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Ekinci and Ors and Civil Aviation Safety Authority [2014] AATA 114 (3 March 2014)

Last Updated: 17 April 2014

Administrative Appeals Tribunal

ADMINISTRATIVE APPEALS TRIBUNAL) No: 2014/0575-80
) 2014/0583
GENERAL ADMINISTRATIVE DIVISION) 2014/0595
2014/0598

Re: Reha Riza Ekinci
Applicant

And: Civil Aviation Safety Authority
Respondent

DIRECTION

TRIBUNAL: The Hon. Brian Tamberlin Q.C, Deputy President

DATE: 16 April 2014

PLACE: Sydney

The Tribunal directs the Registrar, pursuant to [subsection 43AA\(1\)](#) of the [Administrative Appeals Tribunal Act 1975](#), to alter the text of the decision in this application on page 2, and at paragraph 34 as follows:

“(e) Mr Ekinci is not permitted and must not undertake any flying training in limited category aircraft (with the exception of endorsement training).”

.....[sgd].....

The Hon. Brian Tamberlin Q.C, Deputy President

[\[2014\] AATA 114](#)

Division **GENERAL ADMINISTRATIVE DIVISION**

File Numbers **2014/0575-0580**

Re **Reha Riza Ekinci**

APPLICANT

And **Civil Aviation Safety Authority**

RESPONDENT

File Number **2014/0583**

Re **Cloud Nine Helicopters Pty Ltd**

APPLICANT

And **Civil Aviation Safety Authority**

RESPONDENT

File Numbers **2014/0595 and 0598**
Re **Air Combat Australia Pty Ltd**
 APPLICANT
And **Civil Aviation Safety Authority**
 RESPONDENT

DECISION

Tribunal **The Hon. Brian Tamberlin, QC, Deputy President**
Date **3 March 2014**
Place **Sydney**

The Tribunal grants the Applicant's request pursuant to [s 41\(2\)](#) of the [Administrative Appeals Tribunal Act 1975](#) and stays the operation and implementation of the decisions under review, until further order, and subject to the following directions and conditions:

- (a) This matter is to be expedited and heard as soon as possible.
- (b) The parties are to cooperate to obtain an expedited early hearing of the review applications as an urgent matter.
- (c) All outstanding matters raised in all relevant Aircraft Survey Reports be satisfied to  **CASA** 's reasonable satisfaction before further flight of any aircraft.
- (d) All maintenance to be conducted by a certified and qualified maintenance person or body other than Mr Ekinci.
- (e) Mr Ekinci is not permitted and must not undertake any flying training other than endorsement training in limited category aircraft.
- (f) The certifying person or body is to promptly provide  **CASA**  with a copy of relevant maintenance records including maintenance releases, work packs and log book entries.
- (g) Liberty to apply is reserved to all parties in relation to the above orders and conditions.

.....[sgd].....
The Hon. Brian Tamberlin, QC, Deputy President

CATCHWORDS

Application for stay order – relevant factors to be taken into account – review would be rendered nugatory if stay refused - safety and public interest - the prospects of success - consequences for the Applicant of refusal of a stay - stay granted with conditions

LEGISLATION

[Civil Aviation Act 1988 \(Cth\)](#)

CASES

Civil Aviation Safety Authority v Boatman [\[2006\] FCA 460](#)

McKenzie v Civil Aviation Safety Authority [\[2008\] AATA 651](#)

Oaklands v Australian Securities and Investments Commission [\[2011\] AATA 199](#)

Ostrowski v Palmer [\[2004\] HCA 30](#); [\(2004\) 218 CLR 493](#)

Re Commonwealth of Australia v Quirke [\[1986\] AATA 57](#); [\(1986\) 9 ALD 92](#)

Re Griffiths and Civil Aviation Safety Authority [\[1993\] AATA 274](#)

Re Scott and Australian Securities and Investments Commission [\[2009\] AATA 798](#)

REASONS FOR DECISION

The Hon. Brian Tamberlin, QC, Deputy President

3 March 2014

1. This is an application under [s 41](#) of the [Administrative Appeals Tribunal Act 1975](#) (the AAT Act) for the stay of the operation of a decision of the Respondent on 24 January 2014 to cancel the Chief Pilot's Approval and Chief Flying Instructor approval held by the Applicant, Mr Ekinci.
2. Under s 41 the making of an application to the Tribunal for a review of a decision does not affect the operation of the decision or prevent the taking of action to implement the decision, but the Tribunal may, if it is of opinion that it is desirable to do so, grant a stay order affecting the operation or implementation of the decision.
3. As a consequence of [s 31A](#) of the [Civil Aviation Act 1988](#) (CAA) some of the decisions the subject of the substantive application for review are automatically stayed. However, the two decisions referred to above are not stayed.
4. The relevant matters for consideration in deciding whether to grant a stay include those set out by Downes J in *Re Scott and Australian Securities and Investments Commission* [\[2009\] AATA 798](#) at [\[4\]](#) as follows:
 - (i) *The prospects of success.*
 - (ii) *The consequences for the Applicant of refusal of a stay.*
 - (iii) *The public interest.*
 - (iv) *The consequences for the Respondent in carrying out its functions depending on whether the stay is granted or not.*
 - (v) *Whether the application for review would be rendered nugatory if a stay were not granted.*

(vi) Other relevant matters including the time the cancellation has been in place and the likely hearing date.

5. The above considerations apply generally. More specifically in the present case, pursuant to [s 9](#) of the CAA, in exercising its powers and performing its function the Civil Aviation Safety Authority (← CASA →) and therefore this Tribunal acting in its place, must regard the safety of air navigation as the most important consideration.
6. Before granting a stay the Tribunal must be satisfied that the matters have been considered and that they support a conclusion that a “stay is desirable”.

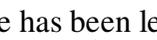
ISSUE

7. The issue is whether the stay sought should be granted, having regard to the foregoing principles examined in the particular circumstances of this case.
8. I now turn to a consideration of the above factors, and their impact on the basis of the evidence presently before me, and having regard to the detailed submissions by Counsel for both parties.

THE PROSPECTS OF SUCCESS

9. As Senior Member Redfern noted in *Oaklands v Australian Securities and Investments Commission* [2011] AATA 199, it is not the role of this Tribunal in a stay application to conduct a preliminary hearing of the issues to be raised at the substantive hearing of the application when making an assessment whether it has any real prospects of success. The task of the Tribunal is to consider whether there are facts and circumstances which would provide some real basis for success: see *Re Commonwealth of Australia v Quirke* [1986] AATA 57; (1986) 9 ALD 92 at [95].
10. ← CASA → submits that the applications for review in this case have no reasonable prospects of success.
11. Evidence has been led from Mr Ekinci on behalf of himself and as CEO and principal of the second and third applicant companies. This evidence was in the form of oral testimony and affidavits. Mr Ekinci was cross-examined in some detail. Evidence was also led from Alison McWilliams, a former employee of the Applicants, as to a conversation with Mr Ho, an air worthiness inspector from ← CASA →, in which Mr Ho is alleged to have had made statements concerning the completion of relevant co-ordination sheets in the log books concerning maintenance. Mr Ekinci contends that to a large extent he relied on assurances and statements by Mr Ho on behalf of ← CASA → in relation to the carrying out and recording of maintenance work. The evidence of these statements is strongly disputed by Mr Ho.
12. ← CASA → also contends that in any event, as a matter of law, Mr Ho had no power to make any waiver or variation of the requirements of the legislation which sets out the regulatory controls in relation to aviation. Therefore any reliance by Mr Ekinci is of no consequence. A mistake of law, whether induced by a third party or not, will not be a defence to an offence created by a statutory provision which does not make knowledge an element of the offence: *Ostrowski v Palmer* [2004] HCA 30; (2004) 218 CLR 493 at 516. In the present case, Counsel for ← CASA → submits that even if any representations were found to have been made by Mr Ho (which is strongly disputed) they would not provide any defence if, as a matter of law, the prescribed procedures were not carried out or there were any breaches of the regulatory. Generally there can be no estoppel against statutory requirements.
13. Prior to the making of the Decisions under review, Mr Ekinci had provided a detailed set of responses to several “Show Cause” notices issued by ← CASA → in November 2012 and August 2013 in which he disputes matters raised by ← CASA → and sets out his reasons. He has provided details of his extensive flying qualifications and experience since at least 1990, which he attaches to his affidavit. H. There is no dispute that he is

an experienced and qualified pilot capable of conducting the operations carried on by himself and the two applicant companies.

14. Evidence has been led for  from Mr Ho; from Mr Campbell, a Certificate Management Team Leader; Mr Marriott, a maintenance specialist with , and from Mr Barkway.
15. Mr Ho's evidence goes mainly to his conversations and communications with Mr Ekinici, and is also directed to rebutting the evidence of Ms McWilliams. Mr Marriott's evidence details the relevant regulatory framework. The evidence of Mr Barkway records details of alleged non-compliance with the requirements of a number of Australian Safety Reports, which are said to indicate a substantial number of deficiencies in compliance concerning maintenance and keeping of records and some operational matters.
16. The decisions under review set out conclusions as to incorrect and incomplete maintenance records; operating aircraft without a valid maintenance release, operating aircraft contrary to conditions as to air worthiness, including repair; and conduct of flights over populace areas without approval; lack of authorised certification for maintenance, and failure to maintain log books. This is not an exhaustive list.
17. Most of the above matters are disputed by Mr Ekinici, and those not in dispute are the subject of explanations and responses by him.
18. At this early stage of proceedings it is not possible to make any precise findings, but having regard to the detailed evidence of Mr Ekinici and his detailed responses to set out in the decision under review, I am satisfied that there are a number of questions to be tried and that these are serious matters which will require resolution on review. In particular there is a central dispute as to the alleged statements and actions of Mr Ho and as to their legal consequences, if they are found to have occurred. There are also disputes as to the number of relevant flying hours, and as to the accuracy or existence of records and the operation of aircraft.
19. I consider that there is evidence of substantive genuine disputes which require resolution, and that they are not without some prospect of success.

THE CONSEQUENCES FOR THE APPLICANT OF REFUSAL OF A STAY

20. Mr Ekinici gave evidence of the impact of the cancellation of the licences under review on his livelihoods. He was cross-examined as to the detail of this and  submits that his assertions as to hardship are greatly exaggerated. It appears that some of the aircraft and assets under consideration were not the personal assets of Mr Ekinici but were owned by other bodies. Nevertheless, looking at the overall position I accept that because of the personal guarantee and financial commitments of Mr Ekinici, there is likely to be a severe disruption to his business, livelihood and goodwill if a stay is not granted and he is not permitted to operate. I consider there is significant hardship if a stay is not granted and this consideration points in favour of a stay for a short period pending determination of the review.

SAFETY AND PUBLIC INTEREST

21. The dominant and most important consideration is safety of air navigation. It is to be given primary weight. The appropriate test is whether the stay will create "a real", as distinct from a fanciful, risk that the safety of air navigation may be compromised and passengers, employees or the public may be put at risk: See *McKenzie v Civil Aviation Safety Authority* [2008] AATA 651.
22. In this case the matters for concern have been known to  for over 12 months and no action has been taken against the licence holders. The Applicant says that , if it had a real concern, would have taken action under [s 30\(DC\)](#) of the CAA. However,  rightly points out that this provision raises a very high threshold and that the circumstance that it has not been invoked does not mean that there is no real risk if a stay is granted: See *Civil Aviation Safety Authority v Boatman* [2006] FCA 460, Madgwick J at [55]. In that case however, there were several specific dangerous incidents found against the applicant and there were the basis for refusal of a stay.

23. I accept the submission by  CASA  that the maintenance of proper records and the following of proper procedures are not simply formal matters of “paperwork”. The keeping of accurate and proper records readily accessible to anyone operating aircraft is basic to the whole system of effective safety regulation.
24. There was no allegation that Mr Ekinici or anyone under his supervision, has engaged in activities which have resulted in any specific dangerous incident or that any operator of an aircraft is other than a competent and experienced pilot and/or instructor.
25. There is no clear or specific direct evidence before me that there is any significant danger in the present case to safety of air navigation if there is a short stay of the operation of the cancellation decisions and an early hearing of the substantive issues. Before the aircraft can fly again there must be full compliance with the CAA and all regulations and other applicable controls. The Applicant has offered to give an undertaking to ensure that no aircraft will fly unless there is compliance with all regulatory requirements. However, as  CASA  points out, such an undertaking provides no additional safety as the provisions must be complied with in any event.
26.  CASA  has referred to the Tribunal decision in *Re Griffiths and Civil Aviation Safety Authority* [1993] AATA 274 where a stay of a  CASA  decision was refused.
27. That case is clearly distinguishable from the present matter because the incidents involved in that case were extremely serious: Cf [8]-[15] of the Reasons for Decision.
28. In the *Griffiths* case there had been two major accidents, one of which involved fatalities. The alleged conduct involved knowingly authorising and allowing helicopters with suspected motor blade defects. These circumstances are a far cry from the conduct investigated in the present case.
29. There is no basis in the evidence presently before me to support a conclusion that there is any serious or imminent danger if a stay is granted but the fact that the evidence does not reach this high threshold is not conclusive on this stay application. The existence of any significant risk, if indicated by the evidence, will be a most important factor to which weight must be given. However, in my view, provided that suitable conditions are imposed and there is an early hearing any possible danger will be minimized.
30. The speedy determination of this application for review is an urgent matter and should be given earliest possible hearing consistent with proper preparation of the parties’ respective cases. It should be expedited to ensure that it is possible to conduct a hearing within the immediate future. In this way any possible safety risk will be minimised.

CONSEQUENCES FOR RESPONDENT OF A STAY

31. On the material before me, there will not be any significant adverse effect on  CASA  generally if a stay is granted, subject to an early hearing and suitable conditions of the type set out above.

WILL ANY HEARING OF THE REVIEW BE RENDERED NUGATORY IF A STAY IS REFUSED

32. Yes. On the evidence before me at present, I am satisfied that if a stay is not granted there is a real risk that the Applicants’ business would collapse and that, if successful on the review, he and the applicants would suffer undue hardship. A significant consequence of any financial collapse of his business will be that any relief by way of review in this Tribunal would be rendered nugatory.

OTHER MATTERS

33. It is in my view significant that cancellation has taken place only one month ago, and that the process undertaken by  has been a lengthy one, and that during the period of consideration by  of the licences and approvals remained in force. I have also taken into account the fact that if  considers there is a significant change in circumstances, or there is additional significant evidence as to danger, it can approach the Tribunal immediately for a variation or variations of the stay.
34. I therefore propose to grant a stay of the operation of the decisions under review in relation to the Pilot's Approval and the Chief Flying Instructor Approval held by Mr Ekinci in the following conditions:

The Tribunal grants the Applicant's request pursuant to [s 41\(2\)](#) of the [Administrative Appeals Tribunal Act 1975](#) and stays the operation and implementation of the decisions under review, until further order, and subject to the following directions and conditions:

- (a) This matter is to be expedited and heard as soon as possible.
- (b) The parties are to cooperate to obtain an expedited early hearing of the review applications as an urgent matter.
- (c) All outstanding matters raised in all relevant Aircraft Survey Reports be satisfied to 's reasonable satisfaction before further flight of any aircraft.
- (d) All maintenance to be conducted by a certified and qualified maintenance person or body other than Mr Ekinci.
- (e) Mr Ekinci is not permitted and must not undertake any flying training other than endorsement training in limited category aircraft.
- (f) The certifying person or body is to promptly provide  with a copy of relevant maintenance records including maintenance releases, work packs and log book entries.

In addition, there should be liberty to apply reserved to either party in relation to variation and operation of the above conditions and directions in the event of any dispute concerning them.

The Tribunal reserves to each party liberty to apply on two days' prior notice if any dispute arises as to conditions or if any further directions are sought. I certify that the preceding 34 (thirty -four) paragraphs are a true copy of the reasons for the decision herein of The Hon. Brian Tamberlin, QC, Deputy President

.....
Associate

Dated 3 March 2014

Dates of hearing	14 and 21 February 2014
Counsel for the Applicant	Mr P Lithgow
Solicitors for the Applicant	Maitland Lawyers
Counsel for the Respondent	Mr B Shields
Solicitors for the Respondent	In House

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