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Jones and Civil Aviation Safety Authority [2013] AATA 674 (20 September 2013)

Last Updated: 23 September 2013

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Division **GENERAL ADMINISTRATIVE DIVISION**
File Number **2013/4115**
Re **Milton Jones**
 APPLICANT
And **Civil Aviation Safety** **Authority**
 RESPONDENT

DECISION

Tribunal **Senior Member Bernard J McCabe**
Date **20 September 2013**
Place **Brisbane**

Pursuant to [s 41\(2\)](#) of the [Administrative Appeals Tribunal Act 1975](#), the Tribunal stays the operation and implementation of decision of the **Civil Aviation Safety** **Authority** to cancel the applicant's pilot's licence until the conclusion of the hearing or further order.

.....
Senior Member Bernard J McCabe

CATCHWORDS

STAY APPLICATION – Cancellation of pilot's licence – Appropriate and desirable to grant stay – Secure the effectiveness of the hearing and decision – Time needed to gather technical evidence – Stay application granted

LEGISLATION

[Administrative Appeals Tribunal Act 1975](#) (Cth) [s 41\(2\)](#)

[Civil Aviation Act 1988](#) (Cth) [s 31A](#)

REASONS FOR DECISION

Senior Member Bernard J McCabe

INTRODUCTION

1. The applicant, Milton Jones, has applied for an order under [s 41\(2\)](#) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) staying the operation and implementation of the respondent's decision to cancel his pilot's licence. He received the benefit of an interim stay under [s 31A](#) of the *Civil Aviation Act 1988* but that stay only remains in effect while the Tribunal considers whether it should make an order under s 41(2) of the AAT Act.
2. Section 41(2) provides:

*The Tribunal may, on request being made, as prescribed, by a party to a proceeding before the Tribunal (in this section referred to as the **relevant proceeding**), if the Tribunal is of the opinion that it is desirable to do so after taking into account the interests of any persons who may be affected by the review, make such order or orders staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates or a part of that decision as the Tribunal considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review.*

3. The language in the sub-section is tortured. Stripped to its essence, the provision requires that the Tribunal be satisfied it is both appropriate *and* desirable to make stay orders. While there is some overlap between these two concepts, it would be *inappropriate* to make an order that was not required for the purpose of securing the effectiveness of the hearing, regardless of whether other considerations suggested it was *desirable* to order a stay.
4. I conducted a telephone hearing of stay on 27 August 2013. The applicant was represented by counsel and provided written submissions and a statement describing the hardship and inconvenience he and his family would experience if a stay were not granted. The applicant also addressed the issue of public safety. I adjourned the hearing that afternoon. In the course of my deliberations, it occurred to me the applicant had not clearly explained why the stay order was *appropriate*. I invited the parties to make further submissions on this point at a resumed hearing. In the meantime, I indicated in a set of written reasons published to the parties that I was satisfied it was otherwise *desirable* to make the order. In summary, I decided:
 - o I accepted the applicant and his family were likely to experience hardship and inconvenience if the applicant were unable to operate his helicopter while the review proceeded;
 - o There was a comparatively small risk to public safety in the circumstances if the applicant was allowed to continue flying; and
 - o There was a robust dispute with respect to the facts of the case and the appropriateness of the regulatory action, so I was not prepared to say the case was without merit.
5. The hearing of stay resumed on 13 September 2013. Both parties filed supplementary written submissions that were the subject of further oral submissions. As it turned out, the applicant was reluctant to take up my invitation to explain why the stay was *appropriate*. After noting my written reasons dated 27 August 2013 had accepted a stay was *desirable*, the applicant's written submissions explained at [3]:

...given that all of the other usual criteria have been adequately addressed the effectiveness of the review hearing does not of itself become a point which must be demonstrated by an applicant.

6. I disagree. I have already pointed out the applicant must establish it is appropriate *and* desirable

to grant a stay. A stay would be inappropriate if the hearing and determination of review could proceed satisfactorily in the absence of a stay. It is not enough for the applicant to establish it is in his interests to be granted a stay, and that the balance of convenience favours that course.

- 7. When pressed at the resumed hearing, Mr Maitland, for the applicant, offered a more nuanced argument. He noted a timetable for the hearing had already been agreed. CASA, for its part, was content to go to an early hearing because it had all the evidence it believed was required in the form of video footage in which Mr Jones is apparently depicted doing things that CASA says warrant regulatory action. But Mr Maitland said his client needed more time to prepare because it would be necessary to obtain technical evidence about the shooting and editing of the video. He said the technical evidence would demonstrate all was not as it seemed. That would take some time, which is why the applicant had agreed to a hearing in November. Mr Maitland said a November timetable was only agreeable on the assumption his client was permitted to continue operating his helicopter in the interim, as that would enable him to maintain his business. If an order of stay was not made, Mr Maitland continued, the applicant would come under considerable financial pressure very quickly and he would be forced to press for an earlier hearing. The applicant would have difficulty gathering evidence that would assist the Tribunal in its deliberations if the applicant had to rush.
- 8. I was provided with a letter from the production company that shot the video footage which was packaged into 16 episodes of 22 minutes each. While the letter did not directly address the question of how long it would take to provide the evidence the applicant proposed calling, the producers did talk of the complex technical issues arising out of the video production. Mr Maitland invited me to infer it would be necessary to separately examine each piece of footage CASA relied on so the technical issues could be properly explained. I was told the applicant might not have the opportunity to undertake that analysis if it became necessary to seek an earlier hearing because a stay was not granted.
- 9. CASA was critical of the applicant's decision not to produce detailed evidence explaining how its financial position would be affected if a stay were not granted. There is something to that, but I am satisfied the evidence establishes the applicant would experience a significant financial cost if he were unable to fly while the review process was underway. It is unclear whether that cost would be such as to threaten the applicant's immediate future to the extent the hearing would become pointless. But I do accept the applicant would be under *some* pressure to bring the matter on early if a stay were not imposed. Given the volume of technical and expert analysis the applicant is expected to produce to rebut the video evidence that CASA says will speak for itself, undue haste is unlikely to improve the quality of the hearing, and may undermine the effectiveness of the review. Ordering a stay would permit the parties to take a more measured approach to the evidence in accordance with the current timetable.
- 10. I am satisfied it is appropriate to order a stay of CASA's decision to cancel the applicant's licence until the conclusion of the hearing or further order in order to secure the effectiveness of the hearing and determination of the decision under review. For the reasons I gave on 27 August 2013, which have been summarised above, I accept it would be desirable to make that order.

I certify that the preceding 10 (ten) paragraphs are a true copy of the reasons for the decision herein of Senior Member Bernard J McCabe .

.....
Associate

Dated 20 September 2013

Date of hearing	13 September 2013
Solicitors for the Applicant	Maitland Lawyers
Respondent	In person

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