



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Yoichi Sakurada v. Canada (Minister of Transport)*, 2019 TATCE 54 (Review)

TATC File No.: H-4316-72

Sector: Aviation

BETWEEN:

Yoichi Sakurada, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard in: Vancouver, British Columbia, on October 30, 2019

Before: Jacqueline Corado, Vice-Chairperson and Member

Rendered: December 18, 2019

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport's decision to suspend the Canadian aviation document issued to the applicant, Mr. Yoichi Sakurada, is upheld. The Minister has proven that the applicant ceases to meet the qualifications necessary to hold a Level 6-Expert language proficiency rating.

I. BACKGROUND AND CONTEXT

[1] By Notice of Suspension (Notice) dated March 13, 2017, Transport Canada (TC) advised Mr. Yoichi Sakurada that the results of his Aviation Language Proficiency Test (ALPT) dated October 23, 2012, which assessed him as Level 6 – Expert, could not be accepted. The Notice advised that TC had received “evidence from the Japanese Civil Aviation Authority that clearly demonstrates” that he did not display the Level 6 – Expert competencies stipulated in Standard 421.06(4) of the *Canadian Aviation Regulations (CARs)*.

[2] The Notice also informed Mr. Sakurada that his new language proficiency rating was assessed as Operational Level 4 and would expire on November 1, 2017. Mr. Sakurada was advised that the decision could be reviewed by the Transportation Appeal Tribunal of Canada (TATC/ Tribunal) in accordance with section 7.1 of the *Aeronautics Act (Act)*.

[3] On April 13, 2017, Mr. Sakurada filed a request for review of the Minister of Transport’s decision, stating that he only received the TC Notice in Japan that same day.

[4] On December 18, 2018, the Minister filed an application to request an order to quash the applicant’s request for review with the TATC. Written submissions were received, and on March 18, 2019, the Tribunal member ruled to dismiss the Minister’s application.

[5] A review hearing took place on October 30, 2019. At the hearing, the following facts were proven and uncontested:

- a. Mr. Sakurada was administered an ALPT in Canada on October 23, 2012.
- b. In 2012, TC used four standard tests for the assessment of a candidate’s language proficiency.
- c. All four standard tests were in the form of scripts; they were designed to test language proficiency in an aviation context and not to test the general fluency in English. Candidates were instructed not to deviate from the script. The four standard scripted tests dealt with situations and concepts found in an aviation context, for example: simulated air traffic controller calls, emergency situations, etc.
- d. Each of the four standard tests comprised 20 questions. Each question was assessed using the six competencies established in Standard 421.06(4) of the *CARs*: pronunciation, structure, vocabulary, fluency, comprehension, and interaction.
- e. In order to obtain a Level 6 – Expert, a candidate needed to score at the highest level on all six competencies established in Standard 421.06(4), in at least 14 of the 20 questions. The candidate could not score lower than a Level 4 – Operational for the remaining six questions.
- f. On December 5, 2012, TC issued a letter entitled: “Aviation Language Proficiency Test Results” (Exhibit M-2). The overall result of the assessment was: Expert – Level 6.
- g. A note at the bottom of the ALPT results states that applicants wishing to reattempt the aviation language proficiency test are subject to the time limits imposed by section 400.04 of the *CARs*.

- h. The issuance and delivery of a Canadian pilot licence requires ALPT results assessed at either Level 6 (Expert) or Level 4 (Operational) as provided by paragraph 401.06(1.1)(b) of the *CARs*.

II. PRELIMINARY ISSUES

[6] During the hearing, the applicant wished to tender evidence of events that happened after the Notice of Suspension dated March 13, 2017. The Minister objected to this evidence on the grounds that it was irrelevant to the adjudication of whether the Minister was justified in its decision to issue the Notice and decision under review.

[7] In the case at hand, the Minister is suspending Mr. Sakurada's language proficiency rating of level 6 on the grounds that he has ceased to meet the qualifications necessary to hold such rating. The Minister based its decision on evidence obtained and events that occurred prior to the issuance of the level 6 rating back in October 2012.

[8] At the hearing, counsel for the Minister confirmed that the Notice and decision dated March 13, 2017 was a suspension that could be lifted on condition that the applicant successfully met the qualifications for a Level 6 - Expert.

[9] I agree with the Minister that the ALPT results dated May 24, 2017 (Exhibit A-1) and the subsequent letter from TC dated June 26, 2017 (Exhibit A-2) are not relevant to contest the Notice and decision from the Minister of March 13, 2017. They are nevertheless relevant to consider whether the suspension can be lifted. I therefore allow both exhibits into evidence.

III. ISSUES

A. Was the Minister's decision to suspend Mr. Sakurada's language proficiency rating of Level 6 – Expert and replace it with Level 4 – Operational justified and in accordance with the *Aeronautics Act* and the *Canadian Aviation Regulations*?

[10] Section 7.1 of the *Act* gives the Minister of Transport the authority to suspend and cancel a Canadian aviation document (CAD) under three different grounds: a) incompetency, b) ceasing to meet the required qualifications necessary for the issuance of the document, and c) the public interest and the aviation record of the document holder justify the suspension or cancellation.

B. Following the March 13, 2017 decision of the Minister, did the applicant succeed in meeting the qualifications for a Level 6 - Expert language proficiency rating in order to justify lifting the suspension?

IV. ANALYSIS

A. Was the Minister’s decision to suspend Mr. Sakurada’s language proficiency rating of Level 6 – Expert and replace it with Level 4 – Operational justified and in accordance with the *Aeronautics Act* and the *Canadian Aviation Regulations*?

[11] At the hearing, the Minister submitted that Mr. Sakurada had ceased to meet the qualifications necessary for the issuance of the document (paragraph 7.1(1)(b) of the *Act*) and that the public interest and aviation record of the applicant would justify the suspension as well (para. 7.1(1)(c) of the *Act*).

[12] The Minister’s evidence focused mostly on the ground for suspension provided by paragraph 7.1(1)(b) of the *Act*: the document holder has ceased to meet the necessary qualifications to hold a CAD. The necessary qualifications for a person who wishes to obtain a language proficiency rating in Canada are established in Standard 421.06(4) of the *CARs*. The requirements read as follows:

Level	Pronunciation	Structure	Vocabulary	Fluency	Comprehension	Interaction
Expert Level describes proficiency more advanced than the minimum required standard	Pronunciation, stress, rhythm, and intonation infrequently are influenced by the first language or regional variation, but almost never interfere with ease of understanding.	Both basic and complex grammatical structures and sentence patterns are consistently well controlled.	Vocabulary range and accuracy are sufficient to communicate effectively on a wide variety of familiar and unfamiliar topics. Vocabulary is idiomatic, nuanced, and sensitive to register.	Able to speak at length with a natural, effortless flow. Varies speech flow for stylistic effect, e.g. to emphasize a point. Uses appropriate discourse markers and connectors.	Comprehension is consistently accurate in nearly all contexts and includes comprehension of linguistic and cultural subtleties.	Interacts with ease in nearly all situations. Is sensitive to verbal and non-verbal cues and responds to them appropriately.

Level	Pronunciation	Structure	Vocabulary	Fluency	Comprehension	Interaction
Operational Level describes the minimum proficiency acceptable for radiotelephony communication	Pronunciation, stress, rhythm, and intonation are influenced by the first language or regional variation, to the extent that they sometimes interfere with ease of understanding.	Basic grammatical structures and sentence patterns are used creatively and are usually well controlled. Errors may occur, particularly in unusual or unexpected circumstances, but rarely interfere with meaning.	Vocabulary range and accuracy are usually sufficient to communicate effectively on common, concrete, and work-related topics. Can often paraphrase successfully when lacking vocabulary in unusual or unexpected circumstances.	Produces stretches of language at an appropriate tempo. There may be occasional loss of fluency on transition from rehearsed or formulaic speech to spontaneous interaction, but this does not prevent effective communication. Can make limited use of discourse markers or connectors. Fillers are not distracting.	Comprehension is mostly accurate on common, concrete, and work-related topics when the accent or variety used is sufficiently intelligible for an international community of users. When the speaker is confronted with a linguistic or situational complication or an unexpected turn of events, comprehension may be slower or require clarification strategies.	Responses are usually immediate, appropriate, and informative. Initiates and maintains exchanges even when dealing with an unexpected turn of events. Deals adequately with apparent misunderstandings by checking, confirming, or clarifying.

[13] The applicant submits that the Minister did not have the jurisdiction to issue the March 13, 2017 decision. He submits that paragraph 7.1(1)(a) of the *Act* does not apply, since a person who has either Level 4 - Operational or Expert level 6 is by definition competent, and that the difference is simply that a person is either sufficiently competent or exceptionally competent. I disagree with this submission. The Minister could find, in the face of relevant evidence, that a person was granted a certain level of language proficiency and subsequently became incompetent due to an unforeseen situation (example: illness), or was not competent to begin with when they obtained a certain level of language proficiency under Standard 421.06(4) of the *CARs*.

[14] The same principle applies for paragraphs 7.1(1)(b) and 7.1(1)(c) of the *Act*. These provisions allow the Minister to suspend or cancel an existing CAD if the holder has ceased to meet the required qualifications or if the Minister is of the opinion that the aviation record and public interest warrant the suspension or cancellation.

[15] The issuance of a CAD is a privilege, not a right. In order for a person to exercise that privilege, they need to meet and uphold the requirements for said CAD. Mr. Andrew Simpson, a civil aviation inspector for training and licencing at TC who also trains all language assessors for TC and conducts assessments himself, testified about the importance of language proficiency. He stated that the International Civil Aviation Organization (ICAO) introduced language proficiency requirements after finding that insufficient language proficiency was a key human factor for many aviation accidents.

[16] Mr. Simpson's testimony highlights the fact that language proficiency is a safety issue; all the more reason for the Minister to take seriously the evidence that a pilot might no longer meet the necessary language requirements.

[17] Mr. Sakurada obtained a Level 6 - Expert in 2012 (Exhibit M-2). Both parties at the hearing indicated that it is possible Mr. Sakurada met the criteria to obtain a Level 6 - Expert at the time of obtaining his Canadian ALPT results in 2012. The Minister does not contest or claim that the 2012 results were erroneous. I therefore dismiss the argument made by the applicant that there was no evidence the results from 2012 were erroneous; this is not in question before the Tribunal.

[18] Mr. Sakurada had lived in California from 2007 to 2010 and used English to communicate at work, to shop, and in other situations while living in the United States. In 2010, he returned to live in Japan and testified that he kept communicating in English to a certain degree.

[19] In 2015, the Japan Civil Aviation Bureau (JCAB) tested 11 Japanese pilots who had obtained a Level 6 - Expert on a Canadian ALPT and found that most of them did not meet the requirements for such rating. Mr. Sakurada was one of those pilots.

[20] The JCAB concluded that among the 11 pilots they tested, only one qualified as a Level 6 - Expert; Mr. Sakurada did not. The JCAB provided TC with the results of their assessment (Exhibits M-3, M-4 and M-5), along with a recording of Mr. Sakurada's interview assessment conducted in Japan (Exhibit M-7), and asked TC to verify the validity of their findings.

[21] The Minister has the responsibility to investigate matters relating to aviation safety under paragraph 4.2(1)(n) of the *Act* after being contacted by the JCAB regarding pilots who held Canadian Level 6 - Expert language proficiency.

[22] TC reviewed the evidence submitted by the JCAB and concluded that the applicant had ceased to meet the qualifications to hold a Level 6 - Expert rating. Mr. Simpson testified and tendered evidence to support the Minister's decision.

[23] Mr. Simpson explained the reasons why the applicant could no longer be considered to meet the requirements under Standard 421.06(4) of the *CARs*. In assessing the evidence provided by the JCAB, the Minister found that the grammatical structure, fluency, comprehension and interaction of the applicant was no longer at the Expert level but at an Operational level. I agree with the Minister's assessment of the evidence that was provided. Furthermore, during the hearing, Mr. Sakurada displayed difficulty at times understanding questions and the instructions.

[24] In his written submissions (pg. 7), the applicant contends that "the system grants an Expert Level holder protection against further retesting *despite* the possibility that a person's language ability might degrade over time".

[25] A person who benefits from the privilege of holding a language proficiency of Expert level 6 does not need to be tested repeatedly and periodically, as opposed to a Level 4 - Operational, and could potentially hold that expert rating forever without ever having to be tested again, unless there is evidence that the person does not qualify for that privilege.

[26] The very objective of section 7.1 of the *Act* is to ensure that CAD holders maintain the qualifications necessary for the delivery of the document in question. The provision allows the Minister to suspend or cancel a CAD when its existence can no longer be justified; it is the very

heart and purpose of that provision. I reject the argument that a Level 6 - Expert ALPT is irrevocable despite a person's loss of language ability over time.

[27] The applicant submitted that the Minister had not investigated every person who had obtained a Level 6 – Expert. The Minister replied that this would be financially onerous and impossible but that they did investigate the 11 names provided by the JCAB. The Minister acted correctly; as mentioned before, a person holding a Level 6 - Expert does not need to be retested unless there are grounds, such as those in section 7.1 of the *Act*, that could apply.

[28] It is unclear why Mr. Sakurada was retested in Japan. As stipulated in the “Aviation Language Proficiency Test Results” letter sent to the applicant:

Canadian Aviation Language Proficiency Test results performed by Canadian Aviation Language Proficiency Test Examiners are considered preliminary test results only. These test results are only to be used for consideration of language level upon application for a Canadian Pilot Licence. These test results are not to be used for any other purpose.

[29] For further clarity, the *Act* recognizes that every person exercising the privileges accorded by a CAD in a foreign state shall comply with the applicable aeronautics laws of that state (subsection 4(2) of the *Act*). Therefore, if Mr. Sakurada tried to use the Level 6 - Expert obtained in Canada while he was in Japan, he still needed to comply with the applicable laws of Japan.

[30] Based on the evidence received from the JCAB, the Minister was justified in applying section 7.1 of the *Act* when a document holder ceases to meet the requirements of their CAD. With all due respect for Mr. Sakurada, the Minister did not use this provision as a “backdoor” to retest his language skills.

[31] The Minister was not under an obligation to retest Mr. Sakurada in order to suspend under section 7.1 of the *Act*; it had the evidence from the language proficiency assessment from Japan and proceeded to assess that material. The obligation for an evaluation exists when an applicant makes an application for a licence or permit (the issuance or renewal of a CAD) under section 6.71 of the *Act* as stated in subsections 401.06(1) and 401.06(1.1) of the *CARs*.

[32] After the suspension of the CAD, the applicant can then try to have the suspension lifted by meeting conditions specified by the Minister and the mandatory requirements for the reissuance.

[33] The applicant takes issue with the way TC removed his Level 6 - Expert ALPT and submits that there is no evidence that the Minister re-assessed him in accordance with the Minister's rules and policies regarding examinations.

[34] I agree with the applicant that the Minister did not fully follow procedure when issuing the March 13, 2017 Notice of Suspension and decision. However, contrary to the applicant's submissions, the procedure to suspend his Level 6 - Expert did not require that a delegated examiner retest Mr. Sakurada. Further, the Advisory Circular referred to by the applicant states in its introduction on page 2: “This Advisory Circular (AC) is provided for information and guidance purposes. It describes an acceptable means, **but not the only means of demonstrating compliance with regulations and standards.**” [emphasis added]

[35] Subsection 103.06(3) of the *CARs* establishes the procedure to be followed by the Minister when suspending or cancelling a CAD under section 7.1 of the *Act*.

[36] The Minister needs to issue a notice that specifies the effective date of the suspension. The Notice dated March 13, 2017 does not specify an effective date of suspension; the applicant was left to assume that the Minister intended its decision to be effective immediately upon issuing the Notice.

[37] Under paragraph 103.06(3)(b) of the *CARs*, the Minister shall include a statement of the duration of the suspension or the conditions under which the suspension is terminated; the Notice is silent in this regard. At the hearing, counsel for the Minister confirmed that the Notice was a suspension and not a cancellation, as Mr. Sakurada could try again to obtain a Level 6 - Expert.

[38] The third procedural obligation for the Minister under subsection 103.06(3) of the *CARs* when cancelling or suspending a CAD is to include a statement in the Notice that a request for review by the Tribunal does not operate as a stay of the suspension. The Minister failed to meet this third procedural obligation in its Notice dated March 13, 2017.

[39] The applicant did not object to any of those procedural errors mentioned and I find that Mr. Sakurada's substantive rights were not affected despite the errors in the Notice. However, the Minister and the aviation community will be better served if notices of suspension and cancellation from the Minister provide in full the information stated in subsection 103.06(3) of the *CARs*.

[40] Therefore, I conclude that the Minister was justified in suspending the Level 6 - Expert language proficiency rating of the applicant when it applied section 7.1 of the *Act* based on the evidence provided by the JCAB.

B. Following the March 13, 2017 decision of the Minister, did the applicant succeed in meeting the qualifications for a Level 6 - Expert language proficiency rating in order to justify lifting the suspension?

[41] In order for the applicant's suspension to be lifted, he needed to prove that he once again could meet the requirements under Standard 421.06(4) of the *CARs*.

[42] Mr. Sakurada submitted into evidence two documents (Exhibits A-1 and A-2) of his attempts to pass an ALPT in Canada in May 2017, after the suspension of his Level 6 - Expert.

[43] He tried first, on May 23, 2017, to reinstate his Level 6 - Expert by undergoing an ALPT in Canada. The result was a Level 4 - Operational.

[44] Mr. Sakurada tried a second time, the next day, on May 24, 2017, and the result was again a Level 4 - Operational.

[45] He tried a third time on the same day, May 24, 2017, and the result was a Level 6 - Expert.

[46] TC refused to accept the Level 6 - Expert result from the third attempt due to inconsistencies shown on the three tests taken by Mr. Sakurada during a two-day span and due to the failure to comply with the re-test waiting period outlined in the *CARs*.

[47] Section 400.04 of the *CARs* states that a person who fails an examination, or a section of a sectionalized examination, is ineligible to rewrite the examination or the failed section for a period of 14 days in the case of a first failure, and for a period of 30 days in the case of a second failure.

[48] The applicant submitted that this provision is not applicable to him, as he understands the first result on May 23, 2017 to be a success and not a failure since he obtained a Level 4 - Operational. I cannot subscribe to this argument by the applicant. On May 23, 2017, the applicant tried to obtain a Level 6 - Expert rating to lift his suspension and he failed to obtain such rating. Therefore, as provided by section 400.04 of the *CARs*, he had to wait 14 days to retest. Instead he retested the next day and obtained a Level 4 – Operational once again. It is unknown why, despite section 400.04 of the *CARs*, Mr. Sakurada underwent a second ALPT the next day, and then a third test on the same day that he failed his second one, when the regulations clearly don't allow it.

[49] A person can request to rewrite an examination. The Minister shall then inform the person in writing of the date on which the person may rewrite the examination and whether they are required to provide evidence of further study or instruction before rewriting the examination (subsection 400.04(5) of the *CARs*). There was no evidence tendered that Mr. Sakurada had made this request to rewrite his ALPT the next day or that the Minister had authorized it and provided him with the date of May 24, 2017 to rewrite the test.

[50] A person can also submit a request to the Minister to shorten the period between examination attempts and the Minister shall grant the request on receipt of confirmation that the person has reviewed their weak knowledge areas (subsection 400.04(6) of the *CARs*). There is no evidence that there had been an authorization from the Minister to shorten the delays; on the contrary, Exhibit A-2 states that Mr. Sakurada failed to “comply with the re-test writing periods outlined in CAR 400.03 (sic)”.

[51] Exhibit A-2 also mentions that if Mr. Sakurada intends to be retested, he is required to present himself in person no earlier than 90 days from the date he last wrote an ALPT, and instructs him to write to a specific email address to obtain a list of examiners allowed to administer the re-test.

[52] Considering that there is no evidence that Mr. Sakurada made a request and was authorized to retest a second and third time on May 24, 2017, I find the results from the third attempt to obtain a Level 6 – Expert cannot be used to lift the suspension.

V. DETERMINATION

[53] The Minister of Transport's decision to suspend the Canadian aviation document issued to the applicant, Mr. Yoichi Sakurada, is upheld. The Minister has proven that the applicant

ceases to meet the qualifications necessary to hold a Level 6 - Expert language proficiency rating.

December 18, 2019

(Original signed)

Jacqueline Corado
Vice-Chairperson and Member

Appearances

For the Minister:	Catherine Newnham
For the Applicant:	Masao Morinaga