be granted or refused would be found at section I.4 of the TSCPP.

[71] In the penultimate paragraph of the fairness letter, which is set out in full at paragraph 79 of these reasons and is summarized in the Background Facts and Dates, the Applicant was given the opportunity to make written representations. He was encouraged to provide information outlining the circumstances surrounding the incident as well as to provide additional information as detailed in the fairness letter.

[72] The Applicant's written representations and the character letters he provided from others were acknowledged and considered by the Advisory Body before it made a recommendation to the Minister or his delegate.

[73] The written representations and information provided by the Applicant were then considered by the Delegate before the final decision was made.

[74] Notwithstanding the foregoing, the Applicant submits he was not advised of the case to be met nor did he have a fair opportunity to respond.

[75] To substantiate this, the Applicant relies on two arguments.

[76] Firstly, he says that significant facts that are likely to affect the outcome of the case "must be provided as required by the applicant".

[77] It appears, based on the above and the balance of the arguments, that the Applicant expected specific instructions on what information would assist his case. For example, he indicates that he made efforts to gain clarification of specific requirements to address in his response, but the only answer he received was that he should provide "all information relevant" and, for him, that did not add clarification.

[78] A review of the fairness letter shows that it outlined the events recited in the LERC report and acknowledged the charge against the Applicant had been withdrawn. It also provided the

Applicant with the website URL for the location of TSCPP. The letter then specifically refers to section 1.4 of the TSCPP as the location of the various grounds upon which the Advisory Body might make a recommendation.

[79] I disagree with the Applicant that there was little indication in the fairness letter of the kind of evidence the Advisory Body expected to receive. In addition to the information outlined above, the penultimate paragraph of the fairness letter states:

Transport Canada would encourage you to provide additional information in writing, outlining the circumstances surrounding the above-noted incident, as well as to provide any other relevant information or explanation, including any extenuating circumstances, within 20 days of receipt of this letter. Any information you provide will be carefully considered in making the decision in respect of your security clearance.

[80] My review of the CTR indicates that the evidence and information being relied upon in refusing to issue a TSC to the Applicant was fully shared with him.

[81] The Applicant objects that the refusal letter found that he had not provided an explanation for why he was trafficking in marijuana, and if he had been asked to answer that, he would have done so.

[82] The Applicant was invited to make an explanation, outline circumstances of the incident and add any relevant information or provide any extenuating circumstances.

[83] Not having done so, the Applicant now says that if “they had made clarification of those relied upon facts” when he requested clarification he would have willingly made testimony in his initial affidavit.

[84] While I realize that an instruction to send “any other relevant information or explanation”, is not explicit, it is not the job of the decision-maker to outline each and every particular ground upon which a security clearance may be denied: *Dhesi v Canada (Attorney General)*, 2018 FC 283 at para 27 and cases cited therein.

[85] As to the Applicant’s argument that he required clarification and was dissatisfied with what he received, the jurisprudence in this area is clear. The Advisory Body has no obligation to apprise an Applicant of deficiencies in their response to the concerns raised, or to give them a further opportunity to address any outstanding concerns: *Ritchie v Canada (Attorney General)*, 2020 FC 342 [*Ritchie*] at para 19.

[86] The Applicant was fully aware that the charge in the incident at issue was possession for the purpose, which is trafficking. Any explanation by the Applicant as to why he was so engaged could have been helpful. If, as he alleges, he had a good reason or explanation for it, he certainly was given the opportunity to provide it. While the Applicant proffered an explanation in his submissions in this application, that information was not before the Advisory Body or the Delegate and it cannot be considered in addressing any of the issues in this application. Having said that, it is far from certain that the information would have led to a different result if it had been submitted to the Advisory Body.

[87] On not receiving any explanation at all for the incident under consideration, it was both reasonable and procedurally fair for the Advisory Body to proceed without asking for more information. Neither the Advisory Body nor the Delegate were required to give the Applicant a second opportunity to respond: *Dhesi* at para 27.

[88] For the foregoing reasons, I find that the Applicant has failed to meet his onus to show that he did not know the case to be met or that he was not provided with the opportunity to respond.

D. *The delay in releasing the Decision was not unfair or unreasonable nor was the applicant's liberty affected*

[89] The Applicant raises several arguments involving what he says was a delay varying in length from “37 months for the Tribunal to reach a decision” to “16 months to communicate the decision . . . when a decision has already been reached by the Tribunal”. He also states it was “unreasonable that during a delay of 16 months that [he was] allowed to be rehired when a decision has already been reached by the Tribunal.”

[90] One set of arguments is that the ‘delay’ in receiving a decision allowed the Applicant to remain employed by WestJet for almost 4 years and to be re-hired by Swoop in that period as a Flight Attendant. In that passage of time, the Applicant had to obtain another temporary clearance. He says that at that time the Advisory Body, without his knowledge, had already decided to refuse his security clearance and the repercussion to him was “a 16 month setback in his career” as he continued to work for Swoop until the Decision was communicated.

[91] This argument that the delay was procedurally unfair to the Applicant is virtually the same as one made in *Ritchie*.

[92] There the applicant, Ms. Ritchie, noted that she was permitted to continue working for almost two years after she responded to the Advisory Body's letter of concern. Justice Fothergill found that while that length of time 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. He determined that the Delegate's decision was procedurally fair: *Ritchie* at para 20.

[93] Considering the jurisprudence of this Court, I find that the passage of 16 months does not ground a finding of procedural unfairness nor trigger a duty to provide the Applicant with a further opportunity to respond. I also find that it does not support a finding that the Decision was unreasonable.

[94] The Applicant alleges that he should have been told of the Advisory Body's decision as he would not have continued his employment if he had known it was negative. The Applicant says that had he known he would not receive a TSC and therefore would have no future career in the aviation industry, he would have pursued other employment.

[95] I do not accept this argument. In making it, the Applicant either overlooks or does not accept the fact that the Advisory Body only makes a recommendation to the Minister. The final decision in this case was made by the Delegate appointed by the Minister. The Delegate made

the Decision only after receiving, reviewing and considering the recommendation of the Advisory Body.

[96] Given the original charges against him and knowing that his security clearance was being questioned, it is my view that the Applicant ought to have known there was a reasonable degree of possibility that he would not receive a TSC and, at that time, he would no longer be able to work in the aviation industry. Nonetheless, the Applicant freely chose to remain employed at WestJet and Swoop rather than pursue other possible employment opportunities. He cannot now, with hindsight, blame the passage of 16 months to release the Decision for having done so.

[97] The Applicant's argument that the 16 month delay affected his liberty is made on the same basis. He says his liberty to obtain new meaningful work and make decisions regarding his career was impacted by the delay. In that context the word "liberty" appears to equate to "freedom" as opposed to a *Charter* right to liberty or not being incarcerated for a criminal offence. As determined above, the Applicant was free to pursue other employment but chose not to even though he ought to have realized that there was a chance that he would be refused a TSC. In any event, the Applicant has presented no legal authority to support this liberty argument, which I find to be without merit.

[98] The Applicant's final argument in this area is that he was psychologically and emotionally affected by the loss of his employment to which he had been fully committed for 4 years. No evidence of any such psychological or emotional harm was tendered by the Applicant. As a result, there is nothing to consider.

[99] Considering the very broad discretion given to the Minister in section 4.8 of the Act and the importance to both the Applicant and the general public of carefully determining whether to grant access to restricted areas of an airport, I find that the period of 16 months in this case does not appear to be an unreasonable amount of time over which to have considered the matter.

[100] The passage of time prior to the Decision being reached does not render the Decision unreasonable or unfair.

E. *There is no evidence of bias or that the decision-maker was not fair and impartial*

[101] The Applicant alleges that he did not receive a fair hearing from an impartial decision-maker. He submits that he “formed a “reasonable apprehension of bias” in regards to [the] letter of refusal, as all evidence presented points to the opposed (*sic*).”

[102] The Applicant supports the allegation by saying that given the evidence he submitted, the conclusion in the Decision suggests that he did not have a fair and impartial decision-maker. This is an allegation that the Delegate was biased.

[103] The test for a reasonable apprehension of bias is “[w]hat] would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he [*sic*] think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”: *Oleynik v Canada (Attorney General)*, 2020 FCA 5 [*Oleynik*], at para 56.

[104] Once there is an allegation of an apprehension of bias, the onus is on the allegor to show there was a real likelihood or probability of bias by the decision-maker. It is a high threshold to meet. The grounds put forward to prove the apprehension must be substantial. The threshold for a finding of a reasonable apprehension of bias is a high one, and the burden on the party seeking to establish a reasonable apprehension is correspondingly high: *Oleynik* at para 57.

[105] By alleging that the decision-maker must have been biased because the Applicant's evidence should have persuaded them to arrive at a different conclusion, the Applicant is expressing his personal opinion on the quality of the evidence considered by the Advisory Body and the Delegate. By his submission, the Applicant is inviting the Court to re-weigh the evidence, which is not the function of the Court on judicial review: *Dhesi* at para 24.

[106] In fact, absent exceptional circumstances, a reviewing court is strongly instructed by the Supreme Court that it must refrain from "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125. There are no such exceptional circumstances here.

[107] The Applicant submits the Delegate would have arrived at the opposite conclusion if they had properly considered the character evidence he had tendered together with the fact that the criminal charge was withdrawn and he had been employed for 19 months at airports, with supervised access to restricted areas, without any issue.

[108] This submission is also a disagreement with the weighing of the evidence. It does not meet the test for proving bias by the Advisory Body or the Delegate.

[109] I find that the Applicant has not met his onus to show that either the Advisory Body or the Delegate were biased against him.

F. *No legitimate expectation arose on these facts*

[110] The Applicant states that he had a legitimate expectation that he would receive some procedural protection given his conduct of having been employed for 37 months from the date of his application for the TSC to the date of his refusal letter.

[111] The question of whether the Decision was unfair because the Applicant had a legitimate expectation that was not met is another issue of procedural fairness.

[112] A legitimate expectation arises when a government official makes “clear, unambiguous and unqualified” representations within the scope of their authority to an individual about an administrative process that the government will follow: *Canada (Attorney General) v Mavi*, 2011 SCC 30 [*Mavi*] at para 68.

[113] Such representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement: *Mavi* at para 69.

[114] In addition, an important limit on the doctrine is that it cannot give rise to substantive rights. The Court may only grant appropriate procedural remedies to respond to a legitimate expectation: *Agraira* at para 97, (emphasis in original).

[115] I have already determined that the applicant received the appropriate procedural remedies. He has not identified nor stated that he received any clear, unambiguous and unqualified representations that an administrative process, other than the one he received, would be followed.

[116] Even if a legitimate expectation did exist that a particular outcome would be reached, that expectation is not enforceable: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [Agraira] at para 97.

[117] I find that the Applicant has not shown that he held a legitimate expectation that a particular process or practice would be followed and that it was not.

[118] For all the foregoing reasons, I am not persuaded that the Decision was arrived at in a manner that was procedurally unfair, in any way, to the Applicant.

X. **The Decision is reasonable**

[119] The Applicant raises several issues within the umbrella of whether the Decision was unreasonable because of several errors of policy and facts.

[120] The Applicant states the Decision was made with indifference for Transport Canada's policies regarding the cancellation and refusal of clearances found in Part II: Standards Section II.35 of the TSCPP, which has already been summarized in the Overview of the Security Clearance Process.

[121] It is not entirely clear what the Applicant's policy argument is here, but I believe it to be that the TSCPP was not reasonably applied, particularly in light of the letters of reference submitted by the Applicant. In addition, because the charge was withdrawn the Applicant again disputes the outcome finding it to be factually unreasonable that he was determined to be a "risk to aviation".

[122] In assessing the reasonableness of the Decision, the test applied by the Delegate in refusing the TSC is important. If the wrong test was applied, the Decision cannot stand and must be set aside.

[123] The statutory test for determining whether to cancel, suspend, refuse or grant a TSC is very low. The decision-maker need only be satisfied that a person "may be prone or induced" to commit or assist with an act disruptive to civil aviation: TSCPP I.4.4. That is the test that was applied.

[124] In considering the application of the test, it has been held that the granting of a TSC is a privilege rather than a right. A single case of conduct casting doubt on an individual's judgment, reliability and honesty could, in light of the low threshold, suffice to justify the revocation of a security clearance: *Dorélas v Canada (Transport)*, 2019 FC 257 at para 35.

[125] Some of the Applicant's procedural unfairness arguments were also raised as evidence that the Decision was unreasonable. I will not revisit those arguments or my analysis of them

here as I have already determined that they do not support a finding that the Decision was unreasonable.

A. *The Decision was not based on only one fact*

[126] The Applicant says the Decision was made only on the fact that he was charged with possession with intent to traffic marijuana and that is unreasonable. The reasons for Decision are not so narrow.

[127] I disagree. In concluding that the TSC should be refused, the Delegate relied on several facts and factors:

- a) The Applicant agreed that the facts as stated in the fairness letter were accurate;
- b) The large amount of marijuana in his possession was more than necessary for personal use;
- c) That amount had an estimated street value of \$1,640 to \$3,280;
- d) The cash and amount of marijuana, when considered together, suggest the Applicant was involved in trafficking, which is a concern given it is recent and the Applicant seeks access to a restricted area of an airport which requires a high level of integrity and trust;
- e) The positive character references were identified and considered;
- f) No explanation was provided for why the Applicant was trafficking in marijuana;
- g) The Applicant admitted he made a mistake that was out of character;

- h) Trafficking is more than a simple “mistake” it is a lifestyle as it requires an organized, premeditated, and somewhat sophisticated act. A source for the drugs is needed as well as buyers;
- i) The \$2,240 in cash in the car suggests the Applicant may have been trafficking prior to this single incident. Given the recentness and seriousness of the incident, the submissions did not provide sufficient information to address the Delegate’s concerns.

[128] It is self-evident from the factors considered by the Delegate that much more was taken into account than the charge of possession for the purpose of trafficking.

[129] I find the Applicant has not shown that the Decision was made on the basis he alleges or that it is unreasonable.

[130] The Applicant also states that Transport Canada called him unreliable, dishonest, and an organized criminal contrary to the character references he submitted which were “the only non-biased things the Delegate could rely upon.” A careful review of the Decision indicates there was no reference to the Applicant being dishonest or unreliable. The word “criminal” was used in relation to the activity of trafficking but the Delegate confirmed that, with the assistance of the police officer, the Applicant did not have a criminal record.

[131] The most critical element of the Decision is that the Applicant failed to provide an explanation for what happened. This is a reasonable finding. The Applicant was advised in the

fairness letter and in response to his direct inquiry for clarification that he ought to provide any other relevant information or explanation, including any extenuating circumstances.

[132] This argument did not show that the process was procedurally unfair to the Applicant and, for the reasons previously given, it does not show that the Decision is unreasonable.

B. *The Decision contains no errors of fact or policy*

[133] I believe the Applicant's argument here is that the Delegate did not properly apply the TSCPP. My reason for saying so is that in his Memorandum of Fact and Law, at paragraph 46, the Applicant set out a number of facts, most of which have already been discussed. The sixth fact listed at subparagraph 46.f of the Applicant's memorandum has not yet been discussed. It is:

46. The "Applicant" has built a reasonable dependency on his career, predicated on a successful outcome with (*sic*) of a R.A.I.C. clearance. The "Applicant" has built a reasonable dependency based on the conduct of Transport Canada with regards to the:

[. . .]

f. NOT been convicted of charges prohibited by the *Transport Canada Clearance Program Policy*

[134] By his capitalization of the word NOT, it appears the Applicant is alleging either that the Delegate wrongly believed the Applicant had been convicted of a criminal offence or, the Delegate wrongly applied the TSCPP. This requires an interpretation that the TSCPP could only apply if the Applicant had been convicted of a criminal charge.

[135] Section II.35.2.a.ii of the TSCPP indicates that a TSC may be cancelled or refused for “any factor that is relevant, . . . including whether the individual, has been convicted or otherwise found guilty . . . of an offence *including but not limited to* . . . trafficking, possession for the purpose of trafficking or exporting or importing under the Controlled Drugs and Substances Act.” (my emphasis)

[136] The Applicant may not have been aware in making this argument that the italicized words noted above are important. In this context, they simply mean that trafficking is only one factor that may be taken into account in determining whether to grant or refuse a TSC application.

[137] The Minister relies on the guidelines in the TSCPP, which is forward looking. When exercising their discretion, the Minister can consider any factor they believe is relevant including criminal charges or prosecutions whether they proceed or end in conviction. The Minister can also look at the underlying factors when determining whether an Applicant may pose a present or future danger to air safety: *Chambers v Canada (Transport)*, 2017 FC 698, (*Chambers*) at para 18.

[138] Given the above, I am satisfied the Delegate did not make an error of fact or policy and the Decision is neither unreasonable nor unfair for those reasons.

C. *The reasons meet the test in Vavilov for reasonable reasons*

[139] The Applicant has also alleged that he had a right to reasons and did not receive them. He believes the character references should have been given considerable weight and he does not

know why his TSC was refused. The Decision only stated that the character references had been read and considered as being positive.

[140] This argument is an allegation that the reasons were not adequate. It is reviewable on a reasonableness standard.

[141] I have itemized the various facts and factors that the Delegate relied upon in deciding to refuse a TSC for the Applicant. I suggest to the Applicant that these facts and factors show ‘why’ his TSC was refused in that collectively they outweighed the character references.

[142] I will now turn to the final matter to be discussed which is whether the reasons in the Decision meet the requirements of reasonableness articulated in *Vavilov*.

[143] The Decision is thorough but it is not lengthy. It is clearly written on two single-spaced pages.

[144] In considering and addressing the Applicant’s various arguments, I have reviewed the Decision from several perspectives and I have discerned no fatal flaws or errors.

[145] My review satisfies me that the Decision it is internally coherent and contains a rational chain of analysis that is justified in relation to the facts and law that constrained the Delegate. On that basis, I am required to defer to it: *Vavilov* at para 85.

[146] I also find the Decision meets the requirements of transparency, intelligibility and justification. Contrary to the Applicant's belief, it addresses how and why the outcome was determined. I am satisfied that the outcome falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Vavilov* at para 86.

[147] For all the reasons given, the application is dismissed, without costs.

JUDGMENT in T-5-20

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name the Respondent as the Attorney General of Canada.
2. The application is dismissed, without costs.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-5-20

STYLE OF CAUSE: ANDREW FARRUGIA v ATTORNEY GENERAL,
MINISTER OF TRANSPORT, CANADA - SAFETY
AND SECURITY - AVIATION SECURITY AND
TRANSPORTATION SECURITY CLEARANCE
ADVISORY BODY

PLACE OF HEARING: HELD BY WAY OF VIDEO CONFERENCE

DATE OF HEARING: MARCH 29, 2021

JUDGMENT AND REASONS: ELLIOTT J.

DATED: OCTOBER 4, 2021

APPEARANCES:

Andrew Farrugia

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Samantha Pillon

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENTS