Federal Court Cour fédérale

Date: 20210315

Docket: T-2040-19

Citation: 2021 FC 211

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 15, 2021

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

Victor COTIRTA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Victor Cotirta [the applicant] is seeking judicial review of the November 20, 2019, decision by the Appeal Panel of the Transportation Appeal Tribunal of Canada [the Appeal Panel], dismissing his appeal. The Appeal Panel upheld the decision by that tribunal's member

[the Member] upholding the decision by the Minister of Transport Canada [the Minister] to suspend Mr. Cotirta's medical certificate, required to maintain his pilot licence.

[2] For the reasons stated below, the application for judicial review will be dismissed.

II. Summary of legislative framework

[3] In Canada, a person who wishes to pilot an airplane must meet the applicable requirements.

[4] Pursuant to section 404.03 of the *Canadian Aviation Regulations* (SOR/96-433) [the Regulations], it is prohibited for any person to exercise or attempt to exercise the privileges of a pilot licence unless that person holds a valid medical certificate of a category that is appropriate for that permit, licence or rating.

[5] Section 404.10 of the Regulations sets out that a Category 1 medical certificate is required for: (1) multi-crew pilot licence—aeroplane; and (2) airline transport pilot licence—aeroplane.

[6] Pursuant to subsection 404.11(1) of the Regulations, the Minister shall assess medical reports to determine whether an applicant for the issuance or renewal of a medical certificate meets the medical fitness requirements and, pursuant to subsection 404.04(2), the Minister may request any medical tests that are necessary.

[7] Subsection 7.1(1) of the *Aeronautics Act*, RSC 1985, c A-2 [the Act] states that, if the Minister decides to suspend a Canadian aviation document because the holder of the document is incompetent or because the holder ceases to meet the qualifications necessary for the issuance of the document or to fulfil the conditions subject to which the document was issued, the Minister shall, by personal service or by registered or certified mail sent to the holder at their latest known address, notify that person of the Minister's decision.

[8] Lastly, section 1.18 of the table under Standard 424.17(4) of the Regulations states that applicants for Category 1 medical certificates with diabetes mellitus may be considered fit provided that certain specific control criteria are met. These criteria are outlined in the Health Canada document "Canadian Guidelines for the Assessment of Medical Fitness in Pilots, Flight Engineers and Air Traffic Controllers with diabetes mellitus 1995" (Ottawa: Health Canada, 1995) [the Guidelines] (Applicant's Record, pages 326 et seq.).

III. Background

[9] Until September 12, 2017, Mr. Cotirta held a pilot licence and the necessary Category 1 medical certificate with a validity period of six months as a solo pilot or one year as a multi-crew pilot.

[10] However, on September 12, 2017, the Minister sent Mr. Cotirta a letter informing him that (1) his medical examination report of May 30, 2017, and the accompanying documents regarding his medical fitness to exercise the privileges of a licence as airline pilot—aeroplane and glider pilot, had been reviewed by the Minister's advisor in accordance with the table of

requirements under Standard 424.17(4) of the Regulations, Medical Category 1, sections 1.18, 3.18 and 4.18; (2) it was established that he did not have [TRANSLATION] "the medical fitness required to receive the privileges of any flight crew licence or permit"; (3) his medical certificate was suspended [TRANSLATION] "in accordance with paragraph 7.1(1)(b) of the Act"; and (4) the suspension would remain in force until the Minister was satisfied of his medical fitness.

[11] On October 30, 2017, Mr. Cotirta requested that the review board of the Transportation Appeal Tribunal of Canada review the decision by the Minister to suspend his medical certificate in accordance with subsection 7.1(3) of the Act. Mr. Cotirta's request for review was heard on February 9, 2018, and Dr. Robert Perlman (the Member) presided at the hearing. Mr. Cotirta was self-represented and testified for himself, while Dr. Robert Flood testified for the Minister. The transcript of the hearing is included in the Applicant's Record, at pages 30 et seq.

[12] Before the Member, Dr. Flood testified about Mr. Cotirta's medical history from June 3, 2013, which led to the suspension of his medical certificate. The chronology of this medical history, ending on September 7, 2017, is documented at paragraph 14 of the Respondent's Memorandum. Dr. Flood wrote to Mr. Cotirta to inform him that he had diabetes with complications of retinopathy, an undefined renal disease and a possible heart condition, and that he was therefore unfit to hold any category of licence.

[13] Before the Member, Mr. Cotirta essentially submitted that (1) he was within the Transport Canada standards for diabetes, as his results were 5.3, 6.3 and 6.5, which he described as a "pseudo-illness", and because one of his physicians allegedly confirmed that he could fly;

(2) the only anomaly in his file was increased creatinine levels due to an excess of medication (Janumet); and (3) he is asymptomatic, which means he has no medical condition.

[14] On May 23, 2018, the Member upheld and confirmed the Minister's decision to suspend Mr. Cotirta's medical certificate. In his decision, the Member summarized the evidence presented by Dr. Flood, recognized as a credible expert witness, and by Mr. Cotirta. In his analysis, the Member noted the medical evidence related to Mr. Cotirta's situation since 2012. He also noted that (1) Dr. Flood asked for the Aviation Medical Review Board's opinion regarding Mr. Cotirta's case, and it concluded, in 2018, that Mr. Cotirta's diabetes and renal disease were unstable; (2) Mr. Cotirta's testimony seemed to confirm the sub-optimal control of his diabetes; (3) Dr. Flood described the relevant Guidelines; (4) Mr. Cotirta's testimony did not accurately describe his expertise; (5) Mr. Cotirta associated the term [TRANSLATION] "asymptomatic" with [TRANSLATION] "no illness" and seemed to deny the existence of his diabetes, which affects his credibility; (6) the Minister showed flexibility in the evaluation of Mr. Cotirta's case, reasonably followed the applicable directives and acted reasonably in ruling that Mr. Cotirta's diabetes and subsequent complications were not stable enough at the time his Category 1 medical certificate was suspended; and (7) the Minister was planning to grant Mr. Cotirta a licence with restrictions once additional medical reports clearly indicated that his health was sufficiently stable and did not compromise aviation safety.

[15] On June 13, 2018, Mr. Cotirta appealed from the Member's decision to the Appeal Panel and on September 12, 2019, his appeal was heard by a panel of three members, one of whom

acted as Chairperson. The transcript of the hearing is included in the Applicant's Record, at pages 506 et seq.

[16] According to the transcript, Mr. Cotirta essentially submitted that the Member (1) erred by not allowing him to be fully heard and to submit his evidence; (2) was biased since he is a physician, conducts medical examinations for Transport Canada and issues licences; and (3) erred by drawing unreasonable conclusions from the evidence and by distorting or ignoring relevant evidence. Mr. Cotirta also submitted that the Member neglected to consider the (prior) evidence that his diabetes indicators were within the normal limits. This evidence would support maintaining his pilot licence. Mr. Cotirta also notes that the Member ignored or dismissed his argument that his medication (Janumet) increased his diabetes indicators in the most recent tests, on which the Minister relied when his medical certificate was suspended.

[17] On November 20, 2019, the Appeal Panel dismissed Mr. Cotirta's appeal and upheld the Member's decision.

[18] The Appeal Panel reiterated the applicable standard of review and grouped together Mr. Cotirta's grounds of appeal as follows:

> [TRANSLATION]
> (1) The Member violated the principles of natural justice by dismissing the application for review without allowing the applicant to be fully heard at the hearing and by showing bias in favour of the Minister during the conduct of the hearing; and
>
> (2) The Member drew unreasonable findings of fact in light of the evidence presented by the parties, in particular by distorting or ignoring the evidence presented by the applicant at the hearing.

[19] Regarding the first ground of appeal, the Appeal Panel noted that the standard of review was correctness. The Appeal Panel essentially concluded that (i) the Member allowed Mr. Cotirta to make all his submissions during the review hearing; (ii) the Member presided over the hearing in a perfectly appropriate manner and in compliance with the rules of the Tribunal and subsection 7.1(6) of the Act; and (iii) Mr. Cotirta failed to demonstrate the Member's bias, which could not be inferred simply because the Member was a physician authorized to conduct medical examinations for Transport Canada and because he had ruled in favour of the Minister in his decision. The Appeal Panel therefore dismissed the appeal with regard to the first ground of appeal.

[20] Regarding the second ground of appeal, involving the facts and the credibility of the witnesses, the Appeal Panel noted that it had to defer to the Member's findings.

[21] The Appeal Panel noted that Mr. Cotirta stated at the hearing that he had only a single argument to raise, namely the violation of the principle of natural justice and procedural fairness. However, the Appeal Panel also noted that, despite this statement, Mr. Cotirta presented arguments on the merits of the case. The Appeal Panel therefore addressed Mr. Cotirta's arguments on the merits.

[22] The Appeal Panel determined that (i) the evidence submitted supports the Member's finding that the Minister considered Mr. Cotirta as a [TRANSLATION] "high-risk" individual, considering the medical investigations that were ongoing at the time of the suspension, and he was therefore deemed incompetent; (ii) the Member's finding with regard to the validity of the

suspension of the certificate was justified, considering the lack of information about Mr. Cotirta's kidney disease and the stability of his diabetes, and well founded in the documentary and testimonial evidence presented during the hearing; and (iii) Mr. Cotirta had not, at the time his licence was suspended, submitted the additional information the Minister had requested, and the Member's conclusion that this lack of information justified the Minister's decision to suspend the certificate was reasonable. The Appeal Panel therefore dismissed the appeal with regard to the second ground of appeal Mr. Cotirta raised.

[23] Having dismissed both of Mr. Cotirta's grounds of appeal, the Appeal Panel therefore upheld the Member's decision that upheld the initial decision to suspend Mr. Cotirta's medical certificate.

[24] The decision by the Appeal Panel is the subject of this application for judicial review.

IV. Parties' arguments and analysis

[25] Mr. Cotirta submitted to the Court a brief affidavit and a memorandum in which he submits the grounds in support of his application for judicial review. Although Mr. Cotirta uses the term *Commission* for the Appeal Panel, for the sake of uniformity, I will use the latter term. Thus, before the Court, Mr. Cotirta submits the following:

> [TRANSLATION]
>
> (1) the September 12 Appeal Panel committed a reviewable error by not considering the facts and arguments and by not referring the decision back to the Minister;
>
> (2) the Appeal Panel committed a reviewable error by not respecting the principles of natural justice;

> (3) the September 12 Appeal Panel committed a reviewable error by not considering the evidence and supporting documents presented by the applicant during the improper suspension of his licence; and
>
> (4) the Appeal Panel's decision is not correct.

A. *Standard of review*

[26] Mr. Cotirta did not make any submissions about the applicable standard of review, although his last argument states that the decision is not "correct".

[27] The respondent, the Attorney General of Canada [the AGC] submits that the applicable standard is reasonableness, and that great deference is owed to the Transportation Appeal Tribunal of Canada, a specialized tribunal, in accordance with the teachings of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The AGC notes, however, that the alleged violation of procedural fairness must be reviewed under the correctness standard (*Vavilov* at paras 54–56).

[28] The Supreme Court of Canada, in *Vavilov*, established the presumption that reasonableness is the applicable standard in all cases (*Vavilov* at para 16). This presumption can only be rebutted in three types of situations and none apply in this case.

[29] When the applicable standard of review is reasonableness, the reviewing court must examine the reasons given by the decision maker and determine whether the decision was based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post Corp v Canadian*

Union of Postal Workers, 2019 SCC 67 at paras 2, 31 [*Canada Post Corp*]). The Court must therefore consider the "outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15).

[30] In judicial review, the Court's purpose is not to reweigh the evidence in the record or to interfere in the decision maker's findings of fact and substitute their own (*Canada Post Corp* at para 61; *Canada (Canadian Human Rights Commission v Canada (Attorney General)*, 2018 SCC 31 at para 55 [*CHRC*]). Instead, it must consider the decision as a whole, in the context of the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47), and simply determine whether the findings are irrational or arbitrary.

[31] Regarding the violation of procedural fairness, the Supreme Court, in *Vavilov*, did not address the applicable standard, except to restate the factors in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (at para 77). The Federal Court of Appeal recently stated that "[t]he law concerning the standard of review for procedural fairness is currently unsettled" (see *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at paras 67–71). The Federal Court of Appeal confirmed that the Supreme Court has not given any guidance on the subject in *Vavilov* in a recent decision (*CMRRA-SODRAC Inc v Apple Canada Inc*, 2020 FCA 101 at para 15). In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 56, the Federal Court of Appeal noted the following:

> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural

> choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice – was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.

[32] Thus, the issue is whether the appellant was heard, whether he had the opportunity to learn what evidence he had to rebut.

[33] Lastly, it is relevant to note that Mr. Cotirta bears the burden of showing that the impugned decision is unreasonable and that procedural fairness was not respected.

B. *First argument: The Appeal Panel committed an error subject to judicial review by not considering facts and arguments, and by not referring the decision back to the Minister*

[34] Mr. Cotirta submits that he is challenging a perverse decision by the Minister, based on [TRANSLATION] "probable allegations and false statements" that do not comply with internal and international practices. He notes that he was deemed fit to continue his activities, in particular in the medical reports of Biron and Drs. St-Onge and Laporte in December 2016, that his medical examination was consistent with the international and Canadian practices and conducted by a physician who had known him for 20 years, and that there was no point in sending the documents again.

[35] Mr. Cotirta finds issue with part of the transcript being published after the Appeal Panel decision was rendered. At the hearing, Mr. Cotirta stated that this argument is about the fact that

the hearing before the Appeal Panel was too short to allow him to properly present his case. He submits that the outcome of the hearing was known from the start—that his appeal would be dismissed. He notes that the Appeal Panel knew of the Member's bias and the roadblock he was facing. Mr. Cotirta criticizes the Member's finding as to his credibility and notes that the Member works [TRANSLATION] "for" the Minister and was in contact with the Minister. Lastly, he alleges that the Appeal Panel violated the confidentiality law (without identifying which act) by searching in his medical record without his consent.

[36] The AGC submits that the Appeal Panel was to limit itself to determining whether the Member's decision was reasonable. He submits that the Appeal Panel adequately determined that the evidence before the Member was sufficient to establish that Mr. Cotirta was a high-risk individual and was therefore incompetent for the purposes of the medical certificate he held. The AGC affirmed that this finding was reasonable, considering the lack of information about Mr. Cotirta's diabetes and his failure to respond to the Minister's requests for additional information.

[37] Mr. Cotirta did not satisfy the Court that the Appeal Panel neglected to consider certain facts or arguments.

[38] As noted above, in a judicial review, the Court is limited to reviewing the reasons given by the administrative decision maker and determining whether the decision is based on "an internally coherent and rational chain of analysis and that is justified in relation to the facts and

law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post Corp* at paras 2, 31). The Appeal Panel is subject to the same standard of review for the Member's decision.

[39] Considering the evidence in the record, it was reasonable for the Appeal Panel to uphold the Member's decision. The evidence also supports the Appeal Panel's finding with regard to the lack of information on the status of Mr. Cotirta's diabetes and the fact he did not monitor his diabetes regularly.

[40] Mr. Cotirta did not show that the Appeal Panel neglected to consider facts and arguments or that it erred by not referring the decision back to the Minister.

[41] Since some of Mr. Cotirta's arguments are repeated, his argument regarding bias will be addressed at point C and the arguments regarding the transcript and confidentiality of his medical record will be addressed at point D.

C. *Second argument: The Appeal Panel violated the principles of natural justice*

[42] Mr. Cotirta submits that the jurisprudence seeks to create balance and consistency and that the Member should have considered the impact that suspending his licence would have on his life. He notes that a discretionary power must respect the spirit of the law and be exercised in good faith. He submits that, during the suspension of his licence and during the hearing before the Member, he was a victim of discrimination, harassment and abuse. He alleges that, faced with the evidence, the Member had a moral obligation, and that stating an intention to dismiss the appeal at the start of the hearing established a reasonable apprehension of bias. He notes that

the impartiality requirement also includes avoiding the appearance of bias. At the hearing, Mr. Cotirta stated that the Member and the Appeal Panel had violated procedural fairness by announcing rather early on that they were restricted in the exercise of their power to allowing the application or referring the case back to the Minister.

[43] The AGC responded that the transcript of the Member's hearing does not support Mr. Cotirta's allegations of bias or violations of the principles of natural justice. The AGC notes that the Member showed flexibility and considered that it was a first hearing for Mr. Cotirta. The Member also brought Mr. Cotirta back to order by reminding him of the rules of cross-examination and by explaining the applicable principles. Dr. Perlman also asked Mr. Cotirta several questions to clarify the evidence. Lastly, the AGC notes that there is nothing to support Mr. Cotirta's allegation that the Member was biased because of his status as a physician.

[44] After a review of the transcript, the Court did not find anything to suggest that there was a violation of the principles of natural justice in this case. The transcript instead shows that the Member was patient and flexible. His interventions were legitimate and aimed to ensure that Mr. Cotirta understood the relevant rules and the efficient proceeding of the hearing over which he was presiding.

[45] According to the transcripts in the record, at the start of the hearing, neither the Member nor the Appeal Panel stated an intention to dismiss the application. Moreover, subsections 6.72(4) and 7.2(3) of the Act set out the powers the Member and the Appeal Panel have in terms of the outcome of the application, and neither erred by citing them at the hearing.

[46] The Court therefore does not note any violation of the principles of natural justice or procedural fairness. Indeed, it seems that Mr. Cotirta was aware of the evidence he had to rebut and that he was heard.

D. *Third argument: The Appeal Panel neglected to consider the evidence and supporting documents presented by Mr. Cotirta during the abusive suspension of his licence*

[47] Mr. Cotirta submits that the Appeal Panel ignored all evidence presented before the lower tribunals and neglected to address or analyze it. Specifically, he refers to a test that reported controlled diabetes (Applicant's Record, page 488). He also submits that he presented evidence that his medication (Janumet) could cause diabetes indicators that exceed the normal limits. Lastly, he alleges that the Appeal Division should not have concluded that he had to contact the Minister again.

[48] The AGC refers to his arguments that the Appeal Division decision is reasonable because the evidence before the Member allowed for the finding that Mr. Cotirta is a high-risk person and therefore unfit within the meaning of the Act.

[49] As submitted by the AGC and as noted above, it was reasonable for the Appeal Panel to determine that the Member's decision was reasonable.

[50] Having to review the decision under the reasonableness standard, the Appeal Panel could not, as requested by Mr. Cotirta, reweigh the evidence, and neither can this Court. As noted above, pursuant to the Supreme Court's decision in *Vavilov,* in judicial review, the Court is not

called upon to reweigh the evidence on record nor to interfere in the decision maker's findings of fact and substitute their own (*Canada Post Corp* at para 61; *CHRC* at para 55).

[51] Mr. Cotirta did not confirm the date the transcript was sent, nor did he file any authorities on the effect of rendering a decision prior to the publication of the transcripts, on the effect of Janumet or on the bias of the Appeal Panel or the Member. Moreover, Mr. Cotirta did not show that the Minister or the Transportation Appeal Tribunal of Canada obtained his medical record illegally. Instead, it seems that Mr. Cotirta himself had submitted the documents regarding his health at the Minister's request, in order to obtain or renew his medical certificate, and the Tribunal obtained the documents the Minister had in order to review his decision.

[52] Mr. Cotirta did not show that the Appeal Panel's decision is unreasonable or that the Appeal Panel had neglected to consider the evidence and supporting documents he had presented.

[53] Insomuch as part of this argument raises principles of natural justice or procedural fairness, no violation was shown.

E. *Fourth argument: The Appeal Panel's decision is not "correct"*

[54] Mr. Cotirta again submits that the Appeal Panel erred by issuing its decision before the hearing transcript was published. He also notes that the Appeal Panel rendered an erroneous decision and clearly exceeded its mandate.

[55] As noted above, the Appeal Panel's decision must be reviewed according to the reasonableness standard, and there is nothing to indicate it is unreasonable. As for the argument that the Appeal Panel exceeded its mandate, Mr. Cotirta did not offer any support for this argument. Instead, it seems that the Appeal Panel duly heard the appeal pursuant to section 7.2 of the Act.

V. Conclusion

[56] On the basis of the teachings of the Supreme Court of Canada, the Court finds that the Appeal Panel's decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker. It is transparent, intelligible and justified. Mr. Cotirta did not show that the Appeal Panel's decision was irrational or arbitrary or that it was unreasonable.

[57] Mr. Cotirta did not show that the rules of natural justice and procedural fairness were violated.

[58] The application for judicial review will therefore be dismissed.

JUDGMENT in T-2040-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. Without costs.

"Martine St-Louis"
Judge

Certified true translation
Vincent Mar, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2040-19
STYLE OF CAUSE:	VICTOR COTIRTA v THE MINISTER OF TRANSPORT
PLACE OF HEARING:	MONTRÉAL (BY VIDEOCONFERENCE—ZOOM)
DATE OF HEARING:	MARCH 2, 2021
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	MARCH 15, 2021

APPEARANCES:

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Renalda Ponari	FOR THE RESPONDENT

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