

Federal Court



Cour fédérale

**Date: 20131010**

**Docket: T-1317-12**

**Citation: 2013 FC 1030**

**Ottawa, Ontario, October 10, 2013**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**DARYL PAUL DOLINSKI**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. INTRODUCTION**

[1] Mr. Daryl Paul Dolinski (the “Applicant”) seeks judicial review of the decision of the Minister of Transport, Infrastructure and Communities (the “Minister”), dated June 6, 2012. In this decision, the Director General of Aviation Security, on behalf of the Minister, cancelled the Applicant’s security clearance, pursuant to section 4.8 of the *Aeronautics Act*, R.S.C. 1985, c. A-2 (the “Act”) and the Transportation Security Clearance Program (“TSCP”).

[2] The application for judicial review is taken pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7 and the *Federal Courts Rules*, SOR/98-106 (the “Rules”).

[3] The Attorney General of Canada (the “Respondent”) represents the Minister in this proceeding.

## **II. FACTS**

[4] The Applicant obtained security clearance at the Edmonton International Airport in 2006. On January 25, 2007, he and another airport employee were apprehended smoking marijuana in the Applicant’s car. Marijuana and a scale were also found in the car. The Applicant was charged for possession of marijuana but the charge was withdrawn.

[5] In 2008, the Applicant began working for Air Canada as a baggage handler.

[6] On February 23, 2009, the Applicant was pulled over by the police. The officer observed what he believed to be marijuana and charged the Applicant with possession of a controlled substance. The officer also found \$1180 in cash and fifty ecstasy tablets. As well, the officer found messages on the Applicant’s cell phone from people asking to buy drugs and received a call from someone asking to “get two”.

[7] The Applicant was charged with possession of a controlled substance for the purpose of trafficking under subsection 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the “CDSA”) and possession of the proceeds of crime under subsection 355(b) of the *Criminal Code*,

R.S.C., 1985, c. C-46. On December 7, 2009, the Applicant pled guilty to the lesser offence of possession of a controlled substance under subsection 4(1) of the CDSA and received a conditional discharge with twelve months probation. The Applicant retained his security clearance and continued to work for Air Canada. On April 3, 2011, he applied for renewal of his security clearance.

[8] By letter dated March 27, 2012, the Applicant was informed by N. Dupuis, the Chief of Security Screening Programs, Security Programs Support at Transport Canada, that his security clearance would be reviewed by the Transportation Security Clearance Advisory Body. The reason for the review was that information had been obtained which raised concerns about the Applicant's suitability for clearance, that is information about the January 2007 and February 2009 incidents.

[9] On April 12, 2012, the Applicant submitted a letter explaining the two incidents, a letter from his lawyer, a letter from his supervisor, and a letter from a Dr. Pagliaro, an expert witness who had been retained by the Applicant in connection with the criminal charges against him.

[10] On April 20, 2012, the Applicant's security clearance was automatically renewed on the basis of a policy permitting automatic renewal, given the length of the review process. On April 25, 2012, the Applicant phoned the Edmonton International Airport Pass Control Office which informed him of the renewal and he began to use this pass.

### **III. DECISION UNDER REVIEW**

[11] On May 10, 2012, the Advisory Board reviewed the Applicant's security clearance and recommended that it be cancelled. On June 6, 2012, the Director General of Aviation Security, for the Minister, decided to cancel the Applicant's security clearance. The decision referred to the information which the Applicant provided.

[12] The Director General concluded that the information regarding the Applicant's recent drug-related criminal offences, including the information regarding texts and calls to his phone from individuals asking to buy drugs, led him to believe that on a balance of probabilities the Applicant might be prone to commit an act, or assist or abet an individual to commit an act, that may unlawfully interfere with civil aviation. The Director General also stated that the Applicant's written statement did not contain sufficient information to address his concerns and that insufficient time had passed to demonstrate a change in the Applicant's behaviour.

[13] By letter dated June 7, 2012, the Applicant was advised by the Director General of Aviation Security that the Minister had cancelled his transportation security clearance. The reasons provided in this letter are the same as those in the decision of June 6, 2012.

### **IV. SUBMISSIONS**

[14] The Applicant argues that the decision was unreasonable. Section I.4 of the TSCP requires that the Minister hold a reasonable belief that a person may be prone to commit an act that unlawfully interferes with civil aviation, or to assist or abet a person in committing such an act.

Relevant factors set out in section II.35(2)(a) of the TSCP include convictions for trafficking or possession for the purpose of trafficking, exporting, or importing, under the CDSA.

[15] The Applicant submits that he was not convicted of such offences, but rather of possession, for which he received a conditional discharge. Although the Court noted in *Lavoie v. Canada (Attorney General)*, 2007 FC 435 at paras. 23-26 that a conditional discharge does not prevent the Minister from considering a conviction, in that case the offence was listed in II.35(2)(a). Possession is not included in section II.35(2)(a). He argues that the Minister's decision was based on a factor not contemplated by the TSCP.

[16] For his part, the Respondent argues that the Minister's decision was reasonable. The Minister had to consider whether reinstating the Applicant's security clearance would be contrary to the objectives set out in section I.4 of the TSCP. In making a decision under section I.4.4 of the TSCP, the Minister may consider any relevant factor, including but not limited to, those listed in II.35(2)(a).

[17] The Respondent further submits that the jurisprudence is clear that the Minister may consider relevant factors not enumerated in the TSCP, including criminal charges resulting in a conviction, charges resulting in some other outcome, and conduct not resulting in criminal charges; see the decision in *Fontaine v. Canada (Transport)* (2007), 313 F.T.R. 309.

[18] In *Russo v. Canada (Transport)* (2011), 406 F.T.R. 49, this Court held that the applicant's use of marijuana was a relevant consideration as he associated with criminals when purchasing the

drug. In *Lavoie, supra*, this Court determined that the Advisory Board and Minister were not limited by the lack of a conviction or by the list in II.35(2)(a).

[19] As in *Russo, supra*, the Applicant's association with criminals when purchasing marijuana is a relevant factor. The Minister's decision was also not based solely on the guilty plea and conditional discharge. Rather, the Minister considered several relevant factors including the 2007 charge for possession and the information indicative of drug trafficking.

[20] The Respondent argues that a relatively low standard of proof is applicable to security clearance decisions. A refusal only requires a reasonable belief, on a balance of probabilities, that a person may be prone or induced to act to commit or assist in an act that may unlawfully interfere with civil aviation. A refusal can be based on a reasonable suspicion (*Fontaine, supra*, paras. 74-75, 81-82; *Lavoie, supra*, para. 29; *Clue, supra*, para. 20). Section I.4.4 involves an assessment of a person's character or propensities and does not require evidence of the actual commission of an unlawful act (*Clue, supra*, para. 20).

[21] Here, the Advisory Body noted the conditional discharge and withdrawn charge, the RCMP reports, the Applicant's possession of a scale, the text messages and calls, that he was using drugs on his break at work, the Applicant's failure to address any of the information indicative of dealing, and the recent nature of the incidents.

## **V. DISCUSSION AND DISPOSITION**

[22] The relevant provision of the Act is section 4.8 as follows:

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.

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

[23] The following provisions of the TSCP are also relevant:

I.4 The objective of this Program is to prevent the uncontrolled entry into a restricted area of a listed airport by any individual who

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:

[...]

[...]

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

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

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

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

II.35

II. 35

1. The Advisory Body may recommend to the Minister the cancellation or refusal 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.

1. L'Organisme consultatif peut recommander au ministre de refuser ou d'annuler l'habilitation d'une personne 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. In making the determination referred to in subsection (1), the Advisory

2. Au moment de faire la détermination citée au sous-alinéa (1), l'Organisme consultatif peut considérer tout

Body may consider any factor that is relevant, including whether the individual:

- a. has been convicted or otherwise found guilty in Canada or elsewhere of an offence including, but not limited to:
  - i. any indictable offence punishable by imprisonment for more than 10 years,
  - ii. trafficking, possession for the purpose of trafficking or exporting or importing under the Controlled Drugs and Substances Act,
  - iii. any offences contained in Part VII of the Criminal Code - Disorderly Houses, Gaming and Betting,
  - iv. any contravention of a provision set out in section 160 of the Customs Act,
  - v. any offences under the Security Of Information Act; or
  - vi. any offences under Part III of the Immigration and Refugee Protection Act;

3. 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.

facteur pertinent, y compris:

- a. si la personne a été condamnée ou autrement trouvé coupable au Canada ou à l'étranger pour les infractions suivantes:
  - i. tout acte criminel sujet à une peine d'emprisonnement de 10 ans ou plus;
  - ii. le trafic, la possession dans le but d'en faire le trafic, ou l'exportation ou l'importation dans le cadre de la Loi sur les drogues et substances contrôlées;
  - iii. tout acte criminel cité dans la partie VII du Code criminel intitulée « Maison de désordre, jeux et paris »;
  - iv. tout acte contrevenant à une disposition de l'article 160 de la Loi sur les douanes;
  - v. tout acte stipulé dans la Loi sur les secrets officiels; ou
  - vi. tout acte stipulé dans la partie III de la Loi sur l'immigration et la protection des réfugiés.

3. si elle possède une mauvaise réputation en matière de crédit et qu'elle occupe un poste de confiance; ou

4. qu'il est probable qu'elle participe à des activités directes ou en appui à une menace ou qu'elle se livre à des actes de violence sérieuse contre la propriété ou des personnes.

[24] The TSCP states that the Advisory Board may consider “any factor that is relevant” and that offences to consider include but are not limited to those listed in II.35(2)(a). In *Russo, supra* Justice



Russell dismissed a judicial review application where the applicant had been convicted of possession and production of marijuana, and admitted to continued occasional use of marijuana.

[25] The within application relates to the Minister's decision to cancel a security clearance. This decision is a discretionary one, having regard to section 4.8 of the Act and the provisions of the TSCP cited above. Such a decision is reviewable on the standard of reasonableness; see the decisions in *Fradette v. Canada (Attorney General)*, 2010 FC 884 at para. 17 and *Clue v. Canada (Attorney General)*, 2011 FC 323 at para. 14. Accordingly, the only substantive issue arising is whether the Minister's decision was reasonable.

[26] In my opinion, the Minister's decision was reasonable. The Applicant's argument that the TSCP's drug-related concerns are restricted to trafficking runs counter to the policy's plain language and the wide discretion afforded the Minister.

[27] I am satisfied that the Minister's decision was reasonable in light of the evidence submitted and the applicable standard of proof. In *Clue, supra*, para. 20, Justice Barnes noted that the standard of proof in such cases involves an assessment of a person's character or propensities and does not require evidence of the actual commission of an unlawful act. This rationale was applied in the recent decision of *Peles v. Attorney General of Canada*, 2013 FC 294.

[28] Although the first charge against the Applicant had been withdrawn and he had received a conditional discharge for the second, the Advisory Body noted the evidence suggested trafficking,

that the Applicant had used drugs while on a break from work, and that the events were fairly recent.

[29] This evidence reasonably supports the Minister's conclusion that the Applicant, on a balance of probabilities, might be prone or induced to commit, or to assist or abet an individual to commit, an act that unlawfully interferes with civil aviation.

[30] In the result, the application for judicial review is dismissed. In the exercise of my discretion, pursuant to Rule 400(1) of the Rules I make no order as to costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed, no order as to costs.

"E. Heneghan"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1317-12

**STYLE OF CAUSE:** DARYL PAUL DOLINSKI v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** EDMONTON, ALBERTA

**DATE OF HEARING:** APRIL 10, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** HENEGHAN

J.

**DATED:** OCTOBER 10, 2013

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