

Guidance on a Governor's review under Article 13 of the Air Navigation (Overseas Territories) Order 2013

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1 BACKGROUND

The Air Navigation (Overseas Territories) Order 2013 (“the AN(OT)O”) gives a Governor of an Overseas Territory (OT) a wide variety of discretionary powers. For example, it may require that certificates, licences or approvals of one kind or another be granted if a Governor is satisfied that the aircraft is fit to fly, the organisation can operate safely or an individual is competent or whether the aircraft should be registered on the OT register or de-registered.

The AN(OT)O requires Governors to publish their requirements for the grant of certificates, licences and approvals by means of an OTAR (Overseas Territories Aviation Requirement) and to take into account those requirements when determining whether to grant the certificate, licence or approval or to require a person to keep or do something or whether to register or de-register an aircraft.

Under Article 6 of the AN(OT)O Governors are obliged to designate a person (this includes an organisation) to carry out the functions set out in that Order on behalf of the Governor. Therefore in practice the Governor’s powers to regulate are exercised on behalf of the Governor by staff working in OTAAs or ASSI.

Whenever the staff of the OTAA/ASSI (acting as the designated person under article 6) inform a person of a decision which is subject to a right of review by the Governor under article 13, they serve a notice on the person which must set out the reasons for that decision.

Under Article 13 of the AN(OT)O the Governor, advised by any technical assessors appointed by the Governor, can be required to review certain decisions made by officials of the OTAA/ASSI designated by the Governor under article 6. Article 13 is set out below:

“Review by the Governor

13. (1) Where any person designated under article 6—

- (a) decides that it would be inexpedient in the public interest to register an aircraft in the Territory; or
- (b) refuses an application for the grant, validation or variation of a licence, certificate, approval, authorisation or rating; or
- (c) decides to cancel the registration of an aircraft; or
- (d) decides to revoke, suspend or vary a licence, certificate, approval, authorisation, validation or rating otherwise than on the application of the holder;

the person designated must serve on the person concerned a notice stating the reasons for the decision and the person concerned may, within 14 days of the date of the service of the notice, serve on the Governor a request that the decision be reviewed by the Governor.

(2) Where such a request under paragraph (1) has been duly served the Governor must, before making a decision, consider any oral representations which may be made to the Governor or any representations in writing which may have been served upon the Governor by the person concerned within 21 days after the date of service of the request and may, before making a decision, consider the advice of such technical assessors as the Governor may appoint as advisers, provided that the Governor must not appoint as an assessor any person who participated in the decision or proposal or in giving

or assessing any test or examination which is to be the subject of the Governor's decision."

The AN(OT)O can be viewed on the UK Government's legislation website:
<http://www.legislation.gov.uk/ukxi/2013/2870/contents/made>

2 HOW TO DEAL WITH A GOVERNOR'S REVIEW

2.1 Timing and priority of review procedure

It is imperative that a hearing be held as soon as reasonably possible after a request for a review is made. This means that a demanding timetable for the preparation of the Brief and subsequent steps will need to be established and adhered to. It is the responsibility of the Governor's office or a lawyer appointed by the Governor for this purpose (see Annex A) to establish a timetable which is consistent with the Governor's responsibilities, to set appropriate milestones and to ensure that the milestones are met. It must be a managed process.

2.2 Procedure leading up to a hearing

When following the procedure leading up to a hearing under Article 13, the Governor must, so far as possible conduct the review in accordance with the rules of natural justice. In particular, an appellant must have the right to make representations to the Governor and to state his case and challenge that of the OTAA/ASSI officials before a final decision by the Governor is made. To enable an appellant to properly exercise that right, it is essential that he be given adequate notice of the case, including sight of all relevant material and documents on which the OTAA/ASSI for the purpose of the review against him and adequate time to prepare his representations.

In most cases the following documents will be exchanged via the Governor's office and in the following order:

1. The OTAA/ASSI 'brief', setting out the facts of the matter, relevant law and policy and the decision to be reviewed;
2. The applicant's representations (in writing)
3. Each party may comment in writing on the other's documents.

In the case of a review of the conduct of a test or examination, the order will usually be as follows:

1. The applicant's representations (in writing).
2. The OTAA/ASSI 'brief', setting out the facts of the matter, relevant law and policy and the decision to be reviewed
3. Each party may comment in writing on the other's documents.

The reason for the reversal of the order of exchange is that only the applicant knows the reasons why he alleges the test or examination was not properly conducted.

Normally 21 days should be allowed for the brief to be written and likewise for the representations following service of the brief. However, in the case of a review of the conduct of a test or examination, these periods could be reduced to 14 days each.

A period of 7 days for the exchange of comments would be appropriate.

Either party may request an extension of time from the Governor.

All documents should be sent to the Governor's office which will co-ordinate the exchange of documents above.

Following the exchange of comments the Governor's office will prepare a paginated bundle of the documents for the hearing, ideally with a contents/index section to aid cross-referencing.

2.3 Public hearing considerations

Hearings should generally be held in public unless the Governor considers it appropriate in the public interest to conduct the hearing in private. The circumstances in which the hearing might be held in private include in the interests of morals, public order, national security, juveniles or the protection of the private lives of the parties or where the Governor considers that publicity would prejudice the interests of justice.

2.4 Review without an oral hearing

There is not always a hearing at which the appellant puts his case orally. Some appellants prefer to put their case in writing and it is then for the Governor to decide it on the basis of the written material provided by the appellant and the OTAA/ASSI personnel.

OTAA or ASSI staff must not discuss a case with the Governor in the absence of the appellant, whether before or after a hearing, until a decision has been made and notified to the appellant. If the appellant chooses not to appear at a hearing, then the staff may not discuss the case with the Governor at all before the Governor informs the appellant of the decision.

2.5 The task for the Governor

The Governor (and any technical assessors) will of course need to read the documents carefully before the hearing. They should identify in particular issues of fact or points of law where there is a dispute between the parties which they may be required to determine. They should however avoid coming to any concluded views at this stage so that their minds are open to argument by the parties at the hearing.

In reaching a decision, the Governor must consider all relevant matters (and must not consider any irrelevant matters). The Governor will need to determine which matters are relevant and which are not.

2.6 The decision required of the Governor

The decision required of the Governor should be expressly set out in the brief which will be prepared for each review by the OTAA/ASSI (see below). The type of decision required will vary according to whether the review is in relation to:

- a refusal of an application or the grant of an application in terms other than applied for, in which case the Governor has to review the decision;
- a decision to revoke, suspend or vary a licence, certificate or approval, in which case the Governor has to decide whether to proceed to revoke, suspend, vary or make the direction in accordance with the decision;
- a failure of an examination or test, in which case the Governor has to decide whether the examination or test was properly conducted. He is not in a position to decide whether the examinee should have passed or failed. If the Governor decides that the examination or test was not properly conducted, the only consequence is that the appellant is entitled to a free retest.

The Governor will be entitled to uphold the refusal or grant or decision of the OTAA/ASSI officials, to reverse that refusal or decision or to substitute such other decision as the Governor is lawfully entitled to make, including in the case of a grant (see bullet point 1 above) a grant either in the terms requested or in different terms.

The Governor's decision may be made at the end of the hearing, if there is one, or, more usually, it may be made after the hearing, when the Governor has considered both party's cases and arrived at a reasoned decision.

The decision should be communicated in writing and sent to the applicant and copied to the OTAA/ASSI.

The decision letter may be written by a member of the Governor's office or by the lawyer appointed to advise the Governor. The final draft is always subject to the Governor's approval.

2.8 Licence action not permanent

The appellant may ask what he can do in order to get the licence, certificate or approval he is seeking or to have his licence etc restored and any helpful advice that he can be given should be offered. Except in some medical cases, the OTAA/ASSI cannot say that a person can never have a licence etc. If he can satisfy the OTAA/ASSI at some time in the future that he has acquired the necessary skills, met the required standards or that he has rehabilitated himself (depending on the circumstances of the case) so as to meet the relevant fitness policy, he will usually be entitled to one.

In this connection, it is important to remember that licensing action cannot be taken as a punishment – see section 3.2. If licensing action is justified, it must take effect until such time as the person satisfies the OTAA/ASSI that he has acquired the necessary skills or that he has become a fit person to hold a licence.

Where licence action is taken on grounds of fitness (of character as opposed to medical fitness) it is particularly difficult to predict when the OTAA/ASSI might be prepared to grant a licence. It may be helpful, depending upon the circumstances, to indicate that the OTAA/ASSI is unlikely to be satisfied as to fitness until the appellant has achieved a period of say, two or three years of unblemished conduct. However, it must always be made clear that the appellant has a right to apply at any future time and that such an application would be considered on its merits.

2.9 Rights of appeal to the Court from the decision of the Governor under Article 193 of the AN(OT)O

If a personnel licence is refused, revoked, suspended or varied on the grounds that the Governor, directly or through an OTAA or ASSI and whether as a result of a review under Article 13 or otherwise, does not consider the person concerned a fit person to hold such a licence, that person, under Article 193 of the AN(OT)O, has a right of appeal to the Supreme Court of the Territory against the decision of the Governor. It is for the Court to consider whether, on the evidence submitted to the Governor, he was wrong in deciding that the person concerned was unfit to hold a licence. There is no such appeal in relation to a decision taken by the Governor on the grounds of knowledge, experience, competence, skill, physical or mental fitness.

If an appellant considers that there has been any breach by the Governor (or OTAA/ASSI) of the rules of natural justice or that the Governor's decision is ultra vires or unlawful in some respect, he can seek judicial review of the decision by the Supreme Court which will examine the proceedings and quash the decision if it feels

that there was any breach of the rules or that the Governor's decision was ultra vires, e.g. where the Governor exceeded his powers or has reached a conclusion which no reasonable tribunal could have reached.

3 RELATED ISSUES

3.1 Provisional Suspension

Article 11 of the AN(OT)O provides that the Governor may, if he thinks fit, provisionally suspend or vary any certificate, licence etc issued under the Order pending enquiry into or consideration of the case.

A provisional suspension may occur:

(1) Where the OTAA or ASSI has information which raises a real doubt as to the continued competence or fitness of the individual or organisation but enquiries are continuing and the officials are not yet in a position to come to a concluded view.

Here the OTAA or ASSI would provisionally suspend "pending inquiry into the case". Because there is no right of appeal against a provisional suspension (except by judicial review) OTAA/ASSI must expedite inquiries so as to put itself in a position to either withdraw the provisional suspension or make a substantive suspension, revocation or variation as soon as possible. If the inquiries are likely to be lengthy it may be necessary to offer an informal right to make representations on the question of whether the provisional suspension needs to be maintained during that period.

(2) Where OTAA or ASSI have completed inquiries and are considering the case or have considered the case and are in a position to substantively suspend or revoke.

Such a decision must be coupled with an offer of a right of review under Article 13.

3.2 Licensing action cannot be taken for punitive reasons

In conducting a review it is important to bear in mind that licensing action cannot properly be taken in order to punish the licence holder. If the law has been broken the offender can only be punished by the Courts after a prosecution. Refusal, revocation, suspension or variation of a licence, certificate or approval may only be taken if the conduct of the person concerned is such that he does not meet the criteria for holding such a licence, certificate or approval. For example, if a pilot has contravened the Air Navigation (Overseas Territories) Order, he may be prosecuted. If his conduct in committing the offence suggests that he does not have the necessary skills of a pilot or that he is an unfit person to hold a pilot's licence then his licence may be revoked.

3.3 Conclusion

Article 13 covers a wide variety of circumstances and two cases are seldom alike. This note therefore can only give some general guidance and ground rules. The ASSI Legal Adviser is closely involved in each review and is available to discuss any problems that may arise in a particular case.

ANNEXES

- A Summary of the review procedure
- B Specimen framework for the hearing
- C Guidance Note which is sent to prospective appellants

1. The Governor should ideally have had no prior involvement in the matter. This may not always be possible but Governors should be aware of the importance of maintaining a neutral and independent mind on cases which may come before them.
2. The Governor may sit with any Technical Assessor(s) he has appointed to advise him on technical matters arising in the course of the hearing. The Technical Assessor will therefore need to be given a set of the hearing papers before the hearing. Any advice he gives should be given during the hearing so that the applicant and OTAA/ASSI may hear it and be allowed to comment on it. The Technical Assessor should not play any part in the making of the actual decision beyond the giving of advice and should not previously have been involved in the decision under review.
3. A timetable for the exchange of documents and a date for a hearing will be fixed subject to availability of the Governor and any Technical Assessor(s).
4. One lawyer from the Chambers of the Attorney-General for the Territory will be appointed to advise the Governor and to manage the review (“the review panel lawyer”). Another lawyer may be appointed by the OTAA or ASSI to advise the OTAA/ASSI officials in preparing the Brief and generally in connection with the review (“the OTAA lawyer”).
5. OTAA or ASSI will prepare a Brief. The Appellant is invited to prepare his written representations. These documents will then be exchanged through the review panel lawyer in the order and in accordance with the procedure at 2.2 above.
6. The OTAA/ASSI officials will prepare comments on the Appellant’s submissions. The Appellant will be entitled to prepare comments on the OTAA/ASSI Brief. The four documents (Brief, Appellant’s representations, officials’ comments on the representations and Appellant’s comments on the Brief) will be supplied to the officials, the Appellant and the Governor at least two weeks prior to the hearing.
7. The relevant OTAA/ASSI officials responsible for the Brief will attend the hearing together with the OTAA lawyer. External Counsel may be instructed to represent the officials at the hearing.
8. The Appellant has the right to be legally represented. The Appellant may attend with whatever witnesses he wishes and shall have the right to put before the Members whatever written or oral evidence he wishes, subject of course to relevance.
9. The Appellant with his legal representative has the right to put questions to the officials.
10. The review panel lawyer will advise the Governor on matters of law and procedure. The review panel lawyer should have had no prior involvement in the case and should not have discussed it with the OTAA/ASSI lawyer or with the officials involved in the case.
11. The review panel lawyer should agree with the Governor an Agenda setting out the hearing procedure to be followed at the hearing. This should reflect the above Guidance. This Agenda should be distributed to the parties at the

commencement of the hearing. An example of an Agenda which may be adopted is at Annex B.

12. A shorthand writer should be instructed to attend and prepare a transcript of the hearing which will be made available to all parties after the hearing.

1. **Introduction by the Governor**
2. **Documents for hearing and record of hearing** - the parties and the panel will all have a copy of the bundle containing both parties' representations and further comments. A transcript of the hearing will be taken and will be made available to the parties subsequently.
3. **Opening statement by the Appellant** - the Appellant may wish to outline his case briefly.
4. **Opening statement by OTAA/ASSI** - the OTAA/ASSI representative may outline its case briefly.
5. **The Appellant's case** - the Appellant will set out his case which should reflect his representations.
6. **Questioning by OTAA/ASSI of Appellant's case** - the Appellant or his witnesses can answer questions put by OTAA/ASSI.
7. **OTAA/ASSI case** - OTAA/ASSI will set out its case which should reflect the OTAA/ASSI Brief.
8. **Questioning by Appellant of OTAA/ASSI case** - the appropriate witness for OTAA/ASSI can answer questions put by the Appellant.
9. **Questions by the Governor** - the Governor may raise questions with any witness at any time. The Technical Assessor(s) may also put questions with the permission of the Governor.
10. **Short adjournment** - the Governor and Technical Assessor(s) will adjourn briefly to consider whether there are any further questions they wish to put to the parties or if they need to ask for legal advice from the review lawyer. It will also provide the parties with an opportunity to consider their closing statements.
11. **Final Questions** - the Governor (and with the Governor's permission, the Technical Assessor(s)) may put any further questions. The Governor may also seek any legal advice he needs in the presence of the parties before retiring to consider his decision.
12. **Closing statement by OTAA/ASSI** - the Officials representatives may make a final comment.
13. **Closing statement by Appellant** - the Appellant may make a final comment.
14. **The Decision** - the Governor will deliberate and come to his decision. If he requires further legal advice from the review's legal adviser the parties should be given an opportunity to make representations on the point in issue. The legal adviser will draft a decision letter on the instructions of the Governor. The Governor will finalise the decision letter and send it to the Appellant and copy it to the Officials.
15. **Dealing with substantial new points** - if substantial new points are raised during the hearing the Governor should ask if either party would like an adjournment to deal with them.

Guidance on requesting a review of adverse decisions or proposals made by OTAA/ASSI

The types of adverse decisions or proposals made by the OTAA or ASSI which are subject to review are defined in Article 13 of the Air Navigation (Overseas Territories) Order 2013. When such a decision or proposal is received the 'applicant' may request a review to be undertaken by the Governor.

How do I request a Review?

The letter containing the notification of the OTAA or ASSI decision/proposal will provide details on whom to contact to request a review.

What Happens Next?

Applicant requests Review	The applicant may within 14 days* of a decision or proposal request a review.
Brief prepared by OTAA/ASSI sent to the Governor's appointed lawyer and forwarded to the applicant	OTAA/ASSI will produce a Brief (as described above) setting out their case.
Representations by Applicant sent to the Governor's appointed lawyer to forward to the OTAA/ASSI	The applicant may within 21 days* of a decision or proposal make written representations of their case, which the OTAA/ASSI will consider.
Comments prepared and exchanged	OTAA/ASSI will prepare comments on the applicant's representations. The applicant will prepare comments on the OTAA/ASSI Brief. These comments will be exchanged via the Governor's appointed lawyer.
Review	Review conducted by the Governor of the review panel and the written decision normally available within 10 days of the review.

For a review of the conduct of flight tests and examinations: as above but the order for the exchange of representations and brief is reversed, i.e. the OTAA/ASSI officials prepare the brief and serve on the applicant via the Governor's appointed lawyer. The applicant may then respond with any written representations.

* The Governor will be sympathetic in the matter of extending time limits if requested to do so. However, it should not be assumed that extensions will be granted.

What is in the Brief?

The Brief is compiled by the OTAA/ASSI and will contain the details and facts on how the official's decision/proposal was reached.

What happens during the Review?

The applicant will normally be offered an oral hearing; this will usually be attended by:

- The Governor and any Technical Assessor(s) appointed by him
- A law officer of the Territory acting as Clerk to the review and providing legal advice on the conduct of the hearing to the Governor
- The applicant
- The applicant's legal adviser, friend and/or witness if required by the applicant
- OTAA/ASSI staff involved with the decision/proposal
- An OTAA/ASSI legal adviser acting as adviser to the OTAA/ASSI
- Shorthand writer.

The hearing will be based on the documents supplied (Brief, Applicant's Representations, Comments by OTAA/ASSI on Applicant's Representations, Comments by Applicant on Brief) and provides to the applicant the opportunity to make oral representations, seek clarification and ask questions. OTAA/ASSI staff will be given the opportunity to seek clarifications, make comments on the oral representations and question the applicant. The last word will go to the applicant.

If any new information or arguments are introduced, either by the applicant or OTAA/ASSI staff, which were not contained within the documents, the hearing may be adjourned to allow time for all parties to consider the new issues.

A transcript of the hearing will be supplied to applicant.

If the applicant decides not to attend or be represented at the oral hearing, the review will be undertaken by the Members solely based on the documents. This will be without the attendance of OTAA/ASSI staff involved with the decision or proposal.

Hearing to be in public

The hearing will be in public unless either the Governor determines otherwise in the public interest or the applicant or OTAA/ASSI request it to be in private and the Governor is satisfied that it may be held in private.

The Decision

The applicant will be informed, in writing, of the decision and the reasons for it, normally within 7 to 10 days of the hearing.

Rights of Appeal to the Court

If a personnel licence is refused, revoked, suspended or varied on the grounds that the OTAA/ASSI does not consider the person concerned a fit person (in terms of character as opposed to medical fitness) to hold such a licence, that person has a right of appeal to the Supreme Court of the Territory against the decision of the Governor. There is no such appeal in relation to decisions taken by the Governor or OTAA/ASSI on the grounds of competence.

Reapplication

It should be noted that after a decision to revoke or refuse a licence, certificate or approval is made the applicant may at any time in the future reapply. Clearly, if a further application is made quite soon after a decision has been reached then in the absence of any relevant new material in support of the applicant the OTAA/ASSI is likely to reach the same decision. However, it is important that the applicant understands that a refusal or revocation is not for life.