[2015] AATA 272

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2014/5933 |
| Re | David Barnes |
|  | APPLICANT |
| And | Civil Aviation Safety Authority |
|  | RESPONDENT |

# Decision

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| Tribunal | **Egon Fice, Senior Member** |
| Date | **29 April 2015** |
| Place | **Melbourne** |

The Tribunal does not have jurisdiction to review the decision of the Respondent on 30 October 2014 to issue the Applicant with a class 2 medical certificate for a period of 12 months.

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

**Egon Fice, Senior Member**

Catchwords

**AVIATION** – Pilots – Qualification for licence – Medical requirements – Administrative Appeals Tribunal – Jurisdiction – Reviewable decisions – Class 2 medical certificate issued for 12 months – no request to vary authorisation – no jurisdiction to review authorisation to issue medical certificate

Legislation

Administrative Appeals Tribunal Act 1975 (Cth) ss 3, 25

Civil Aviation Legislation Amendment (Flight Crew Licensing and Other Matters) Regulation 2013 (Cth) reg 2

Civil Aviation Act 1988 (Cth) ss 31, 98

Civil Aviation Safety Regulations 1998 (Cth) regs 11.015, 61.410, 67.180, 67.190, 67.205 – 67.215, 201.004

Secondary Materials

Explanatory Statement, Civil Aviation Legislation Amendment (Flight Crew Licensing and Other Matters) Regulation 2013 (Cth)

# REASONS FOR DECISION

**Egon Fice, Senior Member**

**29 April 2015**

1. Mr David Barnes is the holder of a private pilot licence (PPL). He is only authorised to exercise the privileges of that licence if he also holds a current class 1 or 2 medical certificate (*Civil Aviation Safety Regulations 1998* (CASR) Reg 61.410 (1)). Mr Barnes suffers from Type 2 diabetes. For that reason, special requirements attach to any applications he may make for the issue of a medical certificate.
2. In an email dated 11 August 2014 Mr Barnes wrote to Dr Navathe, an Aviation Medical Officer with the Civil Aviation Safety Authority (CASA), stating that his Designated Aviation Medical Examiner (DAME), Dr Arthur Pape, recommended he be issued with a class 2, two year medical certificate.
3. In a letter dated 30 October 2014 Dr David Fitzgerald, an Aviation Medical Officer with CASA, wrote to Mr Barnes informing him that a class 2 medical certificate valid for 12 months had been issued to him.
4. On 17 November 2014 Mr Barnes lodged an application for review of CASA’s decision to issue him with a class 2 medical certificate valid for 12 months. His complaint was that he was entitled to a class 2 medical certificate which was valid for two years rather than 12 months.
5. Mr Anthony Carter, a Principal Lawyer with the Legal Branch of CASA, wrote to the Tribunal on 16 January 2015 stating that CASA’s decision of 30 October 2014 was not properly the subject of review as it did not enliven the Tribunal’s jurisdiction.
6. Following a telephone conference held before a Conference Registrar of the Tribunal on 21 January 2015, Mr Barnes wrote to CASA on 5 February 2015 putting forward a proposal which would resolve the issue. On 23 February 2015 Mr Anthony Carter wrote to Mr Barnes rejecting that proposal. A copy of that letter was provided to the Tribunal.
7. This matter came before me on 30 March 2015 for a hearing of the jurisdiction question raised by CASA. In the course of that hearing, I raised questions about the reviewable decisions referred to in the table within Reg 201.004 of the CASR. In particular, I pointed out that Mr Carter in his 16 January 2015 letter had not referred to Item 1(d). I provided Mr Carter with time to respond to my queries regarding that Item. Mr Carter provided written submissions on jurisdiction which were received on 10 April 2015.
8. For the reasons I have set out below, I find that the Tribunal does not have jurisdiction to review Mr Barnes’ application.

# Reviewable decisions

1. Decisions which may be subject to review by the Tribunal are those set out in s. 25 of the *Administrative Appeals Tribunal Act 1975* (AAT Act). Relevantly, it provides:

(1) An enactment may provide that applications may be made to the Tribunal:

* 1. for review of decisions made in the exercise of powers conferred by that enactment; or
  2. for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment.

1. The expression *enactment* is defined in s. 3(1) of the AAT Act which includes:

(c) an instrument (including rules, regulations or by-laws) made under an Act or under such an Ordinance;…

1. Section 31 of the *Civil Aviation Act 1988* (the Civil Aviation Act) deals with the review of decisions. Relevantly, it provides (emphasis in original):

(1) In this section:

**decision** has the same meaning as in the Administrative Appeals Tribunal Act 1975.

**reviewable decision** means:

* 1. a refusal to grant or issue, or a cancellation, suspension or variation of, a certificate, permission, permit or licence granted or issued under this Act or the regulations; or
  2. the imposition or variation of a condition, or the cancellation, suspension or variation of an authorisation, contained in such a certificate, permission, permit or licence; or…

1. The word *decision* is defined in s. 3(3) of the AAT Act as follows:

Unless the contrary intention appears, a reference in this Act to a decision includes a reference to:

* 1. making, suspending, revoking or refusing to make an order or determination;
  2. giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
  3. issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
  4. imposing a condition or restriction;
  5. making a declaration, demand or requirement;
  6. retaining, or refusing to deliver up, an article; or
  7. doing or refusing to do any other act or thing.

1. The CASR are plainly regulations made pursuant to s. 98 of the Civil Aviation Act. Reg 201.004 deals with review of decisions. Relevantly, it provides:

(1) In this regulation:

**authorisation:** see regulation 11.015.

Decisions made by CASA

(2) An application may be made to the Administrative Appeals Tribunal for the review of a decision of CASA mentioned in table 201.004.

**Table 201.004 Reviewable decisions**

**Item A decision…**

1 under a provision of these Regulations:

* 1. refusing to grant or issue an authorisation; or
  2. cancelling or suspending an authorisation otherwise than on the application of the authorisation-holder; or
  3. varying an authorisation otherwise than on the application of the authorisation-holder; or
  4. refusing to vary an authorisation

1. Reg 11.015 defines the expression *authorisation* as:

In this Part:

**authorisation** means:

* 1. a civil aviation authorisation other than:
     1. an AOC; or
     2. a delegation; or
     3. the appointment of an authorised person; or
  2. an approval or qualification of a document or thing under these Regulations, other than a material, part, process or appliance to which regulation 21.305A applies; or
  3. a certificate capable of being granted to a person under these Regulations.

1. There can be no doubt that a class 2 medical certificate falls within the definition of *authorisation,* being a certificate capable of being granted to a person under the CASR. The power to do so is found in Reg 67.180 of the CASR.
2. It should also be clear that the Items listed in Table 201.004 are consistent with the description of a reviewable decision set out in s. 31 of the Civil Aviation Act. Section 31(1)(b) specifically refers to the variation of an authorisation contained in a certificate. Although it might be said that a medical certificate does not expressly contain an authorisation, the fact that the holder of a private pilot licence is only authorised to exercise the privileges of the licence if the holder also holds a class 1 or 2 medical certificate plainly indicates that the authorisation contained in Reg 61.410 is subject to the issue of the appropriate medical certificate. The two Regulations must be read together. In any event, Reg 11.015 defines a certificate capable of being granted under the CASR to be an authorisation.
3. Mr Carter submitted that while there was no express reference under s. 31 of the Civil Aviation Act to variation, cancellation or suspension at the authorisation holder’s request, the wording used in Items 1 and 2 of the Table within Reg 201.004 was consistent with the authorities that it is a necessary prerequisite for application to the Tribunal that a *reviewable decision* must be adverse rather than beneficial to the applicant, or in some instances, other affected parties. Mr Carter did not cite any authority supporting that contention.
4. Furthermore, Mr Carter submitted that s. 31 provides for two different scenarios under (a) and (b). He referred specifically to (b) requiring the imposition or variation of a condition upon an existing permission etc. Mr Carter submitted that neither scenario under the definition found in s. 31 indicates any basis for an applicant to seek review of a beneficial or favourable decision.
5. With respect to Mr Carter, I cannot find any basis for those two propositions put by him. In so far as s. 31(1)(b) has significance, it is found in the words *variation of an authorisation* which is what we are concerned with in this matter, albeit a refusal. First, there is nothing in either the Act or the Regulations which so much as gives rise to an inference that a reviewable decision must be adverse to the applicant. He cited no authority for such proposition and I have not been able to locate one. Secondly, the description of reviewable decisions set out in Table 201.004 does not so much as suggest that they must be unfavourable to an applicant should he or she seek review. In any event, the decision to grant Mr Barnes a class 2 medical certificate for a period of 12 months rather than the two years which he sought is plainly detrimental to him. He would be required to undergo the medical examination and to satisfy the conditions for his diabetes twice as often as he would if the certificate were granted for two years. That would add to the expense of him being permitted to exercise the rights under his private pilot licence.
6. Mr Carter also submitted that the period for which a medical certificate remains valid is not a condition on that certificate. I have no doubt that Mr Carter is correct about that. Reg 67.180(1) simply provides that CASA must issue a medical certificate to an applicant if the applicant meets the requirements set out in subregulation (2). That subregulation says nothing about the period for which a medical certificate remains valid. Reg 67.205(3) addresses that issue. For a person who is 40 years old or older (as is Mr Barnes) when the certificate is issued, a class 2 medical certificate remains in force for a period of not more than two years after the day when the certificate comes into force. The expression *not more than* clearly implies that CASA may determine the period for which the certificate remains in force, but it must not exceed two years. In other words, it is at CASA’s discretion.
7. Mr Carter also referred to Reg 67.210 dealing with an application for extension of the period for which a medical certificate remained in force. Plainly, the holder of a current medical certificate issued by CASA may apply for an extension of the period during which the medical certificate remains in force. If CASA is satisfied that extending the period will not adversely affect the safety of air navigation, it may extend the period during which the certificate remains in force but for not longer than 1 year after the day when the certificate would expire if the period had not been extended (Reg 67.215).
8. I agree with Mr Carter’s submission that Reg 67.190 does not apply in this case. Mr Barnes has not sought reconsideration of a decision to refuse a medical certificate or been issued a medical certificate subject to a condition not sought by him.
9. In his submissions Mr Carter also addressed the fact that Item 1(d) was a recent addition to the CASR, being introduced by the *Civil Aviation Legislation Amendment (Flight Crew Licensing and Other Matters) Regulation 2013* (the amending Regulation). It came into effect on 1 September 2014 (Reg. 2). Although Mr Carter referred to the Explanatory Statement accompanying the amending Regulation, it is not particularly helpful unless one goes back to examine the form of Reg 201.004 prior to the amendment. Prior to its amendment, table 201.004 relevantly described reviewable decisions in this way:

1 under a provision of these Regulations refusing to grant or issue, or cancelling, suspending or varying, an authorisation

2 under a provision of these Regulations imposing a condition on, or varying a condition of, an authorisation

1. The Explanatory Statement to the amending Regulation in respect of Items 1 and 2 of table 201.004 states (at p 35):

**Item [386] – Subregulation 201.004 (2) (table 201.004, items 1 and 2)**

Item [386] makes minor editorial amendments to items 1 and 2 of table 201.004 and excludes, from the list of reviewable decisions, the imposition or variation of a condition requested by an authorisation holder.

1. It should be plain from a comparison of Table 201.004 before and after amendment that what the amendment did in fact was to remove from the former Items 1 and 2 the power of an authorisation holder to seek review of a decision cancelling, suspending or varying an authorisation where that cancellation, suspension or variation decision was made on the application of the authorisation holder. However, Item 1 (d) is not so affected. In fact, it appears to be an addition to the former regulation. The former regulation made no reference to refusing to vary an authorisation. The expression *refusing to vary an authorisation* is not qualified by the words *otherwise than on the application of the authorisation-holder*. In fact, that qualification is unnecessary because, for a reviewable decision to arise, CASA must refuse to vary an authorisation which necessarily implies that the applicant has sought the variation. Accordingly, that application would necessarily be made by the authorisation-holder.
2. Mr Carter also submitted that because Table 201.004 of the CASR refers to reviewable decisions, that must be a reference to the definition in s. 31 of the Civil Aviation Act. The problem with that submission is that under the heading Reviewable decisions is a reference to a decision made under a provision of the CASR. While it is probably correct to say that the Civil Aviation Act makes no reference to *refusing to vary an authorisation,* the descriptions in s. 31(1) are likely sufficiently broad to encompass such a decision. That is particularly so given that s. 98(1)(b) refers to making regulations not inconsistent with the Act, which prescribe matters necessary or convenient to be prescribed for carrying out or giving effect to the Act.

# Presence or absence of a decision

1. Mr Carter submitted that even if I were satisfied that Item 1(d) of Table 201.004 may apply in the circumstances I have described above, it could not apply to Mr Barnes because the preconditions for application of that Item had not been satisfied. Mr Barnes has not made an application to CASA seeking variation of an existing authorisation.
2. In particular, Mr Carter submitted that CASA’s decision made on 30 October 2014 to issue Mr Barnes with a class 2 medical certificate for a period of 12 months could not be construed as a variation of an existing authorisation. I agree. It is correct to say, as does Mr Carter, that following the issue of a class 2 medical certificate to Mr Barnes, very shortly thereafter he simply made an application to the Tribunal seeking a review of that decision.
3. I have also considered the context in which Mr Barnes’ application was made. In his email of 11 August 2014 to Dr Navathe, Mr Barnes said that he received his DAME’s recommendation that he be issued with a class 2 medical certificate for two years. He then specifically requested that his application be assessed for a medical certificate to remain in force for two years. The fact that CASA issued to him a class 2 medical certificate for 12 months rather than two years as he requested clearly implies that CASA is not prepared to issue to him a medical certificate for the period he has requested.
4. I have no doubt that if Mr Barnes had, upon receiving CASA’s letter of 30 October 2014, written to CASA requesting a variation of his class 2 medical certificate so that it remained in force for two years, CASA would have refused. That is implicit in the decision it made. It can also be implied from the fact that upon issuing an application to the Tribunal seeking a review of that decision, CASA has not acquiesced and varied the period for which Mr Barnes’ medical certificate remains in force.
5. I have also noted above [11] and [12] that s. 31(1) of the Civil Aviation Act provides that the word *decision* has the same meaning as in the AAT Act and that the AAT Act describes a wide range of activities which fall within the definition of *decision*. Unless a contrary intention appears, the AAT Act provides that the word *decision* includes a reference to *doing or refusing to do any other act or thing.*
6. However, in the context of Table 201.004, the refusal must be a refusal to vary an authorisation which is in existence. Plainly, until CASA issued to Mr Barnes a class 2 medical certificate on 30 October 2014, there was no authorisation in existence. There was no dispute about the fact that Mr Barnes did not, following the issue of his class 2 medical certificate, ask CASA to vary that authorisation so that it remained in force for two years. In fact, his application to the Tribunal is in respect of the issue of the class 2 medical certificate valid for 12 months. That is not a reviewable decision either under the Civil Aviation Act or the CASR.

# Conclusion

1. The Tribunal’s jurisdiction is governed by s. 25 of the AAT Act. It provides that an enactment may provide for applications to be made to the Tribunal for review of decisions made in the exercise of powers conferred by that enactment. In fact s. 25 goes on in subsection (3) to explain that an enactment may be expressed to apply to all decisions of a person or to a class of such decisions and may specify conditions subject to which applications may be made. In this case, the class of decisions which may be reviewed are those set out in s. 31 of the Civil Aviation Act and Table 201.004 of the CASR. Although Table 201.004 includes a decision refusing to vary an authorisation, that is not the decision which Mr Barnes seeks to have reviewed by the Tribunal.
2. Accordingly, I find that the Tribunal does not have jurisdiction to review the decision to issue Mr Barnes with a class 2 medical certificate for a period of 12 months. Were Mr Barnes minded to seek a variation of the medical certificate which was issued and CASA refused to vary the period for which his medical certificate remained in force, that decision would be reviewable by the Tribunal. Alternatively, Mr Barnes could seek an extension of his existing medical certificate in accordance with Reg 67.210.

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| I certify that the preceding 34 (thirty -four) paragraphs are a true copy of the reasons for the decision herein of Egon Fice, Senior Member |

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Associate

Dated 29 April 2015

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| Date of hearing | **30 March 2015** |
| Date final submissions received | **10 April 2015** |
| Applicant | **In person** |
| Advocate for the Respondent | **Mr A Carter** |
| Solicitors for the Respondent | **Civil Aviation Safety Authority** |