



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Michael Louis Laughlin v. Canada (Minister of Transport)*, 2019 TATCE 39 (Review)

TATC File No.: O-4427-68

Sector: Aviation

BETWEEN:

Michael Louis Laughlin, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard in: Ottawa, Ontario, on May 15, 2019

Before: Keith Whalen, Member

Rendered: September 6, 2019

REVIEW DETERMINATION AND REASONS

Held: The Transportation Appeal Tribunal of Canada confirms the Minister of Transport's decision to refuse to issue a Canadian aviation document pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*, as Mr. Laughlin failed to meet the qualifications necessary for the issuance of the S-76D pilot proficiency check (PPC) due to the failure of his PPC flight check on May 15, 2018.

I. BACKGROUND

[1] On June 12, 2018, Transport Canada (TC) advised Michael Louis Laughlin, the applicant, by registered mail, that due to the failure of his pilot proficiency check (PPC) flight test on May 15, 2018, he would not be issued an S-76D PPC. The letter noted that this constituted a refusal to issue a Canadian aviation document pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*, as Mr. Laughlin had “failed to meet the qualifications necessary for the issuance” of the PPC (Exhibit M-1, Tab 8).

[2] Attached to the letter was Mr. Laughlin’s Flight Test Report PPC (Helicopter), which assessed a score of 1 on exercise 23, Engine Failure. The test report noted that Mr. Laughlin “was not able to control the helicopter during Engine Failure after Take Off before CDP [critical decision point] resulting in crash (Red Screen)” (Exhibit M-1, Tab 2).

[3] On June 12, 2018, Mr. Laughlin requested that the Transportation Appeal Tribunal of Canada (Tribunal) review the Minister of Transport’s (Minister’s) decision (Exhibit M-1, Tab 6).

[4] On February 12, 2019, the Tribunal informed the parties of a review hearing scheduled for May 15, 2019 in Ottawa, Ontario, and the hearing review subsequently took place on that date.

II. DISCUSSION AND ANALYSIS

[5] The respondent adduced evidence through one exhibit and the testimony of one witness, James Bionda, a TC Civil Aviation Safety Inspector, the approved check pilot (ACP) who conducted the flight check on the applicant.

[6] The applicant adduced evidence through two exhibits, was self-represented and testified on his own behalf.

[7] The Minister based its decision on paragraph 6.71(1)(b) of the *Aeronautics Act*, which states as follows:

6.71 (1) The Minister may refuse to issue or amend a Canadian aviation document on the grounds that

[...]

(b) the applicant or any aircraft, aerodrome, airport or other facility in respect of which the application is made does not meet the qualifications or fulfil the conditions necessary for the issuance or amendment of the document; [...]

[8] The issue before the Tribunal is this: was the Minister’s decision to refuse to issue a Canadian aviation document on the grounds that the applicant failed to meet the qualifications necessary for the issuance of an S-76D PPC justified?

A. Burden of proof

[9] The Minister raised the argument that the burden of proof is on the applicant in this case. The Minister acknowledged that it has the burden of proof for assessed monetary penalties, as it is specifically stated in subsection 7.91(4) of the *Aeronautics Act*. However, he argued that since the burden of proof for other matters under the *Aeronautics Act* is not specifically provided, it is on the applicant to prove that the Minister's decision was unreasonable or made in bad faith or that there was a breach of procedural fairness. The Minister did not provide any specific evidence or information to support this argument.

[10] The applicant stated that it was his understanding that the burden was on the Minister.

[11] The Tribunal has, in past practice, operated on the basis that the Minister has the burden of proving its case where it exercises its discretion to refuse to issue a Canadian aviation document. In the absence of any support for deviating from this practice, I find that the Minister has the burden of proof to make the case against the applicant in this hearing. Accordingly, the Minister is required to prove that it was justified in refusing to issue the PPC because the applicant does not meet the qualifications or fulfil the conditions necessary for the issuance or amendment of the document.

B. Was the Minister's decision justified?

[12] The Minister argued the applicant wasn't qualified to receive an S-76D PPC due to his unsatisfactory performance on the simulator flight check. The applicant argued that there was an issue with the simulator, he was treated unfairly because the other applicant on the test also crashed under similar circumstances and was given a pass, the flight check was conducted under conditions that he would not accept as safe in the real aircraft, and he did not receive training for 1200 runway visual range (RVR) night take-offs prior to his flight check.

[13] Mr. Bionda testified that he was the ACP who conducted the flight check on Mr. Laughlin in the S-76D flight simulator at the Flight Safety International facility in West Palm Beach, Florida. The flight check was done in accordance with the S-76 D helicopter PPC script (Exhibit M-1, Tab 3), valid from May 2018 to May 2019 for use during initial IFR (instrument flight rules) PPCs utilizing TC-certified level D simulators.

[14] The flight check was conducted under the flight crew concept with a pilot and first officer. Prior to the commencement of the flight check, the ACP gave the flight crew a pre-flight briefing, which included the scenario particulars, mandatory items, weather, roles and responsibilities and general items related to the flight check (Exhibit M-1, Tab 3, pages 1–7). Section 3.1 of the briefing guide states, "Are you satisfied with the training you received and do you feel ready for your IFR/PPC?" In order for the flight check to take place, the applicant would have signed off on this.

[15] Prior to the departure, the helicopter flight crew copied the Toronto ATIS (Automatic Terminal Information Service) information Alpha (Exhibit M-1, Tab 3, page 18), and the actual weather condition at the time of take-off was 200 feet overcast ceiling with 1200 RVR on Runway 15.

[16] Mr. Laughlin testified that at the time of the simulation he was not comfortable with the lack of runway centreline lighting and the reduced visibility conditions at night and requested a change to a runway with centreline lighting. Mr. Laughlin advised Mr. Bionda that in the actual helicopter he would not depart under these conditions. Mr. Bionda advised that the current weather conditions and runway configuration were approved in accordance with the operator take-off limits authority and that the PPC weather conditions and runway would remain the same for the departure. The flight check continued with the original conditions as specified in the PPC script.

[17] On take-off, Mr. Bionda introduced an Engine Failure During Take-off, at 40 knots airspeed, prior to the Critical Decision Point (CDP), which resulted in a Rejected Take-Off (RTO) procedure. On touchdown on the runway, the helicopter was yawed to the right and not aligned with the runway heading, resulting in the helicopter rolling over. This manoeuvre was assessed as a failure and the flight check was terminated, as the procedure did not meet the performance criteria as defined in the Pilot Proficiency Check and Aircraft Type Rating—Flight Test Guide (Helicopter) TP 14728 (Flight Test Guide). The specific performance criteria under section 8, Rejected Take-off, were items “f. apply the controls correctly to maintain longitudinal alignment on the centreline of the runway” and “g. abort the takeoff if ... in a multiengine helicopter, the powerplant failure occurs at a point during the takeoff where the abort procedure can be initiated and the helicopter can be stopped on the remaining runway/stopway” (Exhibit M-1, Tab 7, page 23).

[18] The Flight Test Guide defines the parameters and criteria for the Rejected Take-off procedure. It states that “... where an operator has RVR 1200 ... take off limits authority, the candidate will demonstrate one such rejected take off to the lowest limit as appropriate to his flight crew position”. It is a requirement for the PPC candidate to demonstrate their ability to reject the take-off in this low-visibility environment and land safely on the runway (Exhibit M-1, Tab 7, page 23)

[19] The evidence of Mr. Bionda, as well as the applicant, confirmed that the operator where Mr. Laughlin was employed was certified to operate in conditions of 1200 RVR at night. Therefore, the Tribunal finds that Mr. Bionda followed the guidance as specified in the Flight Test Guide and that his request to depart in these conditions was not unreasonable.

[20] Mr. Laughlin testified that during the debrief, he advised Mr. Bionda that there were problems with the flight simulator: it was susceptible to rolling over on touchdown and his pedals began to pulsate back and forth during the flare. He indicated to Mr. Bionda that there was a rollover anomaly on this particular simulator that was known to occur with sideways drifting on landing and that a Flight Safety International staff person had confirmed there was a problem.

[21] Mr. Bionda testified that as a result of the applicant suggesting an issue with the simulator, he consulted with the simulator operator on the day in question, who advised that no discrepancies were noted that would cause a simulator rollover condition or the pulsating pedal issue. Mr. Bionda subsequently followed up with Flight Safety International at a later date and received verbal and written confirmation that there were no reported problems with the simulator at the time of Mr. Laughlin’s PPC or before or afterwards (Exhibit M-1, Tab 4).

[22] The applicant provided testimony that his simulator partner had a similar rollover experience on landing on a previous flight, which pointed to the same simulator problem on both flights. Mr. Bionda testified that on the first flight, the helicopter experienced a tail rotor malfunction, which resulted in a complete loss of a flight control. On the second flight, the helicopter lost an engine on departure, resulting in a rejected take-off, and there was no loss of the tail rotor control as a result of this emergency. The performance criteria in both these emergencies are different, and both pilots were graded on the appropriate performance criteria. Mr. Bionda also testified that, based on those performance criteria, on the first flight, it was acceptable for the helicopter to roll over on landing, as there was a loss of a flight control, whereas with a rejected take-off, the pilot should be capable of landing on the runway while maintaining directional control.

[23] The Tribunal was not presented with any evidence to substantiate the simulator rollover problem on touchdown, nor the pulsating pedal issue. The Minister's witness gave testimony to the effect that the applicant "did not control the yaw sufficiently". The helicopter was not aligned with the runway on touchdown, resulting in the rollover, and that was the cause of the crash and not a simulator defect with the pedals.

[24] During Mr. Laughlin's testimony, he stated that two sections of TP 6533, Approved Check Pilot Manual (Manual), were in contradiction to the ACP's actions.

[25] The first section was 5.14, where he argued that Mr. Bionda set up conditions for an undesired aircraft state (UAS) by reducing safety margins. The definition of UAS is "an aircraft position, speed, attitude or configuration that results from a flight crew error, action or omission **which clearly reduces safety margins**" (emphasis in the original) (Exhibit A-2, page 46). The term UAS is used extensively in the four-point marking scale to define an Effective, Adequate, Poor or Unacceptable grading. The Tribunal notes that this section provides a definition that speaks only to reduced safety margins caused by "flight crew error, action or omission". Therefore, the Tribunal finds that this section would not apply in this context; Mr. Bionda could not have acted contrary to this section of the Manual.

[26] The Tribunal finds that, based on the evidence, Mr. Bionda was following the procedures outlined in the Flight Test Guide, which ensured that the helicopter was operated within safe flight parameters. The conditions for the take-off and subsequent in-flight emergency encountered by Mr. Laughlin were not outside the authorized conditions of the company's air operator certificate, nor were they a hazard to the safe operation of the helicopter.

[27] The second section of the Manual that the applicant alleges was not followed by Mr. Bionda was subparagraph 6.27(4)(m)(i), where the applicant argued that Safe Flight Checking Practices – Aircraft were not considered, since he imposed a safe training restriction that he would not depart under the proposed conditions. This section states, "Any restrictions or limits imposed on manoeuvres conducted in the aircraft to ensure safety must be followed" (Exhibit A-2, page 72).

[28] The Tribunal notes that this section does not refer to simulators, and applies only in the context of the flight check briefing. Further, the Tribunal has already concluded that the conditions for take-off were in accordance with the operator's guidelines and TC policy.

Therefore, the Tribunal concludes that this provision would not apply in the applicant's circumstances.

[29] Mr. Laughlin testified that the simulator instructor advised that the only way to reproduce 1200 RVR in the simulator was to introduce fog, and this further restricted his visual cues. Mr. Bionda explained that the RVR of 1200 feet is the actual visibility regardless of the restrictions introduced to the simulator.

[30] Mr. Laughlin stated that he was "essentially forced" by Mr. Bionda to continue the flight check into weather conditions that were a hazard to the operation of the flight, contrary to the Flight Test Guide (page 4). He also stated that they would never use these conditions in their company operations and he would not depart in these conditions, but Mr. Bionda insisted that the flight check continue with these conditions. Mr. Bionda testified that the flight crew may elect to stop and/or discontinue a flight check at any time. In this particular case, the weather conditions were within the authorized take-off limits approved for the company, and a discontinuance of the flight check would have resulted in a non-completion of the PPC. Mr. Laughlin felt pressure to continue the flight check, as it was being conducted on the flight crew and not solely on the applicant. He felt that the impact on his simulator partner would have been substantial, resulting in an incomplete flight check, had he elected to discontinue the flight check.

[31] The applicant also argued that being denied the use of the alternate runway was contrary to the Manual, subsection 6.27(y). This provision states that "Any operational restrictions, not preventing the use of the aircraft or simulator for a PPC, should be reviewed". The Tribunal finds that the PPC flight was not contrary to this provision, as there were no operational restrictions in place at the time. The check pilot was not inducing any restrictions outside the operating certificate, and Mr. Laughlin would not have the authority to impose such a restriction on a flight check when he was being asked to follow an approved check flight scenario.

[32] The Tribunal concludes that while the conditions may not have provided an adequate comfort level for Mr. Laughlin, there was no evidence presented to conclude that any hazardous conditions existed during the take-off or the rejected take-off procedure.

[33] Mr. Laughlin stated that he had extensive helicopter experience on various helicopter types, and he is also an ACP. This was a new helicopter type for him on which he had limited experience, and this was his first PPC with this company.

[34] Mr. Laughlin testified that he received his initial training on the S-76D prior to his flight check, but he had not received any training regarding 1200 RVR departures at night. Mr. Bionda said that he was not aware of this information and he had not asked Mr. Laughlin if all his training had been completed, nor did Mr. Laughlin volunteer this information. Mr. Bionda received a recommendation from the Chief Pilot and Operations Manager stating that the candidate was trained and ready for the PPC. This recommendation is sent to TC when all training for the PPC is completed and the candidate is ready to be flight checked on any part of the training program, including the RVR 1200 operations at night. Mr. Bionda stated that had he been made aware of the incomplete training program, he would not have conducted the flight check.

[35] The Tribunal finds that Mr. Laughlin had opportunities to inform Mr. Bionda of the lack of training for the 1200 RVR operations at night, prior to and during the PPC, but did not pass this information to him.

[36] In conclusion, after careful consideration of relevant exhibits and testimony, the Tribunal finds that the flight check was done in accordance with the procedures in the Flight Test Guide. No evidence or testimony was presented that led the Tribunal to the conclusion that the flight check was conducted in an unsafe or hazardous manner or that the flight simulator experienced any malfunction at the time of the flight check. Mr. Laughlin had opportunities both before and during the flight check to advise Mr. Bionda that he had not received training on the RVR 1200 take-off at night, but he did not apprise him of this issue and therefore Mr. Bionda proceeded with the flight check with the assumption that all training had been completed.

[37] Therefore, the Tribunal finds, on a balance of probabilities, that the Minister's decision to refuse to issue the PPC to Mr. Laughlin was justified, as he failed to meet the qualifications necessary for the issuance of the S-76D PPC.

III. DETERMINATION

[38] The Transportation Appeal Tribunal of Canada confirms the Minister of Transport's decision to refuse to issue a Canadian aviation document pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*, as Mr. Laughlin failed to meet the qualifications necessary for the issuance of the S-76D pilot proficiency check (PPC) due to the failure of his PPC flight check on May 15, 2018.

September 6, 2019

(Original signed)

Keith Whalen

Member

Appearances

For the Minister: Martin Forget

For the Applicant: Self-represented