TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Prijilal Premakumar v. Canada (Minister of Transport)*, 2020 TATCE 9 (Review)

TATC File No.: O-4483-68

Sector: Aviation

BETWEEN:

Prijilal Premakumar, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard in: Toronto, Ontario, on November 14, 2019

Before: Dr. Francis T. Hane, Member

Rendered: March 24, 2020

REVIEW DETERMINATION AND REASONS

Held: 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*, is confirmed. Captain Premakumar failed to meet the qualifications necessary for the issuance of the CL65 pilot proficiency check.

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I. BACKGROUND

[1] The applicant, Captain Prijilal Premakumar, is employed by Air Georgian Limited (Air Georgian), a regional airline, as a captain on the Bombardier (formerly Canadair) CL65 Regional Jet (CRJ). [The type identifiers of CL65, CRJ and CRJ200 are used interchangeably throughout this determination depending on the context].

[2] In the early morning hours of October 11, 2018, Captain Premakumar and First Officer Simon Dupuis attempted a CRJ pilot proficiency check (PPC) administered by Captain Daoud Hassan.

[3] During the Category II (CAT II) instrument landing system (ILS) approach flown by First Officer Dupuis, an alleged breakdown in communication and aircraft control occurred, leading the aircraft to enter an undesired aircraft state (UAS), the degree of which is a point of contention.

[4] Following this event, the PPC was terminated by Captain Hassan who advised Captain Premakumar and First Officer Dupuis that their PPC would be assessed as a "fail".

[5] By letter dated January 23, 2019, Transport Canada (TC) advised Captain Premakumar that because of his failed PPC on October 11, 2018, and pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*, the Minister of Transport (Minister) had decided to refuse to issue his CL65 PPC.

[6] Attached to the TC letter was a copy of the PPC simulator flight test results, indicating that Captain Premakumar received a score of "1" on item 21 – "PNF Duties", with a "critical error", where the safety of the flight was compromised. He also was assessed a score of "2" on item 18 – "Landing (LND)", noting that there was a "major error" and "poor following of SOP's [standard operating procedures] and AFM [aircraft flight manual] requirements for landing".

[7] On February 11, 2019, Captain Premakumar requested a review of the Minister's decision by the Transportation Appeal Tribunal of Canada (Tribunal).

II. ANALYSIS

A. Legal framework

[8] The Minister's decision to refuse to issue a Canadian aviation document is pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*, which states:

> **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; or
>
> […]

B. Did Captain Premakumar fail to meet the qualifications of a CL65 PPC?

[9] The representative for the Minister began her case by calling TC Inspector Gregory Nicholl, the Principal Operations Inspector (POI) assigned to Air Georgian. Inspector Nicholl has extensive experience as an Approved Check Pilot (ACP). He provided the regulatory framework for the ACP program and outlined how PPCs are administered.

PNF duties — the CAT II ILS approach

[10] The Minister called on Captain Hassan to testify. He was the ACP who administered the PPC on Captain Premakumar and First Officer Dupuis. Captain Hassan has experience as both a training captain and an ACP. He proved to be a reliable and credible witness providing compelling testimony. Captain Hassan was able to clearly articulate the particulars of the PPC and how Captain Premakumar's performance deviated from safe flight. With only a minor exception, I found that his testimony (and that of First Officer Dupuis) to be of great benefit.

[11] During Captain Hassan's cross-examination, Captain Premakumar attempted to call into question Captain Hassan's qualifications to evaluate PPCs. Captain Hassan testified that his ACP delegation of authority was delayed because his first two candidates as a monitored ACP were assessed as "fails". According to Inspector Nicholl's testimony, Captain Hassan did not have any difficulty in his ACP duties or require any remedial training related to his ACP delegation of authority.

[12] Captain Hassan testified that he had flown with Captain Premakumar previously and had noted his competence and had recommended him for his upgrade to captain. Captain Hassan spoke highly of Captain Premakumar and I saw no evidence in his testimony, other than his reasonable frustration and discomfort during cross-examination, that he had any animosity toward Captain Premakumar or that he was motivated by malice.

[13] Captain Hassan testified that the flight simulator used for the PPC did not have any defects and was in satisfactory working order. There is no evidence to the contrary.

[14] Captain Hassan testified that during the CAT II ILS approach in question, First Officer Dupuis was the Pilot Flying (PF) while Captain Premakumar was the Pilot Not Flying (PNF). The weather was set at "0/0" indicating that the pilots would not be able to obtain the required visual reference at the decision height (DH) and would therefore need to conduct a go-around and missed-approach procedure. Captain Hassan testified that during the approach, the aircraft descended below the DH and that First Officer Dupuis did not immediately initiate a go-around. Captain Premakumar took control at literally the last second.

[15] Captain Hassan testified that regardless of Captain Premakumar's efforts, the aircraft entered an undesired aircraft state. The *Approved Check Pilot Manual* (ACP manual), tenth edition, TP 6533E (Exhibit M-1) page 46, defines a UAS as: "an aircraft position, speed, attitude

or configuration that results from a flight crew error, action or omission **which clearly reduces safety margins**" [emphasis added in exhibit M-1]. Captain Hassan testified that the aircraft contacted the runway in an uncontrolled state.

[16] Captain Hassan testified that because the simulator's "Crash Inhibit" function was enabled, the simulator screen depicted the aircraft eventually bouncing back into the air rather than showing a crash, as would be indicated by the screen going red — a somewhat macabre design feature that can have an adverse effect on the confidence of trainee pilots. However, he testified that the screen did show flight parameters at the time of the crash. According to Captain Hassan, at its worst state, the aircraft was in a 30 to 35 degree nose-up attitude and a 20 to 30 degree left bank (Exhibit M-6, page 21). Captain Hassan terminated the PPC and notified the candidates that the PPC was assessed as a "fail".

[17] First Officer Dupuis' testimony contradicted that of Captain Hassan. First Officer Dupuis initially testified that the aircraft merely touched the ground in a 10 to 15 degree nose-up attitude, as is to be expected in a low-energy go-around. He testified that nothing was unsafe about the event and that the aircraft speed and vertical speed was accelerating in a positive trend following ground contact and normal gear retraction. He stated that he was surprised that Captain Hassan had halted the PPC as there was no "red crash screen". First Officer Dupuis later testified that the aircraft touched down in a level attitude with the nose gear and main gear touching the runway simultaneously — a point confirmed by Captain Premakumar in his examination-in-chief.

[18] I found the testimony of Captain Hassan and that of First Officer Dupuis to be credible and mostly reliable, to differing degrees, and so I am forced to make my determination based on these two contradictory factual accounts. Regardless of this divergent testimony, I can conclude that the aircraft impacted the runway in an attitude between level, as testified by Captain Premakumar and First Officer Dupuis, and a highly uncontrolled state as testified by Captain Hassan. Based on testimony from all witnesses, I can further conclude that the aircraft did not touch the ground in a normal, nose-high, low-energy go-around attitude.

[19] Even if I accept First Officer Dupuis' testimony in full, and discount that of Captain Hassan entirely, I would still be led to the same conclusion — that the aircraft descended well below the DH with little recognition of its undesired state by the crew. For a brief period, the aircraft was not under positive control by either Captain Premakumar or First Officer Dupuis, which led to the aircraft entering UAS. For this reason, an assessment of "1" for the PNF duties is appropriate.

[20] To make this finding, I am drawn to Exhibit A-6, an excerpt from the *Pilot Reference Manual* for the CRJ200 aircraft. This document states that "the approach pitch attitude is approximately 3-degrees nose down at VREF with flaps 45 set". Captain Premakumar testified that during a go-around, the aircraft is rotated at approximately three degrees per second. Even if I fully accept First Officer Dupuis' and Captain Premakumar's accounts that the aircraft touched down in a level attitude, I can deduce that the go-around was initiated approximately one second prior to touchdown. Allowing the testimony of Captain Hassan, that the rate of decent at DH is approximately 700 FPM, and applying some elementary arithmetic, I conclude that, at best, the go-around was initiated at approximately 12 to 15 feet above the runway — an altitude far below

the DH of 100 feet for the CAT II ILS approach. Ultimately, the failure of Captain Premakumar's PPC rests on this point alone.

[21] This finding is supported by Captain Premakumar's testimony that First Officer Dupuis hesitated in his go-around before Captain Premakumar immediately called for a go-around a second time. Based on the calculations above and the fact that the aircraft contacted the ground, I conclude that the time from the first go-around call, at the DH, to when First Officer Dupuis initiated his go-around, was long enough for the aircraft to travel from the DH to within 12 to 15 feet above the ground.

[22] The facts that I have found above resulted in "*an aircraft position, speed, attitude or configuration that results from a flight crew error, action or omission which clearly reduces safety margins*", meeting the criteria of a UAS, which indicates that a "critical error" occurred. The ACP manual, at section 5.17, 4-Point Marking Scale – Grading Matrix, indicates that a critical error shall be evaluated as a "1", or a "fail".

The simulator Crash Inhibit feature

[23] Much testimony and discussion revolved around the fact that the simulator's Crash Inhibit feature was "on" throughout the PPC. This is a red herring. Captain Hassan testified that the Crash Inhibit is a design feature that prevents the simulator from crashing, possibly damaging the supporting structure. The Crash Inhibit "on" would result in neither the screen going red nor a P57 Crash Status message on the instructor console, as normal during a crash. I found much of this evidence to be a distraction from the essence of this case, that being: what happened during the CAT II ILS approach and attempted go-around?

[24] Captain Hassan testified that he got a Crash Status message, but this testimony was contradicted by the evidence adduced by Captain Premakumar that the crash message only occurs if the Crash Inhibit is "off".

[25] I was impressed by Captain Premakumar's extensive preparation for this case and his development of his evidentiary record, although some of his evidence was irrelevant. Captain Premakumar produced three videos that demonstrated what happens during a CRJ simulator crash with the Crash Inhibit "on" and "off".

[26] Despite objections from the Minister, I admitted these videos into evidence for the following reasons:

a. They were intended to contradict Captain Hassan's testimony that he got a Crash Status message;

b. They were not claimed to be a re-enactment of the PPC in question; and

c. This Tribunal has broad discretion to allow evidence that would not be admissible under traditional rules of evidence.

[27] Indeed, these videos contradict Captain Hassan's testimony that he got a Crash Status message, and I conclude that he did not see such message. This case, however, does not rest on

whether Captain Hassan got a Crash Status message or not, and this would have had no bearing on Captain Premakumar's ability to perform his PNF duties.

[28] Captain Hassan may have been mistaken at the time, or his memory may have briefly failed him during this part of his testimony, but this is hardly a reason to reject his entire testimony and conclude that the CAT II ILS approach was conducted in a satisfactory manner. Captain Hassan succinctly stated that he does not need a computer print-out or a red screen in the simulator to tell him that the aircraft crashed. I cannot help but agree with him.

[29] While I find both Captain Hassan and First Officer Dupuis to be credible and reliable witnesses, the lack of a red crash screen may have affected First Officer Dupuis' recollection of the events and led him to conclude that since there was no red crash screen, there was no crash. Throughout their testimonies, both he and Captain Premakumar seemed to equate the red crash screen with a crash, and anything other than a red crash screen, with satisfactory aircraft control. For this reason, although not required for me to make my determination, I lean toward Captain Hassan's version of events.

Captain Hassan's conduct

[30] The credibility and professionalism of Captain Hassan was raised during the testimony of Captain Premakumar and that of First Officer Dupuis. Captain Premakumar claimed that Captain Hassan's conduct adversely affected his performance. Both pilots testified that they were concerned with Captain Hassan's admitted use of an electronic device; notably its use to take notes, the noise it made during the briefing, and Captain Hassan calling a fellow ACP following the failed PPC. Additionally, both pilots testified that they felt rushed by Captain Hassan. First Officer Dupuis testified that Captain Hassan was the most intimidating ACP that he has ever had.

[31] I disagree with the candidates' assessment of Captain Hassan's administration of the PPC. Whether Captain Hassan used his cell phone or a company-issued iPad, as Captain Premakumar suggested, to make supplementary notes is irrelevant. Only Captain Premakumar could recall if the device made an audible noise during the briefing; First Officer Dupuis could not.

[32] Captain Premakumar submitted that Captain Hassan's cell phone use may have distracted Captain Hassan from making an accurate assessment of the CAT II ILS approach, to his detriment. Rather, I see the potential for the opposite effect; if Captain Hassan had been distracted, he likely would have missed the ground contact and undesired aircraft state. He would have only recorded a minor deviation when a much greater deviation occurred, not the other way around as submitted by Captain Premakumar.

[33] Secondly, I see no issue with Captain Hassan calling his colleague, Captain Sarah Payrack, for advice following the failed PPC. Failing a candidate is a serious decision and Captain Hassan testified that he wanted to ensure that he had his bases covered — he was after all, a new ACP at the time of this PPC. There is no evidence that Captain Hassan called Captain Payrack for nefarious, humorous, or slanderous purposes. Perhaps another ACP would not have the need to call a colleague, but I find no fault with Captain Hassan for his call.

[34] Both pilots testified that they felt rushed by Captain Hassan. I accept their testimony, but this is a subjective feeling, and I cannot rely on their subjective feelings to infer that Captain Hassan provided insufficient time for them to complete their duties in a satisfactory manner. If they felt rushed, they should have asked for extra time for their approach set-up, as indicated in the ACP manual at page 72. This should not be a point of contention. Professional pilots have the responsibility to advise the ACP or ATC (air traffic controller) if they are not prepared to conduct an approach, especially a CAT II ILS.

[35] Captain Hassan is not expected to be perfect in his conduct as an ACP, and I find, based on the principles enumerated in the ACP manual, that his administration of the PPC fell well within an acceptable range. I conclude that even if Captain Hassan's actions deviated from the ideal, these deviations had no effect on Captain Premakumar's performance.

[36] Captain Premakumar objected to how the simulator was set up and suggested that it did not meet the requirements for a simulator under section 606.03 of the *Canadian Aviation Regulations (CARs)*. I can give no consideration to this argument. Captain Premakumar made no mention of this issue to Captain Hassan during the PPC, and there is no evidence that it affected the outcome of the PPC.

Captain Hassan's documents

[37] In his submissions, Captain Premakumar raised suspicions that Captain Hassan's script notes and his Flight Test Report Synopsis (Exhibit M-7) (synopsis) were fabricated. While I see no evidence of fabrication — a serious accusation — I do note several inconsistencies that could raise the suspicion that Captain Hassan's recollection of his note-taking was not as reliable as it should have been.

[38] According to his testimony, Captain Hassan made notes on his CRJ Script (Exhibit M-6) during the course of the PPC. Captain Premakumar argued that these notes were not made contemporaneous to the PPC. He provided no evidence to support this assertion. The handwriting on the Flight Test Report (Exhibit A-4) is neat and legible. The handwriting on the CRJ Script is rough and barely legible. This leads me to believe that Captain Hassan was writing these notes as he was administering the PPC and I rely on them.

[39] First, the Flight Test Report (Exhibit M-4) was not the same report that was originally given to the applicant (Exhibit A-2). In the original report, Captain Premakumar received a "1" for the ILS approach. A mark of "3" was whited out. He was assigned a mark of "2" for PNF Duties. On the final report (Exhibit M-4), Captain Premakumar was assigned a mark of "3" for the ILS approach and a mark of "1" for PNF Duties. Captain Hassan testified that he revised the Flight Test Report following discussions with his leadership and Inspector Nicholl during working hours. He emailed the revised report to Captain Premakumar on October 24, 2018 (Exhibit A-3). This is a concerning practice. Captain Hassan holds a delegation of authority; he is fully capable of assigning marks based on what he observed. His superiors or TC representatives, who were not present, were in an inferior position to evaluate Captain Premakumar's performance and should not be coaching their subordinates on how to complete the Flight Test Report for maximum effect. To do so flies in the face of the guidance and spirit of the ACP manual. Regardless, this point did not affect the outcome of the PPC.

[40] Of greater concern is the timing of when Captain Hassan's synopsis was written. Captain Hassan testified that he made his synopsis within 24 hours of the PPC. While I accept the general premise of the synopsis — that this PPC contained numerous major and critical errors as listed in the CRJ Script — it does not appear to be contemporaneous and may not have been written as testified by Captain Hassan. In the synopsis, Captain Hassan notes that Captain Premakumar was assessed a "critical error" for item 21 - PNF Duties. Yet, his original Flight Test Report (Exhibit A-2) assigns a mark of "2". It is only once the report was revised (Exhibit M-4), possibly on or before October 24, 2018 (Exhibit A-3), that Captain Premakumar's performance on item 21 – PNF Duties was assessed as a "1". This evidence could lead to a reasonable inference that the synopsis was not written contemporaneously as claimed and was written following the revision of the Flight Test Report (Exhibit M-4). I discounted the weight afforded to this evidence accordingly but accept that the synopsis captured the deficiencies in the PPC in a more legible manner than the CRJ Script.

[41] The fact that Captain Hassan did not note the aircraft pitch and bank angle in the Flight Test Report (Exhibit M-4), or during the debrief, is not evidence that he did not complete his notes on the CRJ Script contemporaneously. The quality of the handwriting, or lack thereof on the CRJ Script, is evidence that he was making these notes while he was busy administering the PPC.

[42] In conclusion, I find that at best, the go-around on the CAT II ILS approach was initiated far below minimums. At worst, the aircraft crashed on the runway in a landing accident. Either way, the safety of the flight was critically compromised. The remaining evidence regarding the Crash Inhibit feature and Captain Hassan's conduct is irrelevant to the applicant's performance during the PPC, and the performance of his PNF duties. According to section 5.17 of the ACP manual, compromised safety of flight is a "critical error" that will result in a failing mark of "1" being assessed. For this reason, the Minister's finding that Captain Premakumar did not meet the requirements of a CL65 PPC is confirmed.

C. Admissibility of evidence

[43] During Captain Premakumar's examination-in-chief, he attempted to adduce evidence from the TC document entitled *Aeroplane and Rotorcraft Simulator Manual* (Sim manual). The Minister objected to the admission of this evidence and I refused to enter this document into the record as I found it irrelevant.

[44] During his submissions, Captain Premakumar relied on the Sim manual. I reminded him that this manual was not in evidence. Captain Premakumar pointed out that the Sim manual is a TC document and that since paragraph 606.03(4)(b) of the *CARs* refers to this manual, I should rely on it.

[45] While I find that the information contained in the Sim manual is irrelevant to this case, it is incorporated by reference in paragraph 606.03(4)(b) and therefore deserves judicial notice (*Statutory Instruments Act* at section 16(1); *Ontario v. St. Lawrence Cement Inc*., 2002 CanLII 45010 (ON CA)). Captain Premakumar was correct and was entitled to rely on it during his submissions. This did not affect the outcome of this case.

III. DETERMINATION

[46] 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, is confirmed. Captain Premakumar failed to meet the qualifications necessary for the issuance of the CL65 pilot proficiency check.

March 24, 2020

(Original signed)

Dr. Francis T. Hane
Member

Appearances

For the Minister:	Catherine Newnham
For the Applicant:	Self-represented