

SUPREME COURT OF YUKON

Citation: *Khoza v. Yukon (Registrar of Motor Vehicles)*,
2018 YKSC 6

Date: 20180214
S.C. No. 17-AP011
Registry: Whitehorse

BETWEEN

CANNAAN KHOZA

APPLICANT

AND

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

Before Mr. Justice R.S. Veale

Appearances:
Canaan Khoza
Kimberly Sova

Appearing on his own behalf
Counsel for the Registrar of Motor Vehicles

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Khoza seeks to overturn a decision made by a review officer under the *Motor Vehicles Act*, RSY 2002, c. 153 (the “MVA”), upholding a 90-day suspension of his operator’s licence.

[2] The basic facts are that Mr. Khoza was detained on December 9, 2017, in the context of an impaired driving investigation. He was subsequently charged with failing or refusing to comply with a demand made under s. 254 of the *Criminal Code*. Accordingly, the arresting officer exercised her discretion to impose a 90-day suspension of Mr. Khoza’s operator’s licence under s. 257(1) of the *MVA*. Mr. Khoza unsuccessfully

applied to the Territorial Court of Yukon for a review of this suspension under s. 259 of the *MVA*. He now seeks to establish in this Court that the review officer erred in his determination that the arresting officer had reasonable grounds to impose the roadside suspension.

[3] Mr. Khoza attacks the review officer's determination on two grounds. First, he asserts that he has a medical condition that did not allow him to comply with the demand, and second, he takes the position that the arresting officer did not have sufficient grounds to make a lawful demand under the *Code*.

[4] The Registrar of Motor Vehicles (the "Registrar") disagrees that Mr. Khoza has a remedy in this Court, pointing to the limited scope of discretion a review officer has under s. 259 of the *MVA*. As well, as a preliminary matter, the Registrar objected to the form of Mr. Khoza's appeal, submitting that it should properly have been filed as a judicial review, as the *MVA* does not provide a right of appeal to a review officer's decision.

[5] In his oral reasons, the review officer did not consider Mr. Khoza's asserted medical condition, beyond noting that the level of discomfort he said he was in at the time of the demand was not borne out by a video provided to the Court. In terms of the grounds of the arresting officer, the review officer accepted that she had grounds to make the demand and that the demand was not completed to the necessary satisfaction of the police. Accordingly the suspension was upheld.

ANALYSIS

1. Form of Notice

[6] As I indicated at the oral hearing of Mr. Khoza's application, in this context, I think it entirely appropriate to treat Mr. Khoza's Notice of Appeal as if it were filed as an application for judicial review. There is no prejudice to the Registrar in so doing.

Mr. Khoza's argument and materials are as cogent and sufficient in the context of an application for judicial review under Rule 54 as they are in an appeal under Rule 53.

[7] Further, it seems to be the case that, in seeking the assistance of the court registry, Mr. Khoza was provided the paperwork for filing a summary conviction appeal, and it was reasonable for him to rely on this in preparing his materials.

2. Standard of Review

[8] The applicable standard of review for this application is set out in *Bradasch v. Yukon (Registrar of Motor Vehicles)*, 2000 YTSC 528, ("*Bradasch*"). Although the provisions governing reviews of licence suspensions under the *MVA* have been amended since the decision, none of the changes affect my conclusion in *Bradasch* that a standard of reasonableness is appropriate for questions of fact and mixed fact and law and a standard of correctness for a question of law.

[9] The broader of the issues before me is the extent to which the review officer was required to go behind the undisputed fact of Mr. Khoza's failure to provide an adequate breath sample to consider whether the officer had reasonable grounds to make the demand and whether Mr. Khoza had a reasonable excuse for not complying with the demand. In my view, there is an issue of legislative interpretation that should be assessed on a correctness standard. Indeed, this is the approach applied to a similar

question before this Court in *Hunziker v. Yukon (Registrar of Motor Vehicles)*, 2001 YKSC 518, (“*Hunziker*”).

[10] If I find that the review officer is required to consider either of these two factors in deciding to uphold Mr. Khoza’s suspension, the question then becomes about the reasonableness of the review officer’s finding that the peace officer had reasonable grounds for imposing it.

3. Did the review officer err in upholding the 90-day suspension imposed under the MVA?

[11] Section 259 of the *MVA* governs the review of a roadside suspension:

Review of suspension and disqualification

259(1) A person may apply for review of suspension or disqualification under section 257 ...

(6) In a review under this section, the review officer must consider

(a) any relevant sworn or solemnly affirmed statements and any other relevant information;

(b) the report of the peace officer;

(c) a copy of any certificate analysis under section 258 of the *Criminal Code* ...;

(d) if an oral hearing is held, in addition to matters referred to in paragraphs (a), (b), and (c), any relevant evidence and information given or representations made at the hearing.

...

(8) The only issue before the review officer in a review under this section is whether the peace officer had reasonable grounds to suspend the driver’s operator’s licence or to disqualify the driver, under subsection 257(1).

That issue is to be determined on the balance of probabilities.

...

(11) If the peace officer had reasonable grounds to suspend the driver's operator's licence, or to disqualify the driver, under subsection 257(1) then the review officer must uphold the suspension or disqualification.

(12) If the peace officer did not have reasonable grounds to suspend the driver's operator's licence, or to disqualify the driver under subsection 257(1) then the review officer must

(a) revoke the suspension or disqualification

...

[12] The relevant part of section 257(1) reads:

Roadside suspensions

257(1) A peace officer may suspend the operator's licence of the driver of a motor vehicle, or disqualify the driver from driving, if

...

(b) the peace officer believes on reasonable grounds that the driver failed or refused to comply with a demand made on them to supply a sample of their breath or blood under section 254 of the *Criminal Code* (Canada); ...

[13] Section 254(2) of the *Criminal Code* allows a peace officer to make a demand for a sample of breath for an approved screening device ("ASD") where the peace officer has "reasonable grounds to suspect" that a driver has alcohol in their body. Section 254(5) makes it a criminal offence to fail or refuse to comply with a demand made under subsection (2), unless the person has a "reasonable excuse" for the failure of non-compliance.

[14] On the basis of these sections, Mr. Khoza argues that the review officer erred in his determination under s. 259(8) of the *MVA* that the peace officer had reasonable grounds to suspend his licence. Mr. Khoza says that the peace officer did not have reasonable grounds to believe that he failed or refused to provide a breath sample because he has a medical condition that provides an excuse for his failure to provide an adequate sample and, to paraphrase the second part of his submissions, because the demand was unlawful as the officer did not have an objectively reasonable suspicion that he had consumed alcohol.

a) Reasonable excuse

[15] With respect to the relevance of Mr. Khoza's reasonable excuse to the review officer's determination, this issue was considered in *Hunziker*, cited above.

[16] In *Hunziker*, as here, the applicant took the position that a review officer should consider any reasonable excuse defence available under s. 254(5) of the *Code* when reviewing a 90-day roadside suspension following a driver's failure to provide a suitable breath sample. There was medical evidence before the review officer that Mr. Hunziker was physically unable to provide a suitable sample. After considering arguments about whether this evidence should have been considered in the context of the officer's reasonable grounds, at para. 25, I found that:

“... the legislature clearly intended that the suspension would be upheld following proof on a balance of probabilities of the elements of the offence set out in s. 254 of the *Criminal Code* without the defences of reasonable excuse or due diligence.”

[17] While the legislation has been amended since the decision in *Hunziker*, the amendments serve to incorporate aspects of this Court's decisions in *Hunziker* and

Bradasch, also cited above, and as well state that the review officer is not to substitute his own perspective for that of the peace officer. Nothing in the amendments would affect the conclusion in *Hunziker* that the possible existence of a positive defence is outside the scope of a review by a review officer. Accordingly, I find that the review officer here was under no obligation to take into account a potential defence of reasonable excuse in coming to his determination that the peace officer had reasonable grounds to suspend Mr. Khoza's driver's licence.

[18] As well, I agree with counsel for the Registrar that the review hearing is not meant to be a trial of the s. 254(5) charge.

b) The grounds for the demand

[19] Section 259(8) directs a review officer that the "only issue" before him or her is "whether the peace officer had reasonable grounds ... under s. 257(1)". Section 257(1) requires that the peace officer "believes on reasonable grounds" that the driver failed or refused to comply with a demand "under section 254 of the *Criminal Code*". In making his determination, the review officer was directed by s. 259(6) to consider the report of the peace officer and any relevant evidence or representations made before him. I note that in this case, the review officer did consider the sufficiency of the grounds underlying the officer's reasonable suspicion that Mr. Khoza had consumed alcohol.

[20] The first question that needs to be answered is whether, in considering the peace officer's grounds, the review officer needs to go behind the refusal contemplated by s. 254(5) of the *Code* to consider the basis for the demand in s. 254(2). *Hunziker* is less helpful in this respect, as at that time, the *MVA* required the review officer to conduct his

or her own assessment of the grounds for the charge rather than evaluate those of the peace officer.

[21] In my view, it is necessary that the review officer consider the grounds for the demand when reviewing an officer's suspension under s. 257(1)(b). Even leaving aside any requirements that the *Charter* might place on the scope of a s. 259 MVA review (see e.g. *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46), the wording of s. 257(1)(b) requires that the review officer look at the peace officer's grounds in the context of s. 254, which imports the "reasonable grounds to suspect" basis for a demand.

[22] Here, the review officer had before him the "Notice of 90 Day Suspension" provided to Mr. Khoza, which contained the "Accident Narrative" of the peace officer, as well as a USB key containing a video of the arrest, and Mr. Khoza's representations.

[23] The Accident Narrative indicates that the police had received information from a witness about "a red minivan driving erratically". The witness followed the vehicle to an off-sales shop and blocked it until the police arrived. A screening demand was made to Mr. Khoza, who was the driver and the sole occupant of the vehicle. Significantly, there is no mention of any signs of impairment and the rest of the narrative deals with Mr. Khoza's response to the ASD demand.

[24] Mr. Khoza made representations before the review officer that included an acknowledgment that he had consumed two beers; the first around 6 p.m. and the second around 9:45 p.m. The notice of suspension was issued at 10:28 p.m. Mr. Khoza also said that he was in significant distress throughout the police encounter, experiencing nausea and the urge to vomit and holding his stomach, and that he told

the two attending officers that he was sick. Once at the Arrest Processing Unit, he said that he was vomiting and he ultimately left in an ambulance. Mr. Khoza provided a record from an emergency room physician at the Whitehorse General Hospital and a copy of a prescription for a drug called Pantoloc.

[25] Mr. Khoza also provided the review officer with video images of the entire encounter. I have also reviewed this exhibit and the videos are taken by security cameras outside the off-sales store where the arrest took place. There is no audio. With respect to this video, the review officer found that it depicted Mr. Khoza actively engaged in conversation with the police and not evidently in any discomfort. My review of the video indicates that Mr. Khoza did have a lengthy interaction with the police, but as he is seated in his vehicle throughout, it is hard to determine exactly what his physical state is. In the result, I do not find that the video is of much assistance. I accept that, even though it may not be relevant as a defence in the review of a licence suspension, Mr. Khoza's medical state could impact on the reasonableness of the officer's grounds for making an ASD demand. However, in these circumstances, it is hard to evaluate what the officer could have reasonably concluded from their interaction at the scene. As well, there is no mention of anything in her Accident Narrative.

[26] On the evidence before the review officer, then, the sole ground underlying the arresting officer's ASD demand was a report by a third party that Mr. Khoza was driving erratically.

[27] The review officer accepted that the officer had reasonable grounds to make the ASD demand. However, in so deciding, he found that the officer administered the ASD as a result of the complaint and "presumably because of the smell of alcohol", given

Mr. Khoza's submission about having recently consumed a beer. There is no indication in the Accident Narrative that the arresting officer smelled alcohol on Mr. Khoza.

[28] I find it was unreasonable for the review officer to consider the smell of alcohol as part of the grounds underlying the arresting officer's reasonable suspicion of Mr. Khoza's alcohol consumption, given the evidence before him. As the only basis for making the ASD demand, on this record, was a report of erratic driving, in my view the peace officer did not have reasonable grounds to make a breath demand and, accordingly, did not have reasonable grounds to suspend his licence in the face of a failure or refusal.

CONCLUSION

[29] I find that the review officer erred in his assessment of the reasonable grounds of the peace officer that imposed the licence suspension and that his decision to uphold the suspension was unreasonable in the circumstances. Accordingly, I order that the suspension of Mr. Khoza's licence be revoked.

VEALE J.