

TRANSPORTATION

Judicial review of decision by Director General, Aviation Security denying applicant's application for Transportation Security Clearance (TSC) — Director General finding that information about applicant contained in Law Enforcement Records Check (LERC) report leading her to reasonably believe, on balance of probabilities, that applicant prone or induced to commit act, or assist or abet person to commit act unlawfully interfering with civil aviation — LERC report stating, *inter alia*, that applicant charged with possession of property obtained by crime, charge later withdrawn, subsequently involved in altercation — Applicant providing written response to LERC report — Advisory Body recommending refusing applicant's TSC — Whether requirements of procedural fairness respected herein; whether decision of Director General reasonable — Transportation Security Clearance Program Policy, section I.4, paragraph 4 preventing uncontrolled entry into restricted area of 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” — Words “on a balance of probabilities” suggesting this is the intended standard — However, paragraph 4 rendered ambiguous by use of words “reasonably believes” — Common element of proof on balance of probabilities found in both English, French versions of paragraph 4 is what was intended to be standard of proof here — Other source of confusion about standard of proof whether applicant person who may be prone or induced to commit an act — Question Minister having to answer not whether person will so act but only whether person might so act — This is matter of possibilities, not probabilities — Idea of possibility being established on balance of probabilities counterintuitive — Paragraph 4 calling upon Minister or delegate to determine whether it is more likely than not that an applicant for TSC someone who might be prone or induced to commit act that might unlawfully interfere with civil aviation — *Motta v. Canada (Attorney General)*, 2000 CanLII 14801 (F.C.) suggesting that the only procedural right first-time applicant having is to receive decision not substantively flawed — This conflating procedural review, substantive review — Line of reasoning that maintains distinction between person facing loss of security clearance, first-time applicant nullifying “minimal” procedural rights for first-time applicants — *Motta* overtaken by current practice of Minister, which treats both new applicants, individuals who already hold security clearance in same way — Here, applicant notified of areas of concern, offered opportunity to address them — Advisory Body considering all of the information on file — Requirements of procedural fairness met — However, Director General's decision not reasonable — Assessment of factors leading to refusal of TSC unreasonable — Director General making express or implied findings — Having to proceed with caution when considering withdrawn charges — Simply “wondering” what applicant might do for money if in financial difficulty failing tests of transparency, intelligibility, justification — Director General's reasoning concerning incidents involving applicant proceeding from false premise — Applicant free to submit new application for TSC — Application allowed.

HAQUE V. CANADA (ATTORNEY GENERAL) (T-1352-16, 2018 FC 651, Norris J., judgment dated June 22, 2018, 46 pp.)