IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2009-419-854

MAHAMED HUSSEIN MAHAMED
Appellant

v

LAND TRANSPORT NEW ZEALAND
Respondent

Hearing: 23 September 2009

Appearances: S McKenna for the Appellant
J O'Sullivan for the Respondent

Judgment: 25 November 2009 at 4:30 p.m.

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 25 November 2009 at 4:30 p.m.
pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors:
Mr S McKenna, Norris Ward McKinnon, Solicitors, Hamilton
Ms J O'Sullivan, Almao Douch, Office of the Crown Solicitor, Hamilton

[1] In August 2002 Mr Mahamed was granted refugee status in New Zealand on the basis of a claim that he was a refugee from Somalia. In October 2008, having obtained a New Zealand driver licence, he applied to the respondent under the Land Transport Act 1998 (the Act) for a passenger endorsement so that he could work as a taxi driver.

[2] Section 29A of the Act provides that a person who has been convicted of certain offences "may not hold … a passenger endorsement". The respondent told Mr Mahamed that he would have to provide proof that he had not been convicted of a relevant offence by procuring an original certificate from an appropriate government organisation, sent directly by that organisation to the respondent.

[3] Mr Mahamed said that, because he came from Somalia, and there was no government organisation in that country from which an official certificate could be obtained, he was unable to provide proof in the form requested. He provided a statutory declaration that he had no relevant convictions, and he provided other information. The respondent declined the application for a passenger endorsement because of Mr Mahamed's failure to prove an absence of relevant convictions by means of an official government document.

[4] Mr Mahamed appealed against that decision to the District Court at Hamilton. In a reserved judgment, Judge AIM Tompkins agreed with the respondent's approach and dismissed the appeal. Mr Mahamed appealed to the High Court on the grounds that the District Court decision was erroneous in law: s 111A of the Act.

[5] The principal issues on this appeal are:

a) Was the District Court decision based on a conclusion of law that the respondent was entitled to decline the application on the ground that Mr Mahamed had failed to produce an official government certificate recording that he had no relevant convictions? Or was it a decision of fact based on the evidence?

b) If there was a conclusion of law as just described, was it erroneous?

[6] The respondent, when the application was made, was known as Land Transport New Zealand. It is now known as New Zealand Transport Agency. I will refer to the respondent as "the Agency".

The facts

[7] It is likely that Mr Mahamed was born in Somalia in 1964, but there remains some uncertainty about this as he entered the country using a false passport and cannot provide any genuine documents as to his identity. It was not in issue before me, and it did not appear to be in issue before the District Court, that there is no prospect of obtaining any official documents from Somalia.

[8] When Mr Mahamed applied for the passenger endorsement he was required to answer the question: "Have you ever been convicted of any criminal offence, either in NZ or overseas?" Mr Mahamed answered: "No".

[9] The remaining background is conveniently taken from Judge Tompkin's summary[1]. The Judge referred to the Agency as "NZTA".

> [8] By letter dated 3 December 2008 the NZTA advised Mr Mahamed:
>
> "You have been identified as a person who was not born in New Zealand and before your application can be considered further you are required, pursuant to section 30C Land Transport Act 1998, to provide the following information:
>
> 1. Documented proof of any traffic and/or criminal convictions from the country you have previously been residing in;
>
> or
>
> 2. Where you do not have any traffic/criminal conviction, a certified document to that effect from the relevant jurisdiction.
>
> Only original documents posted direct from an authorised Government Agency, Embassy or Consulate, will be accepted, and these will be retained by the NZ Transport Agency. These documents must be forwarded directly from the issuing agency, in a

[1] *Mahamed v Land Transport New Zealand* (DC HAM, CIV 2009-019-175, 11 June 2009, Judge Tompkins)

sealed envelope, to the address shown at the top of this letter. In the event that you do not, or are not able, to provide the information outlined above, within 12 weeks of this notice, then your application for a "P" Endorsement may be declined."

[9] The following day, 4 December 2008, Mr Mahamed made a statutory declaration in the following terms:

STATUTORY DECLARATION

I, Mahamed Hussein MAHAMED of 3/17 Stanley Street, Hamilton, Halal Slaughterman, currently unemployed, solemnly and sincerely declare that:

1. My full name is Mahamed Hussein MAHAMED.

2. I was born on 1 July 1964 at village Qansaxdheere, Baidoa, Somalia.

3. Since my birth up until January 1990 I stayed in Somalia, and thereafter I stayed around the borders of Ethopia and Kenya which are the neighbouring countries. I virtually stayed [in no] man's land for over 10 years due to the civil war in Somalia.

4. On 20 August 2002 I arrived in New Zealand. I applied for and was granted refugee status in New Zealand on 30 June 2003. I have not been formally granted a Residence Permit yet.

5. Since my arrival in New Zealand I have been continuously living in New Zealand.

6. I have no criminal and or traffic convictions in New Zealand, Somalia or elsewhere except that I was given a traffic ticket in 2005 for over speeding near Morrisville.

7. I am unable to provide any proof of my police records from Somalia as there is no government in the country. There is no authorised government agency, Embassy or consulate of Somalia. Therefore, all I can do is make this declaration only.

8. I know that I commit a criminal offence punishable by fine and or imprisonment if I provide a false statutory declaration.

[10] On 12 December 2008, NZTA advised Mr Mahamed that it proposed to decline his application:

"Upon the grounds that I am not satisfied that you are a fit and proper person to be the holder of such an endorsement by reason of the following facts:

> Before a Passenger Endorsement is issued you will be required to produce evidence that you do not have any traffic or criminal convictions in your country of birth (note – original documents only will be accepted as proof of status and these must be forwarded direct from your Government Agency to me at the address listed below, they must not be handled by you)".

[11] Mr Mahamed responded to NZTA on 16 December 2008 reiterating the contents of his statutory declaration, and saying:

> "Somalia does not have any Government, hence no agency thereof. The only way I could provide you such information was by way of providing a statutory declaration."
>
> … If there is any other way that I can provide you the information required, please let me know. I consider myself a fit and proper person for the issue of a "P" Endorsement.

[12] Lastly, on 19 January 2009 NZTA formally confirmed to Mr Mahamed that his application had been declined, upon the grounds that the agency was "not satisfied you are a fit and proper person to hold such an endorsement".

[10] The Judge also referred to information obtained by the Agency for the purposes of the appeal to the District Court. This was information provided by Immigration New Zealand to the Agency in response to questions posed by the Agency. The information reproduced by the Judge was as follows:

> "2. *"When did Mr Mahamed arrive in New Zealand?"*
>
> Mr Mohamed claimed to have arrived in New Zealand on 22 August 2002 and made a claim for refugee status on 30 August 2002. Mr Mohamed was interviewed by Immigration New Zealand on 12 September 2002, in regards to his identity and arrival details.
>
> On the basis of the details provided, Immigration New Zealand was not able to confirm Mr Mohamed's arrival in New Zealand.
>
> Mr Mohamed advised that he entered New Zealand on a false travel document and that he does not know what name was on it. Mr Mohamed states that the person who obtained the false document travelled with him to New Zealand and had not shown the document to Mr Mohamed.
>
> The 1951 UN Refugee Convention provides an exemption from prosecution for refugees that breach border control laws, provided they present themselves to the relevant authorities immediately to claim refugee status.
>
> 3. *"What documentation was provided when Mr Mahamed arrived in New Zealand and was that documentation genuine?"*

Mr Mohamed provided no genuine documentation upon his arrival in New Zealand.

4. *"How was Mr Mahamed's identity established?"*

   On balance of the information provided our Refugee Status Branch has determined that Mr Mohamed is most likely of Somali descent.

   However, Mr Mohamed's personal identity has not been established or verified.

5. *"What enquiries did Immigration New Zealand undertake with regard to Mr Mahamed's criminal history or lack thereof?"*

   Somalia does not have a government or infrastructure so there is no official process for verifying whether or not Mr Mohamed has a criminal record.

6. *"What documentation was provided to Immigration New Zealand to satisfy it that Mr Mahamed was not suitable for the issue of a residence permit?"*

   Mr Mohamed's residence application was declined as insufficient evidence was provided to verify his identity and travel to New Zealand.

7. *"Any other information held by Immigration New Zealand that satisfied it that a Residence Permit could be granted to Mr Mohamed?"*

   As standard practice, a decision is made once Immigration New Zealand has received all the available information and the applicant has been given the opportunity to respond to any potentially, prejudicial information.

   On the information at hand Mr Mohamed was previously not considered to have provided sufficient evidence of identity or travel movements.

   Mr Mohamed will need to be interviewed again regarding the outstanding issues and the outcome of that interview may help in determining the application".

[11] The Agency put a number of documents in evidence for the District Court hearing. One of these is described as the Agency's "Foreign Jurisdiction Policy". The document is headed "Foreign jurisdiction checks for Passenger (P) endorsements". It commences:

> This fact sheet explains how NZ Transport Agency (NZTA) ensures the suitability (fitness and propriety) of any Passenger (P) endorsement applicant who has spent a period of 12 months or more overseas (foreign jurisdiction).

[12] Following a brief introduction there is a series of questions and answers. These are directed in different ways to the policy requiring production of an official government certificate recording an absence of convictions. The penultimate question and answer encapsulates the Agency's approach. The reference to "documentation" in the question which follows is a reference to an original official government document.

> Q: What if I can't provide the documentation required?
>
> A: The law requires that NZTA must be satisfied as to your fitness and propriety before it can grant a P endorsement allowing you to drive a passenger service vehicle. This can only be achieved using authentic, verifiable documentation.

Statutory provisions

[13] Clause 26(1) of the Land Transport (Driver Licensing) Rule 1999 requires that a person driving a motor vehicle that is operated in a passenger service must hold a passenger endorsement.

[14] Section 29A of the Act prohibits the grant of a passenger endorsement to a person convicted of certain offences. Section 29A is an amendment to the Act which came into force on 16 January 2006. Before this there was no mandatory prohibition of this nature. The relevant provisions of s 29A are as follows:

> **29A Persons convicted of specified serious offences prohibited from holding … passenger endorsement**
>
> (1) A person who has been convicted of a specified serious offence on, before, or after the commencement of this section may not hold … a passenger endorsement on his or her driver licence.
>
> (2) A passenger endorsement is deemed to be expired and of no effect if held by a person who has been convicted of a specified serious offence on, before, or after the commencement of this section.
>
> (3) Despite subsection (1), a person may hold a passenger endorsement if—
>
> (a) the person has not, with respect to a conviction for a specified serious offence, been sentenced to imprisonment for a term exceeding 12 months; and

(b) the Agency is, having regard to the criteria in section 29B(2)(b), satisfied that allowing the person to hold a passenger endorsement would not—

(i) be contrary to the public interest; and

(ii) pose an undue risk to public safety or security.

(4) …

[15] Section 29A(4) defines "specified serious offence" by listing a number of offences contained in the Crimes Act 1961 including murder, specified sexual crimes, and specified crimes of violence. The definition is extended to offences committed outside New Zealand that would constitute one of the Crimes Act offences if committed in New Zealand.

[16] A person wanting to drive a public taxi is also subject to provisions in Part 4A and, in particular for present purposes, ss 30C and 30D. Section 30C sets out a wide range of criteria required to be taken into account by the Agency in determining whether a person involved in any transport service is a "fit and proper person". Section 30D has additional criteria to be taken into account when the Agency assesses whether or not a person is a fit and proper person when the proposed passenger service is, amongst other things, a small passenger service vehicle such as a taxi. The criteria that must be taken into account include matters such as the person's criminal history in general, any transport-related offences and any history of behavioural problems. There is a provision in s 30C(4) permitting the Agency to "take into account any other matters and evidence as the Agency considers relevant".

[17] Clause 35 of the Land Transport (Driver Licensing) Clause 1999 is headed "Criteria and procedure in relation to fit and proper person test". This is also directed to the "fit and proper person test". Clause 35(1) provides that "the Agency may consider, and give such relative weight as the Agency considers fit, to the relevant criteria in ss 30C, 30D and 30E of the Act". Clause 35(2) is as follows:

> The Agency may, for the purpose of determining whether or not a person is a fit and proper person for the purposes of this rule,—
>
> (a) Seek and receive such information as the Agency thinks fit; and
>
> (b) Consider information obtained from any source.

The District Court judgment

[18] After setting out the facts, the Judge defined the issue as follows:

> [14] The issue on this appeal is whether NZTA was correct to decline Mr Mahamed's application because official information as to Mr Mahamed's criminal and traffic history outside of New Zealand cannot be obtained.

[19] The Judge set out sub-sections (1) and (4) of s 29A, and ss 30C and 30D in their entirety. He then said, referring to s 29A on the one hand and ss 30C and 30D on the other:

> [23] These two requirements are distinct and do not overlap. In particular, the statutory scheme does not permit, in any circumstances, NZTA to grant a Passenger Endorsement to an applicant who falls within the scope of s29A, irrespective of whether or not, under sections 30C and 30D, they might otherwise be a "fit and proper person". For the purposes of this appeal, that is a key feature of the statutory scheme.

[20] The Judge then summarised the submissions he received for the Agency and for Mr Mahamed. It is relevant briefly to note a primary submission for the Agency and one for Mr Mahamed, as these bear on the question whether the decision was a determination of law or fact. Central to the case for the Agency was a proposition that, because of the "protective function inherent in the statutory requirement", the Agency would not meet its statutory obligations in respect of s 29A "unless it has sufficient independent official information concerning the criminal history (or absence thereof) of an applicant".

[21] A primary submission for Mr Mahamed was that, given that there is no specific procedure laid down for the inquiry under s 29A, "the statutory scheme does not permit the Agency to avoid exercising its discretion entirely, but rather requires the Agency to assess what information it does have, and on the basis of that to decide whether the Passenger Endorsement should be granted". A further submission was made that there was sufficient evidence for a conclusion to be reached that Mr Mahamed did not have any relevant conviction and that he was, under Part 4A, a fit and proper person.

[22] In setting out the reasons for his decision, the Judge referred first to the distinction between s 29A and ss 30C and 30D, which he had earlier noted[2]. The mandatory nature of s 29A was contrasted with the discretionary nature of ss 30C and 30D. Some emphasis was also placed on the fact that s 29A is contained in Part 4 of the Act whereas the other sections are in Part 4A. He then said:

> [38] It follows that, when an application for a Passenger Endorsement is received, NZTA is required to determine, as a matter of historical fact, whether the applicant has or has not been convicted of any of the specified serious offences either within New Zealand or outside of New Zealand on, before or after the commencement date of that section. To do that, it must necessarily rely on information provided to it by, or at the direction of, the applicant.

[23] The Judge said that s 29A "has a clearly protective function". In this regard he referred to two speeches to the House during the passage of the amendment bill which led to the introduction of s 29A. One speech was from the Minister, including the following:

> The bill also prohibits persons convicted of serious violence and sexual offences from being passenger service drivers. This will address the risk to public safety of having convicted sex offenders and other violent offenders in a one-on-one situation with passengers.

[24] The Judge also recorded part of a speech by Ms Deborah Coddington MP, a member of the select committee that considered the bill. The Judge said that in this speech the member "advised the House that precisely the problem now faced by Mr Mahamed had been explicitly considered by the select committee but that nevertheless the blanket prohibition was still considered appropriate". The part of the speech recorded by the Judge was as follows:

> "I know – and we discussed it at the Transport and Industrial Relations Committee – that with a lot of immigrants these days, especially refugees, it is very difficult to find out exactly [what] criminal history they have, or whether they have one, because we are dealing with different jurisdictions. The committee talked about that. But, where possible, I think the same law should apply. If we are bringing in a law that totally prohibits – no ifs, no buts, no right of appeal – New Zealand people convicted under New Zealand legislation of murder or a serious sexual crime from going into the taxi industry or from getting back into it, then I think we should apply that same legislation to those who have been convicted of comparable crimes in another jurisdiction, when we know and can find out about those crimes.

[2] In [23] cited at [19] of this judgment.

…

…let us at least have a situation whereby the same rules apply to everyone whether he or she was convicted in New Zealand or overseas".

[25] The Judge then expressed his conclusion as follows:

> [42] Thus it seems that, by enacting this section in the form it did, Parliament concluded that the austere result visited upon persons in Mr Mahamed's situation was justified in light of the wider community interest in endeavouring to protect taxi passengers.
>
> [43] Therefore, NZTA is not, in my view, in a position where it can rely solely on a self reported assertion of the absence of an overseas criminal history, but rather is required to insist upon being provided with an appropriate official record in order to establish that an applicant for a Passenger Endorsement falls outside the scope of s29A. That will understandably be frustrating for persons who do not have an overseas criminal record but who cannot, for whatever reason provide, official verification of that fact. But that is what Parliament intended when it enacted s29A.
>
> [44] Because Mr Mahamed cannot provide such verification, NZTA cannot determine whether he falls within or without s29A. In those circumstances, NZTA cannot grant a Passenger Endorsement.
>
> [45] As Mr Mahamed fails at the first hurdle, I am not required to determine, pursuant to ss 30C and 30D, whether he is a "fit and proper person".

Discussion : A determination of law or fact?

[26] I am satisfied that the Judge approached the issue before him as one involving a determination of law and that the decision he reached was a determination of law. This is made plain by paragraphs from his judgment which I have quoted and, in particular, [14], [43] and [44]. It is given emphasis by one of the central submissions for the Agency, recorded by the Judge, and which I summarised at [20].

[27] On this appeal Ms O'Sullivan, for the Agency, submitted that the nature of the Judge's conclusion at [43] needed to be considered in the light of an earlier statement as follows:

> [15] Counsel are agreed that, this being an appeal pursuant to s 106 of the Land Transport Act 1998, this Court should reconsider Mr Mahamed's application *de novo*, based on all the evidential material available to it.

[28] This statement about the scope of the appeal does not alter the nature of the Judge's decision. The statement at [15] simply recorded a general proposition which was not in issue. Had the Judge ruled that the Agency's policy on proof was not binding, he would then have been required to make his own assessment for the purposes of s 29A and, if the conclusion under s 29A was favourable to Mr Mahamed, then make the further assessment required under ss 30C and 30D. Both inquiries would have required a *de novo* hearing, with a full assessment of all of the evidence, findings of fact under s 29A and under ss 30C and 30D, and the exercise of a discretion under ss 30C and 30D.

[29] But that point was never reached because of a conclusion of law. That conclusion, in its essence, was that the Agency was entitled, having regard to the purpose of s 29A, to require a particular form of proof that an applicant for a passenger endorsement did not have a relevant conviction.

Discussion : Was the ruling an error of law?

[30] In the course of the hearing Ms O'Sullivan effectively conceded that the Agency could not, as a matter of law, decline an application for a passenger endorsement solely on the ground that the applicant had failed to produce an official government certification of an absence of relevant convictions. That concession was made following questions from me prior to the morning adjournment and after Ms O'Sullivan had discussed the question with a senior officer of the Agency during the morning adjournment. It was a concession properly made. My reasons follow.

[31] The Judge's conclusion was based substantially on interpretation of s 29A and, in particular, the mandatory nature of its provision. Section 29A sets a standard. However, the issue in respect of the Agency's policy requiring production of a government certificate does not concern the nature of the standard contained in s 29A. What the policy is directed to is the means of establishing whether the standard has been met; the means of proof of a fact. The nature of the standard and

the means of proving whether the standard has been met are distinct matters. However, in my respectful submission the Judge did not sufficiently distinguish between the standard, with which s 29A is concerned, and the means of proof.

[32] Section 29A plainly imposes a mandatory prohibition. And I agree with the Judge that this may be compared with the discretion that arises for the Agency in determining under ss 30C and 30D (and some related provisions) whether an applicant is a fit and proper person. But these differences are differences of consequence once the facts have been established. They are not differences which point to the means by which those facts might be established.

[33] Section 29A makes no provision as to how an absence of convictions might be proved. It makes no provision about evidence at all. If it had been parliament's intention that s 29A should stipulate the means of proving whether the standard was complied with, as well as setting out the standard itself, that would have been included in the section.

[34] The Judge relied on speeches in the House as providing support for his conclusion. Those speeches undoubtedly give emphasis to the reason for the mandatory nature of the prohibition in s 29A. But I do not read the speeches as giving support to an interpretation of s 29A as implicitly authorising what amounts to a rule of evidence. Indeed, the speech of Ms Coddington[3] appeared to recognise the possibility that proof for refugees might not always be the same as proof for somebody born and remaining in New Zealand. The member twice expressed qualifications in respect of refugees: when she said "where possible I think the same law should apply" and "when we know and can find out". In any event, the meaning of s 29A, in relation to a standard, is clear. There does not appear to be need to resort to the uncertain benefit, in statutory interpretation, of speeches in the House.

[35] It is possible that the Agency adopted the arbitrary rule requiring production of an official government certificate because that was seen as the appropriate means of treating people born outside New Zealand in the same way as people born in New Zealand. There is a need to treat all applicants even-handedly, but if this was part of

[3] Recorded at [24] above.

the rationale it confuses different areas of the law. One area of the law is the statutory prohibition in s 29A. This applies equally to everyone, wherever they were born and however they may have arrived in New Zealand. The other area of the law is the means by which a fact might be proved. In proceedings before a Court, including an appeal from a decision of the Agency, the Evidence Act 2006 applies, and that law applies to everyone. The law is that, in general, all relevant evidence is admissible unless particular evidence is either declared inadmissible by an Act or is excluded by an Act. On an application to a statutory body, such as the Agency, the relevant principles of administrative law concerned with evidence apply, and they apply equally to everyone. An organisation exercising a statutory power of decision is bound to consider all relevant evidence unless excluded by an Act.

[36] Once the nature of the Agency's rule is correctly identified as being a rule concerned with evidence, rather than the nature of the prohibition or standard contained in s 29A, it is clear in my opinion that the Agency was not entitled to impose the arbitrary rule of proof that it did impose. There are some further considerations supporting this conclusion.

[37] Clause 35 of the Land Transport (Driver Licensing) Rule 1999 gives the Agency power, amongst other things, to "seek … such information as the Agency thinks fit" in relation to inquiries under ss 30C-30E as to whether a person is "fit and proper". Section 30C itself has complementary provisions as to the wide range of matters the Agency may consider when determining whether a person is fit and proper in relation to any transport service. These specific powers do not provide authority for the Agency's policy under s 29A.

[38] These provisions, and the general power in s 30C(2)(f) for the Agency to consider "any other matter" it considers appropriate, give emphasis to the more fundamental point already touched on. This is that a person applying for a licence to a government organisation should be able to put all relevant information before that organisation, in the absence of any statutory provision limiting or excluding that right. If there is no statutory exclusion, the government organisation is then bound, as a matter of elementary fairness, both to consider and then to weigh all relevant information.

[39] Related to this is the principle of general application that a statutory obligation to enquire should not be fettered by arbitrary rules intended to apply in every case. This is designed, amongst other things, to deal with an elementary consideration; this is that circumstances from one case to another can vary to a great extent. This is something courts deal with daily. It is a consideration which generally constrains Judges from seeking to lay down general rules when the subject matter is bound to throw up many factual differences with which a general rule cannot adequately deal. This aspect of human affairs – the variation of facts from one case to another – is amply demonstrated in this case, and in other cases, dealing with applications under s 29A.

[40] A submission by Ms O'Sullivan indicated that the Agency recognised that in some cases there might be exceptions so that the standard rule requiring an official document should not be applied. Ms O'Sullivan gave an example of a New Zealand soldier serving overseas for an extended period in a country where no official government record would be available as to whether or not the soldier had committed a relevant offence. I was advised that in such circumstances the Agency would be willing to consider other types of evidence, such as evidence from the soldier's commanding officer. If a refugee is able to provide evidence from other people who were with him in his country of origin, why should that evidence not also be considered?

[41] Other examples may be provided which demonstrate why an arbitrary rule such as this should not apply. I will give two examples. These are prompted by the Agency's question and answer policy document referred to above at [11] and [12]. There was the following question and answer:

> Q: What if I already have these documents?
>
> A: In order for NZTA to make an accurate assessment of an applicant's fitness and propriety, it must have access to genuine documents. To ensure authenticity, these documents they [sic] must be supplied by the issuing authority, consulate or embassy **directly** to NZTA. To prevent any opportunity for alteration, documents that have been in your possession **will not** be accepted.
>
> …
>
> (emphasis in original)

[42] This is arbitrary and unfair. I will provide an illustration why this is so by referring to a refugee, but the illustration could apply in other circumstances. A person may flee a country as a refugee in possession of a genuine government document which certifies that the person has no convictions and does so precisely in the form preferred by the Agency. The person comes to New Zealand, retains possession of the document, and later applies for a passenger endorsement. Subsequent events in the country of origin may make it impossible to get another original from a recognised government. Or the government in the country of origin may refuse to supply a new certificate. The applicant may have kept the original document in pristine form, but would not only come up against the arbitrary rule as to the form of proof, but a further arbitrary presumption that a document tendered by an applicant is likely to be false. There might be grounds for initial caution, but there could be no reasonable justification for refusing to accept the document as proof of its contents if the applicant provided adequate proof that the document was not a forgery and had not been tampered with. It might even be that evidence in this form would be more reliable than a purportedly official document from a now hostile government.

[43] The second question and answer is as follows:

> Q: I have lived in New Zealand for years, is it necessary to request information from overseas?
>
> A: **Yes**. Irrespective of how long you have lived in New Zealand, NZTA must be satisfied you have no traffic and/or criminal convictions incurred prior to arriving in New Zealand or during a period of time spent overseas (longer than 12 months) as certain convictions may prohibit you from holding a P endorsement.

It is clear from the document as a whole that in a case such as this the proof required would be the official government certificate. But the example raises the possibility of an applicant who arrived in New Zealand at a young age. If the applicant was, say, five years old when he or she arrived in New Zealand, it is difficult to imagine that the Agency would require an official certificate from the applicant's country of birth to the effect that the applicant had not been convicted of any offence prior to leaving that country at the age of five.

[44] Two other cases in the District Court were referred to me. The earlier case was a decision of Judge Sharp in *Moradi v Land Transport New Zealand*[4]. This was decided approximately seven weeks before the hearing of Mr Mahamed's appeal. The applicant in that case was born in Iran. He was granted refugee status in New Zealand and then made an application for a passenger endorsement. The Judge said that Mr Moradi had "testified on oath to being unable and unwilling to provide a police certificate from Iran for fear of prosecution". His application was declined by the Agency because of the absence of an official certificate. Judge Sharp allowed an appeal on the ground that the Agency's policy when applied to Mr Moradi was unlawful. The Judge said:

> [24] … if [refugees in New Zealand] are because of their status, engendered by persecution in their home country, unable to provide proof of lack of convictions, then I believe as a matter of public policy that that [the Agency] in this situation is bound to accept a declaration such as that filed by Mr Moradi. To do otherwise, in my view, is indeed to discriminate against a refugee contrary to the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990. That, of course, is unlawful.

[45] In the present case some submissions were made for Mr Mahamed concerning the application of the Convention Relating to the Status of Refugees and discrimination under s 21G of the Human Rights Act 1993. The Convention is in a schedule to the Immigration Act 1987 and applies as specified in s 129D of the Immigration Act. The submissions were not pressed by Mr McKenna, for Mr Mahamed. Arguments relating to the Convention and discrimination had not been advanced in the District Court. I am aware that an appeal from the decision in *Moradi* is presently subject to a reserved decision in this Court. For these reasons I consider it unnecessary and inappropriate to express any opinion on the Convention and discrimination issues or, in that context, on the reasons for the decision in *Moradi*.

[46] The second case is *Thet v New Zealand Transport Agency*[5]. The applicant in this case was born in Myanmar in 1972. He fled to Thailand in 2004 and was granted refugee status in New Zealand in 2005. He could not supply an official government certificate from Myanmar. That fact was accepted, but his application

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[4] (DC AK, CIV 2008-004-002260, 2 April 2009)
[5] (DC AK, CIV 2009-004-664, 22 September 2009, Judge Roderick Joyce QC)

under s 29A was declined for the same reason Mr Mahamed's application was declined.

[47] When Mr Thet's case came before the District Court, Judge Tompkin's decision in the present case and Judge Sharp's decision in *Moradi* had been delivered. Judge Joyce QC noted the fact, but did not discuss the other cases. He decided that the matter at issue had to be determined by "applying conventional evidential principles" (at [76]). Although at that point in his decision the Judge referred to an inquiry whether an applicant is a fit and proper person, his conclusion was directed also to the inquiry under s 29A. He then set out his reasons for approaching the issue in this way. Following this he considered and weighed a range of evidence presented to him. It included cross-examination of the applicant. He was able to conclude as a matter of fact, without the assistance of an official government certificate, that the applicant had not been convicted of any offence specified in s 29A, and also that he had no other criminal history. He said he reached this conclusion by, inter alia, "applying the civil standard of proof in terms I find to be consonant with both the purpose and reach of the legislation and the particular circumstances" (at [130]c)).

[48] As will be apparent from everything I have said to this point, I agree with Judge Joyce's approach. The question that arises under s 29A is to be determined by weighing all relevant evidence without any prescriptive rule as to what evidence will or will not suffice.

[49] For these various reasons I am satisfied that the Agency, as it has now accepted, was not entitled to have a blanket rule requiring an official government certificate recording an absence of convictions. And for these reasons I have concluded that the Judge was, with respect, in error in upholding this rule of proof. What must be done by the Agency, in all cases, is to assess all relevant evidence in order to determine whether or not s 29A(1) applies. The essence of the task for the Agency is to be satisfied that the applicant is not a person who has any conviction for a specified offence. The standard of proof is the civil standard of the balance of

probability. That standard is to be applied in the manner discussed by the Supreme Court in *Z v Dental Complaints Assessment Committee*[6].

[50] The appeal is allowed for the reasons recorded to this point. There is an added reason for doing so. This is that there is a possibility that Mr Mahamed and his legal advisers for the District Court appeal (not his present solicitors and counsel) may have been misled by advice from the Agency to an extent which would justify referring the matter back to the District Court for a rehearing. This could have arisen as a consequence of the Agency's advice that nothing other than an official government certificate would suffice. This was put in correspondence, and in standard form documents, with some force.

[51] As a matter of law, in the light of my conclusion, it was open to Mr Mahamed, on an appeal to the District Court, to ignore all of this and present whatever evidence he could assemble that was relevant to the issue. That is precisely what happened in the appeal in *Thet* before Judge Joyce. It included oral evidence from the applicant (and possibly from supporting witnesses) and, therefore, cross-examination, with the ability of the Judge to make a direct assessment of the applicant. If Mr Mahamed was deterred from doing so by the advice from the Agency that would be understandable. Perhaps it should not have deterred his legal advisers, but whatever the reason for the approach on Mr Mahamed's behalf on the appeal to the District Court, I do consider that, for this further reason, he should have an opportunity of presenting a full case unencumbered by the policy which the Agency has now apparently abandoned.

Disposal of the appeal and further proceedings

[52] On an appeal under s 111A of the Act the High Court Rules apply. The relevant rule is r 20.19. It is appropriate to direct, pursuant to r 20.19 that the original appeal from the decision of the Agency be reheard in the District Court and subject to some additional directions which I will mention.

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[6] [2009] 1 NZLR 1.

[53] The reason for directing a rehearing will be apparent from the discussion to this point: Mr Mahamed must be given an opportunity of presenting a case freed of the Agency's rule of proof. Further he needs to have an opportunity of assembling all evidence that may be available to him to support his primary contention that he has no relevant convictions.

[54] There is a question whether the rehearing should be before Judge Tompkins. I have no doubt that Judge Tompkins would be well able to rehear the case without being influenced by the decision he earlier reached on the point of law. However, to avoid any risk of misplaced apprehension on the part of the appellant, a risk which is perhaps emphasised by his own history, I do consider it best to direct that another Judge preside at the new hearing.

Result

[55] The appeal is allowed.

[56] The decision of the District Court dated 11 June 2009 dismissing Mr Mahamed's appeal is set aside.

[57] Mr Mahamed's appeal is to be reheard in the District Court by a Judge other than Judge Tompkins.

[58] The proceeding is remitted to the District Court for a date to be fixed for directions to be made for the further conduct of the proceeding.

[59] If there is any question of costs a memorandum in that regard on behalf of the appellant should be filed and served by 8 December 2009 with a response from the Agency by 15 December 2009.

Peter Woodhouse J