

Date: 20091118

Docket: T-42-09

Citation: 2009 FC 1182

Ottawa, Ontario, November 18, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

TEJINDER KAUR BHATTHAL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of a decision of the Canadian Air Transport Security Authority's (CATSA) Certification Decision Review (CDR) panel denying the Applicant's request to be reinstated as a certified Pre-Board Screener.

II. Background

[2] The Applicant, Ms. Tejinder Kaur Bhatthal, was employed as a Pre-Board Screener with GARDA from 2001 until January 9, 2008. During this time, she was certified as a Pre-Board

Screener by the CATSA and worked at the Calgary International Airport (Applicant's Memorandum of Fact and Law at para. 1).

[3] On December 18, 2007, the Applicant underwent testing conducted by Ms. Marsha Hammill, a CATSA employee, to be recertified for Explosion Detection X-ray (EDX) (Respondent's Memorandum of Fact and Law at para. 3).

[4] After the Applicant completed the examination, Ms. Hammill noticed that the Applicant had something written on the back of her left hand (Certified Tribunal Record (CTR) at Tab 3, p. 19). Ms. Hammill states that the words were "high", "contrast" and "grayscale", three words which are relevant to the EDX equipment (CTR, Tab 3 at p. 19).

[5] The Applicant was de-certified by the CATSA because a CATSA National Decision Board found she had cheated on the EDX exam (CTR, Tab 3 at p. 18).

[6] The Applicant's employment with GARDA was terminated on January 9, 2008 as a result of the CATSA decision (CTR, Tab 1 at p. 5).

[7] Although that which was written on the Applicant's hand is in dispute, the Applicant did, herself, admit to having written something on her hand for the purpose of studying. Ms. Hammill stated that there were three clearly written words on the Applicant's hand. The Applicant admits that there was writing on her hand, but contends that it was one, faded, word that was irrelevant to

the testing, although she had said it was on her hand for the purpose of studying (CTR, Tab 1 at p. 3; Applicant's Memorandum of Fact and Law at para. 4).

[8] Ms. Michelle Glubrecht, an official from the Applicant's union, took a digital photograph of the Applicant's hand shortly after the incident. Copies of this photograph are in the tribunal record and show something written on the Applicant's left hand, but the copies lack detail and the writing cannot be read (CTR, Tab 4 at pp. 36, 37, 38).

[9] The writing was also seen by Mr. Farhan Malik, a Screening Officer and Ms. Gaganjot Brar, a GARDA Training Manager (CTR, Tab 5 at p. 30). In an email to Ms. Brar, Mr. Malik states that the writing on the Applicant's hand was freshly written and relevant to the EDX machine, although he has not stated what the words actually were. He also states that he saw the Applicant fade the writing by rubbing her hand while being taken by Ms. Hammill to see Ms. Brar (CTR, Tab 5 at p. 31).

[10] In an email, dated December 20, 2007, Mr. Brar states that Ms. Hammill brought the Applicant to see the former after the writing had been discovered. Ms. Brar states that Ms. Hammill told her that the Applicant had the words "high", "contrast" and "grayscale" on her hand and that these words were relevant to the testing. Ms. Brar states that she tried to read the writing but it was illegible (CTR, Tab 5 at p. 32).

III. Issues

[11] (1) Was the CDR panel's decision to refuse to re-certify the Applicant reasonable?

(2) Did the CDR panel give sufficient reasons for rejecting the Applicant's claim?

IV. Decision under Review

[12] The decision of the CDR panel was made by Mr. John Stroud, Vice-President of Strategic and Public Affairs at the CATSA, on December 11, 2008. This decision was made based on the CATSA's authority to de-certify screening officers pursuant to Section 8 of the *Canadian Air Transport Security Authority Act*, S.C., 2002, C. 9, S. 2 (CTR, Tab 7 at p. 47).

[13] Mr. Stroud accepted Ms. Hammill's statement that the Applicant had written "high", "contrast" and "grayscale" on her hand and found that these words relate to imaging functions of the EDX equipment, as stated in Section 18.1.2.9 of the CATSA's Standard Operation Procedures (SOP). Mr. Stroud cited Mr. Sam Russell, Screening Operations Manager with GARDA, who stated that GARDA's investigation determined that the Applicant had cheated on the exam because she had writing on her hand. (In this regard, attention was drawn to Section 18.1-7 of the CATSA SOP.) Mr. Stroud held that the Applicant had not provided evidence that the writing was not relevant to the test (CTR, Tab 7 at p. 49). On these grounds, the CDR panel upheld the Applicant's decertification on the grounds that she had engaged in professional misconduct by having access to information relevant to the exam during her testing (CTR, Tab 7 at p. 50).

V. Summary of Pertinent Submissions

[14] The Applicant claims the CDR panel erred by not making negative credibility findings regarding the evidence of Ms. Hammill. The Applicant submits that Ms. Hammill did not like her personally and that her evidence should be disregarded as a result of this. The Applicant also submits that the panel erred by disregarding evidence that is favourable to her (Applicant's Memorandum of Fact and Law at para. 17).

[15] The Applicant makes a claim under the *Canadian Charter of Rights and Freedoms*, Schedule B, Part I to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter) that the employees of the CATSA and GARDA are discriminated against (Applicant's Memorandum of Fact and Law at para. 18). The Applicant does not submit which section of the Charter has been violated. These proceedings are not the proper forum to make a Charter claim regarding the alleged wrongdoing of the CATSA, as her submissions are not directed towards the behaviour of the decision-maker or at the decision-making process in regard to the judicial review in question.

[16] The Respondent submits that the standard of review of a CDR panel should be reasonableness because the CATSA is involved in interpreting its own statutes and has expertise in this particular area (Respondent's Memorandum of Fact and Law at paras. 11-12). The Respondent submits that it was open to the decision-maker to conclude that the writing was relevant to the testing. The Respondent notes that the Applicant admits that she wrote something on her hand while she studied for the exam and two witnesses recognized that writing as being relevant to the testing (Respondent's Memorandum of Fact and Law at para. 16).

VI. Standard of Review

[17] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraphs 62, 64, the Supreme Court set out the applicable test for assessing the standard of review. The Court must first ascertain whether past jurisprudence has satisfactorily determined the standard of review with regard to the particular category of question. If the standard of review has not yet been determined, the Court will examine the four following factors: (1) presence of a privative clause; (2) purpose of the tribunal as set out in its enabling legislation; (3) the nature of the question at issue; (4) the expertise of the tribunal.

[18] Although there is no privative clause in the *Canadian Air Transport Security Authority Act*, it is clear that deference should be given to this decision. The purpose of the tribunal can be seen from the mandate of the CATSA, as established in Section 6 of the *Canadian Air Transport Security Authority Act*. Subsection 6(3) states that the CATSA must “carry out its responsibilities under this section in the public interest, having due regard to the interest of the travelling public.” Also, subsection 6(1) states that the mandate of the CATSA is to “take actions, either directly or through a screening contractor, for the effective and efficient screening of persons who access aircraft or restricted areas through screening points”. It is clear from this mandate that the decisions of the CATSA involve the balancing of public policies and must be given deference as a result.

[19] The questions before the tribunal are factual. In the case of *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, the Supreme Court held that subparagraph 18.1(4)(i) of the *Federal Courts Act*, R.S., 1985, c. F-7, gives a high degree of

deference to administrative fact finding (*Khosa* at para. 46). The CDR panel had to review an investigation from GARDA and make credibility findings.

[20] The tribunal has expertise in the area of the certification of screening officers. Subsection 6(2) mandates that the CATSA is “responsible for ensuring consistency in the delivery of screening across Canada and for any other air transport security function provided for in this Act.” In addition to this, as the Respondent points out, the decision-maker in this case has worked with the CATSA since its inception and, as a result, has expertise in the internal workings of the CATSA (Respondent’s Record, Tab C; Section 8 of the *Canadian Air Transport Security Authority Act* gives the CATSA the authority to create its own procedures for certifying screening officers and the CATSA must be given sufficient deference to enforce its own policies.

[21] Based on the above analysis, the standard of review to be applied to a CDR panel is reasonableness.

[22] In *Dunsmuir*, the Court held that reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process, as well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para. 47).

VII. Relevant Legislative Provisions

[23] The Tribunal Record is complete except for two items that cannot be disclosed due to the operation of Section 4.79 of the *Aeronautics Act*, R.S., 1985, c. A-2. Section 4.79 states:

Unauthorized Disclosure

Unauthorized disclosure — security measures

4.79 (1) Unless the Minister states under subsection 4.72(3) that this subsection does not apply in respect of a security measure, no person other than the person who made the security measure shall disclose its substance to any other person unless the disclosure is required by law or is necessary to give effect to the security measure.

Court to inform Minister

(2) If, in any proceedings before a court or other body having jurisdiction to compel the production or discovery of information, a request is made for the production or discovery of any security measure, the court or other body shall, if the Minister is not a party to the proceedings, cause a notice of the request to be given to the Minister, and, *in camera*, examine the security measure and give the Minister a reasonable opportunity to make representations with

Communications illicites

Secret des mesures de sûreté

4.79 (1) Sauf si le ministre soustrait la mesure de sûreté à l'application du présent paragraphe en vertu du paragraphe 4.72(3), seule la personne qui a pris la mesure peut en communiquer la teneur, sauf si la communication est soit légalement exigée, soit nécessaire pour la rendre efficace.

Avis au ministre

(2) Dans le cadre d'une procédure engagée devant lui, le tribunal ou tout autre organisme habilité à exiger la production et l'examen de renseignements et qui est saisi d'une demande à cet effet relativement à une mesure de sûreté aérienne fait notifier la demande au ministre si celui-ci n'est pas déjà partie à la procédure et, après examen de ces éléments à huis clos, lui donne la possibilité de présenter ses observations à ce sujet.

respect to it.

Order

(3) If the court or other body concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest in aviation security, the court or other body shall order the production or discovery of the security measure, subject to any restrictions or conditions that the court or other body considers appropriate, and may require any person to give evidence that relates to the security measure.

Ordonnance

(3) S'il conclut que, en l'espèce, l'intérêt public en ce qui touche la bonne administration de la justice a prépondérance sur l'intérêt public en ce qui touche la sûreté aérienne, le tribunal ou autre organisme doit ordonner la production et l'examen de la mesure de sûreté, sous réserve des restrictions ou conditions qu'il juge indiquées; il peut en outre enjoindre à toute personne de témoigner au sujet de la mesure.

[24] The mandate of the CATSA is set out in Section 6 of the *Canadian Air Transport Security*

Authority Act:

Mandate

6. (1) The mandate of the Authority is to take actions, either directly or through a screening contractor, for the effective and efficient screening of persons who access aircraft or restricted areas through screening points, the property in their possession or control and the belongings or baggage that they give to an air carrier for transport. Restricted areas are those established under the

Mission

6. (1) L'Administration a pour mission de prendre, soit directement, soit par l'entremise d'un fournisseur de services de contrôle, des mesures en vue de fournir un contrôle efficace des personnes — ainsi que des biens en leur possession ou sous leur contrôle, ou des effets personnels ou des bagages qu'elles confient à une compagnie aérienne en vue de leur transport — qui ont accès,

Aeronautics Act at an aerodrome designated by the regulations or at any other place that the Minister may designate.

par des points de contrôle, à un aéronef ou à une zone réglementée désignée sous le régime de la *Loi sur l'aéronautique* dans un aéroport désigné par règlement ou dans tout autre endroit désigné par le ministre.

Other responsibilities

(2) The Authority is responsible for ensuring consistency in the delivery of screening across Canada and for any other air transport security function provided for in this Act. It is also responsible for air transport security functions that the Minister may assign to it, subject to any terms and conditions that the Minister may establish.

Mission supplémentaire

(2) L'Administration veille à ce que le niveau de contrôle soit uniforme partout au Canada et exécute également les autres fonctions liées à la sûreté du transport aérien que prévoit la présente loi et celles que le ministre, sous réserve des modalités qu'il détermine, lui confère.

Carrying out mandate

(3) The Authority must carry out its responsibilities under this section in the public interest, having due regard to the interest of the travelling public. Those responsibilities are a governmental function.

Fonctions administratives

(3) L'Administration exerce les attributions qui lui sont confiées sous le régime du présent article dans l'intérêt public et en tenant compte des intérêts des voyageurs; ces attributions sont exercées à titre de fonctions administratives.

[25] The CATSA decertified the Applicant pursuant to its authority in Section 8 of the *Canadian Air Transport Security Authority Act*:

Criteria for screening
contractors and officers

8. (1) The Authority must establish criteria respecting the qualifications, training and performance of screening contractors and screening officers, that are as stringent as or more stringent than the standards established in the aviation security regulations made under the *Aeronautics Act*.

Critères

8. (1) L'Administration établit des critères de qualification, de formation et de rendement, applicables aux fournisseurs de services de contrôle et aux agents de contrôle, qui sont au moins aussi sévères que les normes qui sont établies dans les règlements sur la sûreté aérienne pris sous le régime de la *Loi sur l'aéronautique*.

Certification

(2) The Authority must certify all screening contractors and officers against the criteria established under subsection (1).
Varying, suspending or cancelling certification

Certificat

(2) L'Administration accorde un certificat de conformité aux fournisseurs et aux agents qui se conforment aux critères.

Varying, suspending or
cancelling

(3) If the Authority determines that a screening contractor or officer no longer meets the criteria in respect of which they were certified, the Authority may vary, suspend or cancel their certification.
Contracting

Modification, suspension et
annulation

(3) L'Administration peut modifier, suspendre ou annuler un certificat si elle conclut que son titulaire ne se conforme plus aux critères.

Contracting

(4) The Authority may establish contracting policies specifying minimum requirements respecting wages and terms and conditions of employment that persons must meet in order to be awarded a contract by or on behalf of the Authority for the delivery of screening. The Authority must establish such policies if required to do so by the Minister.

Contracts for services or procurement

(5) The Authority must establish policies and procedures for contracts for services and for procurement that ensure that the Authority's operational requirements are always met and that promote transparency, openness, fairness and value for money in purchasing.

Politique contractuelle

(4) L'Administration peut — mais est tenue de le faire si le ministre le lui ordonne — établir une politique contractuelle qui précise les normes minimales que la personne qui souhaite conclure un contrat de fourniture de services de contrôle doit respecter quant aux salaires et conditions de travail applicables aux agents de contrôle embauchés.

Achat de biens et de services

(5) L'Administration établit les règles et méthodes à suivre concernant les contrats de fourniture de biens et de services qui garantissent l'importance primordiale de ses besoins opérationnels et qui favorisent la transparence, l'ouverture, l'équité et l'achat au meilleur prix.

VIII. AnalysisIssue 1: Was the CDR panel's decision to refuse to re-certify the Applicant reasonable?

[26] The CATSA is a federal government agency that was established by the *Canadian Air Transport Security Authority Act* in response to the events of September 11, 2001. Its mandate is to protect the public by securing Canada's air transportation system. As such, the CATSA is responsible for the provision of services such as pre-board screening, the area in which the Applicant was employed. The CATSA contracts with screening contractors, such as the Applicant's

former employer, GARDA, to provide these services. Although the CATSA contracts for the provision of services, the *Canadian Air Transport Security Authority Act* makes the CATSA responsible for training and certifying screening officers. The CATSA SOP governs every aspect of the Screening Officer position.

[27] It is clear that the CDR panel's decision turns on Ms. Hammill's version of events on the basis of the factual evidence as a whole. Recognizing that the actual writing in the Respondent's hand, she admitted she had herself written for the purpose of studying for the exam. It is well-known that a reviewing court must give deference to credibility findings made by administrative decision-makers (*Jamil v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 792, 295 F.T.R. 149 at para. 16).

[28] In this case, based on this standard of review, it is not for the Court to interfere with the decision of the CDR, if reasonable in light of the evidence, because it was up to the CATSA, as master of its domain of airport security, to weigh the evidence before it.

Issue 2: Did the CDR panel provide sufficient reasons in support of its decisions?

[29] The Applicant and Ms. Hammill have contradictory versions as to what was written on the Applicant's hand. It is clear from the tribunal record that Ms. Hammill was the only person to identify the words; this means the CDR panel's decision is based on a finding that Ms. Hammill is credible. The CDR panel may come to its own findings regarding the credibility of witnesses based on a clear explanation for findings as is required in order to give sufficient reasons (Donald J.M.

Brown et al., *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto, Ontario: Canvasback Publishing Inc., 2008) at para. 12:5320). The evidence of the Applicant in respect to her having written on her hand, in and of itself, is that which gave the measure of clarity required on the basis of the referred record.

[30] The material before the decision-maker must be carefully analyzed. Ms. Hammill states she noticed the writing on the Applicant's hand after the Applicant had failed the EDX testing (CTR, Tab 3 at p. 19). Mr. Riyaz Khawaja, a GARDA screening officer, states that he heard Ms. Hammill inform the Applicant that she passed the exam and only noticed the writing after the Applicant gave Ms. Hammill her certification papers (CTR, Tab 4 at p. 35). Mr. Malik, another screening officer, also states that he heard Ms. Hammill inform the Applicant she had passed the exam (CTR, Tab 5 at p. 31). In addition to this, Ms. Brar, the CATSA Training Manager who saw Ms. Hammill and the Applicant immediately after the writing was discovered had a chance to examine the hand closely and could not read what was written, yet, something had been written (CTR, Tab 5 at p. 32). Finally, in a CDR interview, Ms. Hammill stated that she had not informed the Applicant that she had failed the exam (CTR, Tab 8 at p. 72).

[31] There are significant inconsistencies in the Applicant's evidence. While the Applicant admits that she had written one word on her hand that had been scribbled and faded, both Mr. Malik and Ms. Hammill saw several dark, freshly written words (CTR, Tab 5 at p. 31). Ms. Brar, also, states that the Applicant informed her that the writing was a phone number. This contradicted the Applicant's own admission in her submissions that it was a word she had written earlier in the day

to help study for the test. The Applicant states she has no memory of saying it was a phone number (CTR, Tab 5 at p. 32 and Tab 6 at p. 45). In her affidavit before this Court, the Applicant states that she wrote “words” on her hands (Applicant’s Record, p. 9 at para. 13). This is inconsistent with the Applicant’s submission that she only wrote a single word. The Applicant has never stated what words she wrote on her hand but never contradicted that she had written on her hand for studying purposes.

[32] Although it is true that the CDR panel’s reasons point to evidence other than Ms. Hammill’s statement, such as the statements of Mr. Malik and Mr. Khawaja, this evidence merely proves that the Applicant had writing on her hand. (CTR, Tab 7 at p. 48).

[33] It is clear from the reasons that the critical finding of the CDR panel is that there was writing on the Applicant’s hand. As has been shown, that finding is at the very basis of a credibility finding. Given the jurisprudence and the evidence before the CDR panel, it is the Court’s conclusion that the CDR panel found Ms. Hammill’s evidence more compelling than the Applicant’s. That did occur through the evidence that the Respondent herself had admitted to having written on her hand and corroboration from two witnesses specified that her hand had writing on it.

[34] In the case of *Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services* (1985), 9 O.A.C. 205, 51 O.R. (2d) 302, the Court held that if a board rejects a claim on the ground of credibility, it owes a duty to the claimant to clearly state its grounds for disbelief (*Re Pitts* at para. 30). The Court quoted Sir Robert McGarry in saying “[i]n order that faith may be

maintained in the legal system, it is necessary that losing parties be satisfied that they have been fairly dealt with, that their position has been understood by the judge, and that it has been properly weighed and considered” (*Re Pitts* at para. 31).

[35] The CDR panel explicitly states the reason for the Applicant’s decertification was that she had information in her possession that was relevant to the testing (as what was studied for, was what was tested).

[36] The Applicant herself had admitted in an October 14, 2008 letter that her actions should have resulted in her failure of the EDX endorsement:

- a. I fully understand and certainly regret that I committed a grievous error in judgment by having writing on my hand prior to commencing a certification test. Further, I understand that this error did, and should have, resulted in my EDX Certification failure. That being said, as EDX is a specialized function, I believe that failing EDX certification should not impact my Level 3 PBSO certification.

[37] It is a reasonable finding that the Applicant’s action resulted in revocation of her Personal Conduct Endorsement. A screening officer must have all of her endorsements to remain certified; the loss of the Personal Conduct Endorsement leads to decertification and that is not unreasonable (*Takoff v. Toronto Stock Exchange* (1986), 11 C.C.E.L. 272, 35 A.C.W.S. (2d) 155; *Thomas v. Canada (House of Commons)*, 1991 CarswellNat. 1668).

IX. Conclusion

[38] Although it is incumbent on this Court to specify that a few, clear sentences, even if brief, acknowledging contradiction on the part of certain witnesses would have been more accurate of an analysis to ensure a greater measure of synthesis which, although somewhat absent, does not change the reasonableness of the outcome.

[39] As has been said, the CDR panel's decision is reasonable, recognizing that the Applicant admitted to having writing on her left hand, and even stated on one occasion that it was a "word" and on another that "words" were written thereon. The Applicant also qualified that the writing was for the purpose of studying; therefore, on the Applicant's evidence alone, the decision is reasonable. Thus, it was open to the panel to reach such a decision. Although, the evidence of certain persons was somewhat contradictory, nevertheless the evidence of the Applicant herself is conclusive in respect of the panel's decision, recognizing that, if only for the Applicant's own evidence in respect of the writing, the panel's decision is reasonable.

JUDGMENT

THIS COURT ORDERS that the Application be denied with costs in the sum of one thousand dollars.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-42-09

STYLE OF CAUSE: TEJINDER KAUR BHATTHAL v.
THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: November 4, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: November 18, 2009

APPEARANCES:

Ms. Tejinder Kaur Bhatthal FOR THE APPLICANT

Mr. Barry Benkendorf FOR THE RESPONDENT

SOLICITORS OF RECORD:

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