



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Kamal Eljak v. Canada (Minister of Transport)*, 2021 TATCE 2 (Review)

TATC File No.: Q-4620-27

Sector: Aviation

BETWEEN:

Kamal Eljak, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference on November 19, 2020

Before: Andrew Wilson, Member

Rendered: February 1, 2021

REVIEW DETERMINATION AND REASONS

Held: The decision by the Minister of Transport to refuse to issue a Commercial Pilot Licence to the applicant is upheld.

I. BACKGROUND

[1] By way of notice dated May 28, 2020, Transport Canada (TC) advised the applicant that, pursuant to section 6.71 of the *Aeronautics Act*, the Minister of Transport (Minister) had decided to refuse to issue a Commercial Pilot Licence – Aeroplane (CPL). TC cited paragraph 6.71(1)(b), qualifications or conditions necessary for issuance or amendment not met or fulfilled, as the reason for the refusal to issue the CPL.

[2] TC wrote in the notice that the refusal to issue the CPL was due to the fact that the Commercial Pilot Licence – Aeroplanes written examination (CPAER) required by Standard 421.30(3)(c) of the *Canadian Aviation Regulations (CARs)* was expired on the date that Mr. Eljak applied for the CPL. TC noted that Mr. Eljak submitted his application personally on May 12, 2020, without having submitted it to an authorized person.

[3] Additionally, TC noted that Mr. Eljak’s first attempt at the CPAER written examination, a partial pass written on February 6, 2018, expired on February 6, 2020, and accordingly was expired at the time of his application on May 12, 2020. Subsection 400.03(1) of the *CARs* sets out time limits for the validity of written examinations.

[4] By way of an email received by the Transportation Appeal Tribunal of Canada (Tribunal) on June 16, 2020, Mr. Eljak requested that the Tribunal review Transport Canada’s decision to refuse to issue him a CPL.

II. PRELIMINARY ISSUE

[5] A case management video conference was held on October 27, 2020, and minutes of that conference were sent to the parties by the registrar. The minutes recite that:

The Applicant admits the factual basis forming the ground for the Minister’s decision to issue the Notice. Specifically, he accepts that he applied for his Commercial Pilot Licence in May 2020, approx. 27 months after his first attempt (partial pass) at writing the CPAER exam in February 2018 (the partial re-write occurred in September 2018). These facts, as alleged in the Notice, are not contested by the Applicant.

[6] At the outset of the review hearing, I confirmed with the applicant that he did indeed admit that the relevant dates were correct, namely February 6, 2018, and September 18, 2018, for the two written exams, and May 12, 2020, for the date of his application.

III. LEGAL FRAMEWORK

[7] Paragraph 6.71(1)(b) of the *Aeronautics Act* provides the Minister of Transport with the authority to refuse to issue or amend a Canadian aviation document (CAD) where the applicant does not meet the qualifications or fulfill the conditions necessary for the issuance or amendment of the document.

[8] Subsection 400.03(1) of the *CARs* provides:

Time Limits

400.03 (1) Subject to subsection (3), written examinations, including all sections of a sectionalized examination, that are required for the issuance of a permit or licence or for the endorsement of a permit or licence with a rating shall be completed during the 24-month period preceding the date of the application for the permit, licence or rating.

[9] The written examinations required for the CPL are specified in *CARs* Standard 421.30(3)(c). The CPAER examination consists of four sections broken down by subject area. The minimum passing grade for each section is 60 per cent, as is the passing grade for the overall exam. A candidate who fails any part may rewrite that section at a later date.

IV. ANALYSIS

A. Issues

[10] There was no contest over the relevant dates, and the applicant did not contest that his application date of May 12, 2020, fell outside the 24-month window imposed by subsection 400.03(1) of the *CARs*. Instead, he argued that the extenuating circumstances surrounding his late application should result in him being issued a CPL.

[11] Therefore, broadly speaking, the issue in this case is whether there are circumstances that relieve the applicant from the strict application of the *CARs*, and if so, should this panel return the matter to the Minister for reconsideration.

B. Extenuating Circumstances

[12] The applicant is an international student who has time constraints based on his student visa. Having successfully completed his CPL flight test, he was building airtime to meet the experience requirements for a CPL. In the last week before February 6, 2020, he flew many hours to reach the total required for the application.

[13] The applicant testified that, on or about February 2, 2020, he approached the then Chief Flying Instructor (CFI) at his flying school, to make application in time to meet the deadline. He testified that the CFI advised him that he was not yet a Transport Canada “authorized person”, but expected to be issued this authority within a short time. The applicant also testified that the CFI advised him not to worry because the 24-month window did not close until September 2020, being the date when the applicant passed the last, rather than the first, section of the CPAER. As explained below, and as admitted by the applicant, this information was incorrect.

[14] According to the applicant, on February 19, 2020, the CFI texted him and advised that he had that day been granted authority as a flight test examiner by the Minister. Text message exchanges in evidence show that the CFI then began to express some uncertainty about his previous advice, suggesting that “worst case you write [the CPAER] again it’s like 5 days prep”.

[15] The applicant then approached a CFI at a different school, who advised him that his application was too late. He also attempted to contact the local TC office, but by then COVID-19

had struck and he could not reach anyone there. He ultimately submitted his application directly at the TC office on May 12, 2020. That application was refused by TC, as described above.

C. Applicant's Argument

[16] The applicant, being self-represented, did not set out his argument in strict legal terms. Rather, he explained that he had missed the deadline only because he followed the advice of the CFI who was, or had held himself out to be, a Transport Canada delegate. Therefore, he argues, TC bears the responsibility for his late application, and consequently TC should issue him a CPL.

[17] Similarly, the applicant did not spell out the legal route whereby he could be issued with a CPL, but did, *inter alia*, mention the possibility of a ministerial exemption from the *CARs* under the *Aeronautics Act*, subsection 5.9(2).

D. Legal Analysis

[18] The CPAER is a “sectionalized examination” within the meaning of *CARs* subsection 400.03(1). All sections of the exam, not just the last section, must fall within the 24-month window preceding the application for the licence. Since the applicant passed the first three sections on February 6, 2018, the window that included those first three sections closed on February 6, 2020. Since the applicant did not apply until May 12, 2020, the application was too late to be accepted.

[19] The time limits set out in *CARs* subsection 400.03(1) are mandatory. These time limits are binding both on applicants for licences and on Transport Canada itself. Their strict application is important, for the reasons set out in *Jerry Prasad v. Canada (Minister of Transport)*, 2018 TATCE 28:

[42] This Tribunal accepts the Minister's argument, based on Mr. Skrynyk's testimony, that aviation legislation and regulations are complex and it is important that applicants for commercial pilot licences strictly adhere to them. [...] We also concur with the Minister's argument that the regulatory scheme does not allow for flexibility in respect of the applicable time limitation between full completion of a flight test and the date of a licence application

[20] I find that in order to meet the time limits set out in *CARs* subsection 400.03(1), the applicant's application for a CPL was due on or before February 6, 2020.

[21] Importantly, *CARs* subsection 400.03(1) is an administrative, not a penal, section. It does not consider fault or fairness. It is simply a mandatory time limit which must be complied with in order for a licence application to be processed. Since there is no regulatory provision for flexibility or leniency, it follows that the time limit must govern regardless of the reason for it having been missed.

[22] Although nothing turns on it, in my view the Minister's occasional use of the terminology “officially induced error defence” to describe the applicant's case was perhaps misplaced. Strictly speaking, the legal term “officially induced error” refers to a due diligence defence to a strict liability offence. *CARs* subsection 400.03(1) neither creates an offence nor makes allowance for due diligence.

[23] It follows that the facts presented by the applicant, even if accepted, cannot change the legal conclusion that his application was too late and, under the *CARs*, could not be accepted by TC. The only possible route for him to be issued a CPL would be a ministerial exemption from the *CARs* under the *Aeronautics Act*, which he raised at the hearing.

[24] The Minister does from time to time, under the authority of the *Aeronautics Act*, subsection 5.9(2), issue blanket regulatory exemptions from the *CARs*. When the COVID-19 crisis struck, the Minister extended the written examination window by regulatory exemption until January 31, 2021. However, COVID-19 was not a known factor on February 6, 2020, and the parties agree that this exemption applies only to examinations written after March 11, 2018. Accordingly, the last section of the exam that the applicant passed on September 18, 2018, is captured by the exemption, but the first three sections he passed on February 6, 2018, are not.

[25] Ministerial exemptions to the *CARs* under subsection 5.9(1) of the *Aeronautics Act* are discretionary. In *Prism Helicopters*¹ the Federal Court has ruled that *CARs* exemptions are a Canadian aviation document, and that therefore this Tribunal may review the decision to suspend, cancel or refuse to renew an exemption under subsection 7.1(1) of the *Aeronautics Act*. It may be that the same logic applies with respect to section 6.72 of the *Aeronautics Act*, and that this Tribunal may also have jurisdiction to review the refusal to issue an exemption. However, it is unnecessary for me to delve into such uncharted waters.

[26] The matter before the Tribunal is the refusal of the Minister to issue a CPL. There is no application before me to review a refusal of an exemption, and to be clear, the applicant did not allege that the Minister has actually refused to issue an exemption. Rather, he merely suggested that the issuance of an exemption might be a means by which the Minister could issue a CPL despite *CARs* subsection 400.03(1).

[27] Short of the jurisdiction referred to in the *Prism Helicopters* case, this Tribunal has no jurisdiction with respect to ministerial exemptions. That limited jurisdiction is not engaged in the present matter.

E. Factual Analysis

[28] The essence of the applicant's complaint is that he relied on misstatements by TC or its delegate to his detriment, and therefore he should be entitled to the issuance of a CPL.

[29] Logically, a misstatement or other event occurring after the deadline has passed, cannot have caused the missing of the deadline. Therefore, only events occurring on or before February 6, 2020, could be relevant to the missing of the deadline.

[30] The applicant agrees that the CFI told him on or about February 2, 2020, that he was not yet an authorized person. On February 19, 2020, the CFI texted that he had that day become an "authorized person" and could now proceed with his paperwork. Based on the applicant's own

¹ *Canada (Attorney General) v. Prism Helicopters Limited*, 2007 FC 1346 (CanLII)

testimony and supporting text messages, and there being no evidence to the contrary, I find as a fact that the CFI was not a TC delegate on or before the February 6, 2020, deadline.

[31] There is also no evidence that TC held the CFI out to be a TC delegate before that date, nor would TC have any reason to do so.

[32] In the alternative, the applicant argues that the CFI himself wrongfully held himself out to be a TC delegate, and that this should oblige TC to issue him a licence. There are two main problems with this argument, one factual and one legal.

[33] Firstly, there is no evidence that the CFI wrongfully held himself out as an agent of TC during the relevant time. The applicant's own evidence is to the contrary. It shows instead that the CFI advised the applicant on or about February 2, 2020, that he was not yet a delegate but expected to be appointed shortly, which was why he told the applicant (incorrectly) that the application could wait until his appointment came through. Only later, on February 19, 2020, did the CFI advise the applicant that he had been appointed that day.

[34] Secondly, in law, a principal is responsible for the acts of an agent only if the principal holds the agent out to be his agent. If the principal has no knowledge of the wrongful holding out, then the principal bears no responsibility. There is no evidence that TC held the CFI out to be its representative or knew of any wrongful holding out at any time.

[35] I therefore find that TC played no role in the applicant's failure to make a timely application for his CPL.

[36] This is not the proper forum to address the question of whether the CFI misled the applicant on or before February 6, 2020, while **not** a TC delegate. This is a matter which does not involve the respondent, Transport Canada, and is not a subject matter within the jurisdiction of this Tribunal.

F. Conclusions

[37] I accept the Minister's characterization of *CARs* subsection 400.03(1) as being mandatory and binding on both the applicant and Transport Canada. I find that, as a matter of statutory interpretation, the reason for missing the deadline is not relevant. The Minister properly refused the application for a CPL because, on the date it was received, more than two years had elapsed since the applicant had passed some of the required written exams.

[38] Since the CFI was not a delegate of the Minister on or before February 6, 2020, the argument of the applicant must also fail on the facts. He did not rely on any mistaken advice by TC or a TC delegate in failing to apply on or before February 6, 2020. Transport Canada was not at fault, and properly refused to issue the CPL.

[39] I also observe that the basis for the applicant's suggestion that a regulatory exemption was indicated was that there was some fault on the part of the Minister in refusing to issue him a CPL. Without commenting on matters within ministerial discretion, I have found that there was no such fault.

[40] I have sympathy for the position in which the applicant now finds himself. However, the narrow focus of this Tribunal is on whether Transport Canada properly refused to issue a licence, and I have found that it did.

[41] In the course of this hearing, it became clear to me that the applicant is intelligent, well spoken, and dedicated to the pursuit of his aviation career. I have no doubt that, once these administrative hurdles are cleared, he will be a credit to the profession, and I wish him the best of luck in the future.

V. DETERMINATION

The decision by the Minister of Transport to refuse to issue a Commercial Pilot Licence to the applicant is upheld.

February 1, 2021

(Original signed)

Andrew Wilson
Member

Appearances

For the Minister: Martin Forget
For the Applicant: Self-represented