

CANADA / JUDGMENT

Singh v. Canada (Attorney General)

2006 FC 802

COURT

Federal Court

DECIDED

23 June 2006

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Docket: T-10-06 Citation: 2006 FC 802 OTTAWA, ONTARIO, June 23, 2006 PRESENT: The
Honourable Mr. Justice von Finckenstein BETWEEN: BHUPINDER SINGH Applicant and
ATTORNEY GENERAL OF CANADA Respondent REASONS FOR ORDER AND ORDER

- [1] The Applicant was born in India and immigrated to Canada on July 14, 2004. He is now a permanent resident. Prior to immigrating to Canada, he worked with the IDBI Bank in India and held a management position from November 1999 to June 2004.
- [2] The Applicant began his employment with Air Canada on April 25, 2005. At that time, he applied for his Transportation Security Certificate ("TSC") for Pearson Airport in Toronto. When his security clearance was denied, Air Canada terminated his employment but stated he can re-apply once he has received his security clearance. The Applicant is now working with the Royal Bank on a casual basis and is struggling to support his family which includes a wife and small child.
- [3] Airport security is governed by the Aeronautics Act, R.S. 1985 c.A-2 (the "Act") sections 4.3(2) and 4.72 and the Canadian Aviation Security Regulations, SOR/2000-111 (the "Regulations") sections 3 and 39. These provisions provide:
- s. 4.3(2) of the Act:
- (2) The Governor in Council may by regulation authorize the Minister to make orders with respect to any matter in respect of which regulations of the Governor in Council under this Part may be made
- (2) Le ministre peut, lorsque le gouverneur en conseil l'y autorise par règlement, prendre des arrêtés en toute matière que ce dernier peut régir par règlement au titre de la présente partie.
- s. 4.72 of the Act:
- (1) The Minister may make measures respecting aviation security. [...]

- (1) Le ministre peut prendre des mesures pour la sûreté aérienne. [...] Section 3 of the Regulations:
3. (1) Under subsection 4.3(2) of the Act, the Minister is authorized to make orders with respect to aviation security for the purposes referred to in subsection 4.7(2) of the Act, including orders prescribing security measures, applicable to
- a) aerodrome operators serving air carriers; [...]
3. (1) En vertu du paragraphe 4.3(2) de la Loi, le ministre est autorisé à prendre des arrêtés régissant la sûreté aérienne aux fins visées au paragraphe 4.7(2) de cette loi, notamment des arrêtés établissant des mesures de sûreté, visant:
- a) les exploitants d'aérodrome qui desservent des transporteurs aériens; [...] Section 39 of the Regulations:
39. A person must not enter a restricted area at an airport at which the Airport Restricted Area Access Clearance Security Measures apply unless
- a) a restricted area pass has been issued to the person for access to the restricted area and, if applicable, the person is subject to the security controls set out in that document; or
- b) the person is authorized by the aerodrome operator to have access to the restricted area in accordance with an order made under subsection 3(1).
39. Il est interdit à toute personne d'entrer dans une zone réglementée d'un aéroport auquel les Mesures de sûreté relatives à l'accès aux zones réglementées d'aéroport s'applique à moins que, selon le cas :
- a) la personne ne détienne un laissez-passer de zone réglementée donnant accès à celle-ci et, le cas échéant, qu'elle ne soit assujettie aux contrôles de sûreté indiqués dans ce document;
- b) la personne ne soit autorisée par l'exploitant d'aérodrome à avoir accès à la zone réglementée conformément à un arrêté pris en vertu du paragraphe 3(1).
- [4] The following extracts from the Respondent's Memorandum of Fact and Law set out in detail how airport security with respect to TSC's is administered and how the Applicant's application was handled:
4. The purpose and objective of the Aeronautics Act and Canadian Aviation Security Regulations (the "Regulations"), is to prevent interference with civil aviation, and to promote the safety and security of the public, passengers, crew members, aircraft, aerodromes, and other aviation facilities by, among other things, requiring certain classes of persons to hold a TSC.

5. Security at designated aerodromes ("airports") is governed by the Aeronautics Act and its Regulations and policy. The Regulations provide, in part, that restricted areas of airports are only accessible to persons holding a Restricted Area Pass. However, before operators of designated airports can issue a Restricted Area Pass, the person must be granted a TSC by the Minister under the Airport Restricted Area Access Clearance Security Measures (the "Measures") promulgated under the Regulations. [...]
7. The Minister has a broad discretion to grant, refuse, suspend or cancel a TSC. The Minister exercises his discretion in accordance with policy and objectives contained in the Transportation Security Clearance Program - Policy (the "Program"). The Program is made available to members of the public on the Transport Canada, Security and Emergency Preparedness website. The Minister instituted the Program in 1985 following the bombing of Air India Flight 182.
8. Among other things, the Program requires applicants to be citizens or permanent residents of Canada and limits the maximum period of validity of a clearance issued by the Minister to no more than 5 years, after which a new application is to be filed to be considered anew.
9. Pursuant to section 1.3(c) of the Program, an applicant for a TSC must provide 5 years of adequate, reliable and verifiable information to permit the necessary background checks to be completed. [...]
11. As set out in section II.19 of the Program, a person who applies for a TSC must undergo comprehensive background checks that include a fingerprint-based criminal records check with the RCMP, a CSIS indices check, and a Credit Bureau check ("background checks"). The background checks can not verify information relating to time spent residing or working outside of Canada. Accordingly, when an applicant has been outside of Canada during the review period in question, the security check will return "incomplete".
12. If an applicant such as Mr. Singh has not been in Canada for the full five years and the security check is returned as "incomplete", the applicant is advised in writing of areas of concern and given the opportunity to provide additional information in support of the application.
13. Once the applicant has provided any additional information he or she wants to have considered, the application is put before the Review Panel. The Review Panel is established within Transport Canada to provide advice and recommendations to the Minister in respect of TSC applications. Upon receiving an application, the Review Panel considers the information provided by an applicant. The Review Panel then formulates a recommendation to the Minister to either grant or refuse the TSC depending on whether the application meets the Program requirement for adequate, reliable and verifiable information.
14. When an application is refused by the Minister, the individual must wait 5 years before re-applying for a TSC. If, after a refusal by the Minister, the applicant is able to demonstrate to the satisfaction of the Review Panel that there has been a significant change in the

circumstances related to the refusal, the Minister will reconsider the application. Such a "significant change" could include evidence of more time having been spent in Canada, or additional information that is adequate, reliable and verifiable covering the 5 year period under review. [...]

18. The background checks relating to Mr. Singh's application for a TSC were completed by August 25, 2005. The security check came back "incomplete" because Mr. Singh did not reside nor work in Canada for the full 5 years preceding his application.
19. After the review of Mr. Singh's application and background checks, Mr. Singh was advised that, of the five (5) years of sufficient, reliable and verifiable information generally required to formulate a recommendation to the Minister of Transport, the information provided for 4 of the 5 years was not sufficient to fully access the factors relevant to a TSC as the information pertaining to the period of time he spent in India could not be verified by Transport Canada.
20. On or about August 3, 2005 Ms. Mattioli spoke with Mr. Singh and indicated to him the kind of records he could produce in order to verify his activities for the time he was in India. Mr. Singh provided additional information in support of his application including an original policy clearance certificate from India, school documents from Canada, documents relating to his employment with IDBI Bank in India.
21. On September 21, 2005, Mr. Singh's file was presented for consideration by the Review Panel. The Review Panel recommended that the TSC application be refused. Specifically, the unanimous recommendation of the Review Panel, was that the application be refused for the following reasons:
 - (a) Of the five (5) years of information required to make a decision, only a period of one (1) year and one (1) month was deemed to be verifiable and reliable; and
 - (b) The additional information provided by the Applicant in support of his application was reviewed and deemed to not sufficiently meet the information standards of the Transportation Security Clearance Program.
22. On or about September 21, 2005, the Review Panel's Recommendation and Rationale was submitted to the Minister. The Review Panel's recommendation for refusing to recommend approval of Mr. Singh's TSC application was based on the lack of reliable and verifiable information pertaining to the 3 years and 9 months Mr. Singh spent residing outside of Canada during the past five year period under review, and the extent to which documents from India could not be verified.
23. On November 17, 2005, the Minister refused Mr. Singh a TSC. [references removed]
- [5] The Minister's decision dated Nov. 18 , 2005 informed the Applicant as follows: The Panel was unanimous in its decision to recommend the refusal of this application based on the absence of sufficient, verifiable and reliable information. Specifically, of the five (5) years of

information generally required to formulate a recommendation, a period of three (3) years and nine (9) months of information provided in Mr. Singh's application is considered not sufficient to fully assess the factors relevant to a transportation security clearance. This period of time reflects the time he spent in India, where information cannot be verified under the arrangements available to Transport Canada. In addition, additional information provided by the applicant in support of his application was reviewed and deemed to not sufficiently meet the information standards of the Transportation Security Clearance Program.

[6] The applicant, who is self represented, now seeks judicial review of the decision.
STANDARD OF REVIEW

[7] As specified in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 3, 2003 SCC 19, a pragmatic and functional analysis must be conducted to determine the applicable standard of review. Four contextual factors are considered in the analysis: the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purpose of the legislation; and the nature of the question.

[8] With respect to the first factor, the Act contains neither a privative clause nor an automatic right of appeal. Grounds for review are also set out in the Federal Courts Act, R.S.C. 1985, c.41 at subsection 18.1(4). This leads to a more deferential standard of review.

[9] The Minister (as represented by the Review Panel) is a specialized body that has expertise in making these decisions. The decision is generally applying the discretion given under the Act to the facts as presented by the Applicant.

[10] The purpose of the Act and the Program is to maintain the security of airports by preventing the uncontrolled entry of undesirable people into restricted areas. The Act does not give rise to expectations by applicants that they will automatically be granted a TSC if they submit the proper documentation.

[11] The final factor to consider is the nature of the question. The issue in this case concerns the Review Board's assessment of the evidence. This is a factual determination which is within the expertise of the Review Board and should be afforded significant deference. Although the decision likely affects the ability of the Applicant to obtain employment with an airline, it does not have a detrimental effect on the individual's ability to obtain any other employment in Canada or to continue to reside in Canada.

[12] On the basis of the foregoing analysis, I agree with the Respondent that the standard of review should be patent unreasonableness. ISSUE

[13] Was the decision to deny the TSC patently unreasonable?

ANALYSIS

[14] The Applicant submits:

- a) he submitted all information that was requested from him;
- b) the Respondent can easily verify the correctness of the information submitted; and
- c) it is unfair to deny him the TCS given that he met all requirements.

[15] While I have a great deal of sympathy for the Applicant, who made a very favourable impression on the Court, I fail to see anything patently unreasonable in the Respondent's decision. No evidence was presented that the Minister made an error, acted capriciously or acted arbitrarily. Given that airport security is of such vital importance, the Program, in effect, calls for a five year stay in Canada or else the production of verifiable information from foreign countries before a TSC is granted.

[16] As the Applicant is a recent immigrant, he does not have the necessary record of five years in Canada. Given that Canada does not have an information verification agreement with India, from a pragmatic point of view, there is no way in which the Applicant can meet the Program's requirements.

[17] It is unfortunate that the Program administrator, in an effort to assist the Applicant and in order to be fair to him, advised him as to the documentation he could provide and emphasized that original copies of a police clearance report and employment records were desirable. The Applicant heeded the advice and provided the stipulated documents. He even went further and after his application was denied, he produced and furnished to the respondent an updated Police Clearance certificate dated January 13, 2006.

[18] Yet, his Application was denied given there is no way to verify the information. There is nothing patently unreasonable given the absence of a verification agreement with India.

[19] The Applicant genuinely desires to work at the airport and although not so framed he makes a second argument in terms of legitimate expectations and the duty of fairness owed to him. He submits that having complied with all the requirements and having obtained the original documents specified by the Program administrator, it would be unfair to deny him the TSC. This point was addressed in *Motta v. Canada (Attorney General)*, [2000] F.C.J. No. 27 at paragraph 13 where Justice Pinard succinctly observed: In the case at bar, we are dealing with a simple application for clearance or a permit made by a person who has no existing right to that clearance or permit and is not accused of anything. As the Minister's refusal to grant access clearance does not involve the withdrawal of any of the plaintiff's rights, the latter can have no legitimate expectation that he will be granted clearance (see *Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage) et al.* (1997), 132 F.T.R. 89, and *Cardinal v. Alberta (Minister of Forestry, Lands and Wildlife)*, December 23, 1988, Edmonton 8303-04015, Alta. Q.B.). In the circumstances, therefore, I consider that the requirements imposed by the duty to act fairly are minimal and that, after allowing the

plaintiff to submit his application in writing as he did, the Minister only had to render a decision that was not based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before him. As no evidence was submitted that the decision duly made by the Minister pursuant to the powers conferred on him by the Act and Regulations was without basis, this Court's intervention is not warranted.

- [20] I agree with Justice Pinard in that the Applicant can have no legitimate expectation. As a recent immigrant without a track record in Canada, he has no legitimate reason to expect that he would be allowed to work in a highly sensitive area that requires a TSC. The duty of fairness owed to him is minimal. He was certainly given every opportunity to make his case.
- [21] It is unfortunate that he was not saved considerable efforts and inconvenience by simply informing him of the importance of a mutual verification agreement between Canada and India. However, given that the final decision is a discretionary one, its outcome could not be assumed. I fail to see how the administrator can be said to have been in breach of procedural fairness by pointing out the desirability of original documents, while knowing that the chance of getting a TSC was very minimal due to the absence of a verification agreement.
- [22] Accordingly, this application will be dismissed. ORDER THIS COURT ORDERS that this application for judicial review be dismissed. "Konrad W. von Finckenstein" Judge FEDERAL COURT NAME OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-10-06 STYLE OF CAUSE: BHUPINDER SINGH APPLICANT and ATTORNEY GENERAL OF CANADA RESPONDENT PLACE OF HEARING: Toronto, Ontario DATE OF HEARING: June 19, 2006 REASONS FOR ORDER AND ORDER: von Finckenstein, J. DATED: June 23, 2006 APPEARANCES: Mr. Bhupinder Singh FOR APPLICANT Ms. Jacqueline Dais-Visca FOR RESPONDENT SOLICITORS OF RECORD: Bhupinder Singh 96 Yuile Crt. Brampton, ON FOR APPLICANT John H. Sims, Q.C. Deputy Attorney General of Canada FOR RESPONDENT

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