



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Guido Lepore v. Canada (Minister of Transport)*, 2019 TATCE 43 (Review)

TATC File No.: A-4459-27

Sector: Aviation

BETWEEN:

Guido Dominic Lepore, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard in: Vancouver, British Columbia, on June 12, 2019

Before: Arnold Olson, Member

Rendered: October 10, 2019

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport's decision to refuse to issue a Class 3 Flight Instructor Rating – Aeroplane to Mr. Guido Lepore is upheld, as the applicant did not meet the qualifications or fulfil the conditions necessary for its issuance.

I. BACKGROUND

[1] On April 17, 2018, Mr. Guido Lepore applied to renew his Class 3 Flight Instructor Rating – Aeroplane. On October 24, 2018, Transport Canada (TC) informed him that, pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*, the Minister of Transport (Minister) had decided to refuse to issue the rating. The Notice stated that he had not met the qualifications or conditions necessary for the issuance of the Canadian aviation document (CAD), pursuant to Standard 421.66(3)(c) of the *Canadian Aviation Regulations (CARs)*.

[2] On October 31, 2018, Mr. Lepore filed a request with the Transportation Appeal Tribunal of Canada (Tribunal) for a review of the Minister’s decision.

[3] Mr. Lepore had previously held a Class 3 Flight Instructor Rating – Aeroplane but at the time of his application for renewal dated April 17, 2018, the validity period had been expired for a period of approximately seven years. As part of his application for renewal, he received a recommendation from a Class 1 flight instructor as required in Standard 421.66(3)(c)(i) and also successfully completed a flight test as required in subparagraph (iii). He disputes the remaining requirement of a written examination as set forth in subparagraph (ii).

II. ANALYSIS

A. Legal Framework

[4] The Minister based its decision in part 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; ...

[5] The Minister alleged that Mr. Lepore did not meet the qualifications or fulfil the conditions required for his flight instructor rating pursuant to Standard 421.66, “Renewal of Flight Instructor Rating”, which is applicable to the renewal of all classes of flight instructor ratings. Paragraph 3(c) of the Standard provides for the circumstance where a flight instructor rating has been invalid for more than 24 months and states:

421.66 (3) (c) Where a flight instructor rating has been invalid for more than 24 months, an applicant for renewal shall:

(i) provide a recommendation from the holder of a Class 1 Flight Instructor Rating in the appropriate category indicating that the applicant is considered competent to complete the written examination(s) and undertake an instructor flight test;

(ii) successfully complete the examination requirement set forth under Knowledge for the appropriate flight instructor rating; and

(iii) successfully complete a flight test for the appropriate flight instructor rating.

[6] Mr. Lepore was applying for a renewal of his Class 3 instructor rating and therefore his application was subject to the additional requirements of Standard 421.70, “Class 3 – Aeroplane – Requirements”. This Standard provides for “knowledge requirements” under paragraphs (2)(a) and (b) as follows:

421.70(2)(a)(iii) obtain a minimum of 70% in the written examination Flight Instructor Rating – Aeroplane Class 4 (AIRAF).

[7] The parties also referenced Standard 421.69, which applies to the issuance of a Class 4 Flight Instructor Rating – Aeroplane and states, in part:

421.69 Class 4 – Aeroplane – Requirements

(5) Credits

(a) Knowledge

[...]

(iii) An applicant who holds or has held within the preceding 24 months, a flight instructor rating – Helicopter, shall be considered to have met the written examination requirement.

[8] Standard 421, “Flight Crew Permits, Licences and Ratings”, is incorporated by reference into the *CARs* through section 401.01, which states:

Any reference in this Subpart to the personnel licensing standards is a reference to the *Personnel Licensing and Training Standards respecting Flight Crew Permits, Licences and Ratings*.

Since this standard is incorporated by reference, it has the same authority as the *CARs*.

B. Was the Minister justified in refusing to issue the CAD due to the requirements or conditions not being fulfilled?

[9] On behalf of the Minister, Mr. Andrew Armstrong, Civil Aviation Inspector, Commercial Flight Standards, referred to extensive emails (Exhibit M-1, tab 6) between Transport Canada officials and Mr. Lepore. These emails show some initial confusion as to whether the “knowledge credit” specified in Standard 421.69(5)(a)(iii), referring to Class 4 Flight Instructor Ratings, had been interpreted correctly and could apply to Mr. Lepore, thus eliminating the requirement for him to complete a written examination.

[10] Within the emails to which Mr. Armstrong referred was Mr. Lepore’s response on April 20, 2018, to an email of the same date from TC asking if he had completed the written test, since his rating had been invalid for more than 24 months. His email to Mr. Justin Miller, Technical Team Lead, Flight Operations, indicated that he had received direction from TC that his current Class 2 Flight Instructor Rating – Helicopter met the qualification for the knowledge credit to be applied, thus exempting him from completing the written examination. He wrote:

I cleared this with TC already, my current Class 2 Helicopter [flight instructor rating] meets the requirement ... Fundamentally, we referenced the credits on the Class 4 initial where another exam was not required, therefore it logically, and their interpretation, followed that the same exam would not be required for the renewal. CARS 421.69(5)(a)(iii).

A reply, also dated April 20, 2018, stated that Mr. Miller agreed with this interpretation: “You’re right about the credit, you don’t need to complete the [written] exam.” (Exhibit M-1, tabs 6(b) and (g)).

[11] However, approximately six months later, in October, Mr. Armstrong at TC headquarters in Ottawa reviewed Mr. Lepore’s application for licensing. In Mr. Armstrong’s interpretation of Standard 421.69(5)(a)(iii), he determined that the knowledge credit did not apply. His email dated October 11, 2018 stated:

The Aeroplane and Helicopter Instructor ratings are separate ratings. Therefore since the Aeroplane Instructor rating has been expired for more than 24 months, [you] must meet the requirements of 421.66(3)(c). So [you] must get a recommendation from a Class 1 to do the written [examination] and get 70% on the AIRAF exam.

[12] As a result of Mr. Armstrong’s reason that the “Aeroplane and Helicopter Instructor ratings are separate ratings”, Mr. Lepore’s Class 3 Flight Instructor Rating – Aeroplane privileges were suspended (Exhibit M-1, tab 6(f)). Mr. Lepore responded to this suspension by emailing Ms. Tara Akerley of TC on October 20, 2018, stating that he was “now stumped by the interpretation of CARs 421.69(5)(a)(iii) ... it clearly says that a current Helicopter Instructor Rating is a valid credit for the written examination ...”. **Within an internal TC email exchange**, on October 23, 2018, Mr. Armstrong provided a different reason for the suspension: “The credit [knowledge credit specified in 421.69(5)(a)(iii)] is for the initial issue of a Class 4 Instructor rating only. The credit is not for the renewal of an instructor rating. The requirements for renewal are in 421.66(3)(c)” (Exhibit M-1, tab 6(c)).

[13] At the review hearing, Mr. Armstrong testified that the title of Standard 421.69 is “Class 4 – Aeroplane – Requirements” and thus the knowledge credits to which it refers apply only to applicants for a Class 4 instructor rating. Since Mr. Lepore was applying for a renewal of his Class 3 Flight Instructor Rating, these credits were not available to him. He pointed out that Class 4 flight instructors were required to work under direct supervision whereas Class 3 instructors were not. Thus, the Minister’s concern for public safety dictated a higher level of knowledge verification for flight instructors working independently and therefore the requirement of a written examination for Class 3 instructors was justified.

[14] Mr. Armstrong did not have any specific concerns about Mr. Lepore’s diligence or commitment to safety; requiring him to successfully complete a written examination was merely an application of Standard 421.66 in accordance with its title, “Renewal of Flight Instructor Rating”. Mr. Lepore subsequently completed the written examination (AIRAF) to a high standard (Exhibit M-1, tab 4).

[15] Mr. Lepore presents as a highly qualified aviator with substantial experience as an aeroplane, helicopter and aerobatic flight instructor. He declined to present evidence or provide a sworn statement. Instead, once the evidentiary record was closed, he offered a summation of his view that if a knowledge credit is available for an entry-level Class 4 instructor rating, it is only reasonable that the credit should also apply to applicants for a higher rating such a Class 3 rating. Since Standard 421.69, Class 4 – Aeroplane specifies that the holder of a current Flight Instructor – Helicopter rating shall be considered to have met the written examination

requirement, he held that the same interpretation should also apply to his application for a Class 3 Flight Instructor Rating – Aeroplane.

[16] In his view, it is not reasonable for Transport Canada to place a more onerous requirement on an application to renew a rating than is required for its initial issuance. Moreover, TC's concern for public safety through a verification of knowledge is met during the conduct of every flight test, since one of the required components of a flight test is verification of knowledge.

[17] The underlying issue at review is whether Transport Canada ultimately referenced the correct regulation when the decision was made to suspend Mr. Lepore's instructor rating privileges. It appears that TC had initially referenced a portion of Standard 421.69 to process his application for renewal of his Class 3 instructor rating and had relied upon the "knowledge credit" available under subparagraph (iii) to exempt him from the requirement to complete the written examination. The email exchanges from April 20, 2018 indicate that an effort was being made to apply logic to an interpretation of the regulations – not always a successful undertaking. A proper application of Standard 421.69 arises from its title: Flight Instructor Rating – Aeroplane, 421.69 "**Class 4** – Aeroplane – Requirements". Therefore, Standard 421.69 is only applicable to the issuance of a Class 4 instructor rating. Neither Standard 421.69 nor portions thereof can be used to process an application for a Class 3 instructor rating. A different Standard, 421.70 "**Class 3** – Aeroplane – Requirements", is applicable to Mr. Lepore's situation and makes no mention of a knowledge credit. Thus, the knowledge credit was not available to Mr. Lepore upon application for renewal of his rating for Class 3 – Aeroplane. This interpretation was stated by Mr. Armstrong in his email of October 23, 2018 and at the review hearing.

Obiter Dictum

[18] In his email of October 11, 2018, Mr. Armstrong provided that the foundational reason for the suspension of Mr. Lepore's flight instructor privileges was because "The Aeroplane and Helicopter Instructor ratings are separate ratings." My difficulty with this reasoning is twofold: if the ratings were not indeed "separate" then the essential meaning of the knowledge credit would be lost; secondly, the real reason is that TC had initially applied the wrong regulation. I can understand why Mr. Lepore would be puzzled by this rationale for suspending his flight instructor privileges, or "stumped", as he kindly stated in his reply of October 20, 2018. It is not apparent from the Minister's evidence provided at the review hearing or from Mr. Lepore's summation that he was ever provided with a proper reason for the suspension of his Class 3 instructor rating privileges. In the absence of a valid reason, it would have been entirely reasonable for him to insist that the regulator provide one or, as a last resort, to request a review of the Minister's decision as he did on October 31, 2018.

Conclusion

[19] The requirements for the renewal of a flight instructor rating are provided for in Standard 421.66. Where a flight instructor rating has been invalid for more than 24 months, subparagraph 3(c)(ii) requires the successful completion of a written examination for knowledge. Standard 421.70 is the applicable flight instructor rating provision in this case, and provides the requirement to obtain a minimum of 70% on the written examination, Flight Instructor Rating –

Aeroplane Class 4 (AIRAF). Therefore, I find that Mr. Lepore was properly required to successfully complete the written examination. As a result, I find that the Minister's decision to refuse to issue Mr. Lepore the instructor rating was justified, as he did not meet the qualifications or fulfil the conditions required for renewal under Standard 421.66(3)(c).

III. DETERMINATION

[20] The Minister of Transport's decision to refuse to issue a Class 3 Flight Instructor Rating – Aeroplane to Mr. Guido Lepore is upheld, as the applicant did not meet the qualifications or fulfil the conditions necessary for its issuance.

October 10, 2019

(Original signed)

Arnold Olson

Member

Appearances

For the Minister: Amani Delbani

John Lindsay

For the Applicant: Self-represented