



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Grigorri Menshikh v. Canada (Minister of Transport)*, 2022 TATCE 11 (Review)

TATC File No.: O-4716-38

Sector: Aviation

BETWEEN:

Grigorri Menshikh, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference held on January 28, 2022

Before: Yves Duguay, Member

Rendered: February 28, 2022

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Grigorri Menshikh, failed to comply with instructions given by a crew member, with respect to wearing a face mask, as required by section 36 of the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 13*, dated November 10, 2020, a designated provision, thereby committing an offence contrary to subsection 7.6(2) of the *Aeronautics Act*.

The total amount of \$1,000 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

I. BACKGROUND

[1] On April 27, 2021, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty (Notice) in the amount of \$1,000 to Mr. Grigorri Menshikh, pursuant to section 7.7 of the *Aeronautics Act*. The Notice stated:

On or about 22 November 2020, while flying on Air Canada flight number 144 departing from the Calgary International Airport, located in Calgary, Alberta to the Toronto Pearson International Airport, located in Mississauga, Ontario, in the places between these two airports, failed to comply with instructions of a crew member on that flight, with respect to wearing a facemask, as required by section 36 of Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No. 13, dated 10 November, 2020, a designated provision, thereby committing an offence contrary to s.7.6(2) of the *Aeronautics Act*.

[2] On May 26, 2021, the applicant requested a review of this Notice by the Transportation Appeal Tribunal of Canada (Tribunal).

II. PRELIMINARY ISSUE: LATE REQUEST TO POSTPONE THE HEARING

[3] On January 27, 2022, the applicant sent an email to the Tribunal's Registry requesting a postponement of the hearing in order to consult a lawyer. The Registry, in its email reply, advised Mr. Menshikh to present his reasons at the hearing the following day and provided the applicant with a copy of the Tribunal's policy for requesting a postponement, which states:

4.8 No postponement will be granted within two weeks of the scheduled hearing date unless the party requesting the adjournment demonstrates that exceptional circumstances require it. If through exceptional circumstances the hearing cannot be attended by a party, the Tribunal should be contacted immediately.

[4] The Registry previously provided Mr. Menshikh with an applicant's guide in May 2021 and then again in September 2021. The guide provides applicants with relevant information concerning the hearing's proceedings, including the request for postponement; it states:

Request for Postponement of Hearing

In the interest of fairness and natural justice to all parties and in an effort to conduct its hearings expeditiously, the Tribunal expects all parties to respect scheduled hearing dates. The Tribunal will not accede to all requests for postponements, even where the parties themselves come to an agreed date for a new hearing.

Occasionally, the Tribunal will direct that a hearing be postponed when absolutely necessary. In the absence of good cause, and unless a party would be prejudiced if a postponement were not granted, the Tribunal will direct that hearings take place at the date and time referred to in the notice previously served on the parties.

[5] On January 28, 2022, at the start of the review hearing, I asked Mr. Menshikh, to present his reasons for postponing the hearing. He provided the three reasons that follow.

(1) *The Minister's late disclosure of the Aeronautics Act and a Supreme Court of Canada (SCC) decision*

[6] Mr. Menshikh was concerned that the late disclosure of these documents, on January 27, 2022 by the Minister's representative, would prejudice his defence, as he claimed that the SCC decision dealt with a question of jurisdiction.

[7] Mr. Villemure, representing the Minister, told the Tribunal that the SCC decision will serve to explain the burden that is on the Minister to prove the alleged infraction on a balance of probabilities and not to raise any jurisdictional issue.

[8] Similarly, Mr. Villemure will refer to the *Aeronautics Act* and the *Interim Order* to explain and justify the legal context concerning the alleged infraction and the monetary penalty.

[9] I believe that the late disclosure of these documents will not cause prejudice or hardship to Mr. Menshikh's defence.

(2) *The unavailability of a recorded telephone conversation between Mr. Menshikh and the Transport Canada inspector*

[10] On January 26, 2022, Mr. Menshikh requested the recording of a telephone conversation that took place in March 2021 between himself and Ms. Nora Duguid, the Transport Canada inspector assigned to the case. Mr. Menshikh claimed that the recording would show a biased attitude on Ms. Duguid's part. Mr. Villemure explained that the recording was no longer available due to technical issues.

[11] I believe that the unavailability of this recorded conversation will not cause prejudice to Mr. Menshikh's defence, as he can still cross-examine Ms. Duguid. Mr. Menshikh can also provide us with his version of the event, should he elect to testify.

(3) *The presence of an Air Canada lawyer who was granted observer status for the hearing*

[12] Mr. Menshikh informed the Tribunal that he intends to sue Air Canada. He claimed that the presence of Mr. Shalabi, an Air Canada lawyer, will harm his case against Air Canada.

[13] I informed Mr. Menshikh that the Tribunal's hearing procedures call for an open court. As a result, interested parties can attend, unless the hearing deals with sensitive or confidential matters, which is not the case here.

[14] I believe that the presence of Mr. Shalabi, who is not allowed to intervene, will not harm Mr. Menshikh's case in any future actions he may contemplate against Air Canada.

Decision

[15] Under section 4 of the *Transportation Appeal Tribunal of Canada Rules*, the Tribunal may take any action it considers necessary to enable it to settle the matter effectively, completely and fairly. Requesting a postponement to consult a lawyer a day before the hearing, when Mr.

Menshikh could have done so more than five months ago, is unfair to the witnesses and the Minister.

[16] I find that Mr. Menshikh did not provide me with exceptional circumstances or with good cause that would justify a postponement. Accordingly, I dismissed his request and we proceeded with the hearing. I informed Mr. Menshikh that he could appeal this preliminary decision along with the review determination.

III. ANALYSIS

A. Legal framework

[17] Mr. Villemure demonstrated, to my satisfaction, the validity on November 22, 2020, of the *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No. 13 (Interim Order)*. This was not contested by Mr. Menshikh. Therefore I accept that the *Interim Order* was valid and in force at the time and place of the alleged infraction.

[18] In this case, the designated provision is **section 36** of the *Interim Order*. As part of my analysis, I will also refer to **section 35** of the *Interim Order*, which states in part:

35 (1) Subject to subsections (2) to (3), a private operator or air carrier must require a person to wear a face mask at all times during the boarding process and during a flight that the private operator or air carrier operates.

(2) Subsection (1) does not apply

[...]

(b) when the person is drinking, eating or taking oral medications;

B. Issue

[19] Did Mr. Menshikh provide a lawful excuse for not wearing his face mask, or did he, as he claimed, exercise all due diligence to prevent the contravention under the *Aeronautics Act*, which states:

8.5 No person shall be found to have contravened a provision of this Part or any regulation, notice, order, security measure or emergency direction made under this Part if the person exercised all due diligence to prevent the contravention.

C. Evidence

[20] The Minister's evidence in this case consists of the testimonies of Ms. Sonja Urzinger, an Air Canada service director with thirty-four years of experience, and of Transport Canada inspector Ms. Nora Duguid.

(1) The testimony of Ms. Sonja Urzinger

[21] Ms. Urzinger identified Mr. Menshikh as the person who failed to comply with her instructions to wear a face mask, on Air Canada flight 144, on November 22, 2020. I am satisfied that the Minister has proven that Mr. Menshikh is the person who contravened the designated

provision at the time and place of the alleged infraction. Mr. Menshikh did not contest these facts.

[22] Ms. Urzinger testified that during the flight, she had to instruct Mr. Menshikh to wear his face mask on two occasions. In the first instance, Mr. Menshikh was sleeping, without a face mask, in his individual business class seat.

[23] Then, 20 minutes before landing, Ms. Urzinger instructed Mr. Menshikh once more to wear his face mask. She told him that he had to wear it even if he was sipping water. Mr. Menshikh responded by yelling that he was still drinking. According to the witness, he did not wear his face mask for the remainder of the flight.

[24] Upon landing in Toronto, Ms. Urzinger completed an Air Canada passenger e-report, including her statement (Exhibit M-1), which she read into the record of the hearing.

[25] Ms. Urzinger told the Tribunal that announcements are made over the public address system every 15 minutes, during the boarding process, to remind passengers to wear their face masks at all times during the flight. The same message is repeated during the welcome announcement and is included in the safety video.

[26] The witness also explained to the Tribunal that Air Canada policy requires passengers to wear a face mask at all times during the flight, but that passengers are allowed to remove their mask, while actively eating or drinking, within a period of 15 minutes.

[27] Under cross-examination, Ms. Urzinger could not remember if the announcements made on November 22, 2020 included a reference to the 15-minute period found in Air Canada's policy. Mr. Menshikh suggested to the witness that the announcements did not include that information and she responded by saying that she could not recall.

[28] At Mr. Menshikh's request, Ms. Urzinger read the current Air Canada announcement, which reminds passengers that they must wear their face mask at all times during the flight, except for brief periods of time while eating, drinking, or taking oral medication and that every effort should be made to eat or drink within a period of 15 minutes.

[29] It is possible that the announcements made by Ms. Urzinger on November 22, 2020 did not include the reference to the 15-minute period mentioned in Air Canada's policy.

[30] Mr. Menshikh requested an adjournment to seek a copy of the text used by Ms. Urzinger for the announcements made during the flight in November 2020.

[31] I explained to Mr. Menshikh that Ms. Urzinger provided the relevant information during her testimony, when she read at his request the content of the current announcement. I told the applicant that I understood his position and his contention that the announcement in November 2020 did not include the information concerning the 15-minute period for actively eating and drinking. I informed Mr. Menshikh that he could raise this issue during his testimony, should he decide to testify, or in his closing arguments.

[32] I did not grant the adjournment, and we proceeded with the hearing. I reminded Mr. Menshikh that he could appeal this preliminary decision as well, along with the review determination.

[33] Although he questioned the veracity and the content of Ms. Urzinger's testimony, Mr. Menshikh did not present any evidence to refute or contradict her testimony concerning the two instances when he failed to comply with her instructions. I found Ms. Urzinger to be a credible witness, and I have no reason to doubt the veracity of her testimony.

[34] Concerning the first instance, the applicant admitted in his statement (Exhibit M-3) that he was sleeping without his face mask. There is no exception in the *Interim Order* that would allow a person to remove their mask while sleeping.

[35] As for the second instance, the applicant suggested that he was allowed to remove his mask, as he was drinking water. The exception found in paragraph 35(2)(b) of the *Interim Order* cannot be invoked as a lawful excuse when a passenger is instructed by a crew member to wear the face mask, as required under section 36 of the *Interim Order*.

[36] While the *Interim Order* does provide an exception for eating and drinking, it does not specify a time period. The 15-minute period is part of the air carrier policy and has no bearing on this case.

(2) *The testimony of Ms. Nora Duguid*

[37] Ms. Duguid testified that she was assigned to investigate this matter upon the receipt of the Air Canada e-report. She later contacted Ms. Urzinger to confirm the content of the report and her statement. She also contacted Mr. Menshikh to obtain his version of the event and his statement.

[38] On March 3, 2021, after they spoke on the phone, Mr. Menshikh provided Ms. Duguid with his statement in the form of an email.

[39] In his statement, Mr. Menshikh confirmed that he was not wearing his face mask when he was found sleeping. However, he denied not wearing his face mask during the last 20 minutes of the flight. He concluded his statement by writing that "... *my not wearing a mask was either due to me sleeping or consuming food or drinks*". Mr. Menshikh, by his own admission, did not comply with Ms. Urzinger's instructions to wear his face mask.

[40] During his cross-examination of the witness, Mr. Menshikh challenged Ms. Duguid on inconsistencies in the number of times he was allegedly instructed to wear his face mask. Ms. Duguid, from her conversation with Ms. Urzinger, claimed that there were 10 such instances, whereas Mr. Menshikh suggested that it was not more than three times.

[41] Whether it was three or 10 times, this has no bearing on the case at hand, but it is an aggravating factor that I may consider for assessing the penalty.

D. Monetary penalty

[42] Under paragraph 8(b) of the *Aeronautics Act*, if I find that there was a contravention to a designated provision, I must inform the Minister of the amount determined for the monetary penalty. The maximum penalty for contravening section 36 of the *Interim Order* is set at \$5,000. There is no set minimum amount in the *Interim Order*. However, Transport Canada may set the penalty amount according to its own procedures, which call for a minimum penalty of \$1,000.

[43] In assessing the monetary penalty in this matter, I will consider the mitigating and aggravating factors proposed by the Tribunal in *Canada (Minister of Transport) v. Wyer*, [1988] C.A.T.D. No. 123, CAT File No. O-0075-33 (Appeal) (Wyer).

(1) Mitigating Factors

[44] I find that Mr. Menshikh's actions were neither planned nor premeditated. He did not receive a formal written warning from Air Canada and the authorities did not have to meet the flight. This is also a first offence for the applicant.

(2) Aggravating Factors

[45] Although he admitted to the infraction in his statement, Mr. Menshikh did not show any remorse for his actions or his rude conduct on board the aircraft. He was also reminded at least three times, by his own admission, to wear his face mask.

[46] The *Interim Order* contains provisions to mitigate the significant risk associated with COVID-19 infection. Mr. Menshikh's failures to comply with these provisions constitute a serious infraction. Considering the circumstances in this case, I find that a monetary penalty of \$1,000 provides a reasonable level of punishment and deterrence for this infraction.

E. Conclusion

[47] I find that on a balance of probabilities, all of the constituting elements of the contravention in question have been established by the evidence. Consequently, I conclude that Mr. Menshikh contravened section 36 of the *Interim Order*. The applicant did not provide a lawful excuse for not wearing his face mask in the two instances when he was instructed to do so by Ms. Urzinger, and he did not exercise all due diligence in taking reasonable care to prevent the infraction.

IV. DETERMINATION

[48] The Minister of Transport has proven, on a balance of probabilities, that the applicant, Grigorri Menshikh, failed to comply with instructions given by a crew member, with respect to wearing a face mask, as required by section 36 of the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 13*, dated November 10, 2020, a designated provision, thereby committing an offence contrary to subsection 7.6(2) of the *Aeronautics Act*.

[49] The total amount of \$1,000 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

February 28, 2022

(Original signed)

Yves Duguay
Member

Appearances

For the Minister:	Eric Villemure
For the Applicant:	Self-represented