IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-002507

UNDER	Land Transport Act 1998 section 111A
IN THE MATTER OF	an appeal on questions of law against the judgment of the District Court at Auckland
BETWEEN	NEW ZEALAND TRANSPORT AGENCY Appellant
AND	REZA MORADI Respondent

Hearing: 19 November 2009

Counsel: Michael J Hodge and Craig Linkhorn for Appellant
Respondent in Person (with interpreters)
Peter J Andrew as Amicus Curiae

Judgment: 26 November 2009 at 4:00pm

JUDGMENT OF HUGH WILLIAMS J

This judgment was delivered by
The Hon. Justice Hugh Williams
on

26 November 2009 at 4:00pm

……..
Registrar/Deputy Registrar

The appeal is dismissed. If costs are an issue they may be dealt with in accordance with paragraph [57].

Introduction

[1] Mr Moradi, the respondent, wants to be a taxi driver. Born in Iran, he fled his country of birth in fear of persecution following political activity in opposition to the regime in that country which the regime regarded as criminal. After transiting through a number of countries, he and his family arrived in New Zealand in December 2006 and he was granted refugee status by the Refugee Status Appeals Authority in 2007. Between the judgment which is the subject of this appeal and the appeal hearing, he was granted residency.

[2] Those who wish to drive vehicles ferrying members of the public are required to be granted what is called a "P" (for passenger) endorsement on their drivers licence. Amongst other things, the process of obtaining a "P" endorsement requires them to satisfy the New Zealand Transport Agency, the appellant, they have not been convicted of specified serious offences as required by and listed in s 29A of the Land Transport Act 1998.

[3] Mr Moradi fulfilled – and continues to fulfil – all the requirements for a "P" endorsement other than that he has not been able to satisfy NZTA that he has not been convicted of any of the specified serious offences listed in s 29A. NZTA therefore refused his endorsement application. He appealed to the District Court, where on 2 April 2009 he was successful in persuading Judge Sharp to direct NZTA to reconsider his endorsement application "on the grounds that he has satisfied them that he has no relevant disqualifying criminal or other convictions".

[4] Because there are conflicting District Court decisions on what applicants for "P" endorsements must demonstrate to NZTA in order to comply with s 29A, NZTA has appealed to this Court and this judgment deals with that issue.

[5] This is apparently the first occasion on which s 29A and NZTA's requirements in relation to it have come before this Court (though another appeal was argued a short time before this one and is the subject of another reserved judgment: *Mahamed v Land Transport New Zealand* CIV-2009-410-000854 HC HN, 25 November 2009, Woodhouse J).

Statutory and Regulatory context : Legal Issues

[6] Section 29A relevantly reads:

> **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.
>
> …
>
> (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.

[7] "Specified serious offence" is defined as including most of the major sexual and violence crimes in the Crimes Act 1961 but, of importance, subs (4)(d) extends the definition to:

> An offence committed outside New Zealand that, if committed in New Zealand, would constitute an offence specified in paragraphs (a) to (c).

[8] Section 30C requires NZTA when considering whether persons are "fit and proper" under Part 4 of the Act – which includes s 29A – to consider and "give any relative weight that the Agency thinks fit having regard to the degree and nature of the person's involvement in any transport service" to a number of matters including any criminal history, traffic offending, behavioural problems and any other matter the Agency considers is appropriate to take into account in the public interest. Again, the inquiry into criminal history is not confined to New Zealand convictions. There are slightly differing requirements according to the type of application being considered and in addition NZTA has wide powers of information gathering (which,

if prejudicial and to be taken into account, must be disclosed to the applicant) to put into the mix in considering whether the application is "fit and proper".

[9] Section 29A was inserted into the principal Act with effect from 16 January 2006 by the Land Transport Amendment Act 2005 and both the Long Title to the principal Act and the Parliamentary Debates on the Amendment make clear that a principal purpose of both is protection of the public.

[10] Under the Land Transport (Driver Licensing) Rule 1999 clause 27, a person is only entitled to obtain a "P" endorsement on their driver licence if they satisfy certain criteria including that:

> (g) The Agency is satisfied in accordance with clause 35(1) that the person is a fit and proper person to be the holder of a passenger endorsement.

Clause 35 in essence mirrors ss 30G-I.

[11] Thus it follows that in deciding whether it is "satisfied" that a "P" endorsement applicant is a "fit and proper person" NZTA is required to assess a number of features and has wide information gathering powers in relation to the application. It also has a very wide mandate as to the weight it accords that information but must assess such applications against the absolute bar imposed by s 29A: persons who have been convicted of a "specified serious offence" (and sentenced to more than 12 months' imprisonment) are statutorily forbidden from holding a "P" endorsement.

[12] It needs to be repeated that Mr Moradi has satisfied all the statutory and regulatory requirements for a "P" endorsement, other than that he has been unable to satisfy NZTA that he has not been convicted of a "specified serious offence" outside this country. (There is no suggestion he has been convicted of such an offence in New Zealand.)

[13] Therefore, the essential question in any application for a "P" endorsement is whether NZTA is "satisfied" that the applicant is a "fit and proper person" to hold such endorsement. That, of course, involves the NZTA being satisfied applicants

comply with the discretionary elements pertaining to such applications but, also being "satisfied" that the applicant does not have any of the disqualifying convictions listed in s 29A.

[14] This appeal is essentially about what applicants for "P" endorsements have to do to satisfy NZTA their applications are not debarred by s 29A.

[15] In relation to "satisfied" the most pertinent assessment of that word is, in the Court's view, the Court of Appeal decision in *R v White (David)* [1988] 1 NZLR 264, 268. That was an application for leave to appeal a sentence of preventive detention and accordingly the Court of Appeal's observations required certain amendments to fit within the NZTA processes but, that notwithstanding, the Court of Appeal said:

> Secondly, the phrase "it is satisfied" does not carry with it the implication of proof beyond reasonable doubt and has not been construed to have this meaning in the many cases in which it has been considered. … We would decline to follow it. The phrase "is satisfied" means simply "makes up its mind" and is indicative of a state where the Court on the evidence comes to a judicial decision. There is no need or justification for adding any adverbial qualification to "is satisfied": *Blyth v Blyth* [1966] AC 643. In that case the House of Lords rejected the view of the Court of Appeal that "it is satisfied" means "satisfaction beyond reasonable doubt". Lord Pearson said at p 676:
>
> > "The degree or quantum of proof required by the court before it comes to a conclusion may vary according to the gravity of the subject matter to which the conclusion relates, but in relation to each subject matter the specified conclusion is reached or not reached by the end of the trial: the court either is or is not satisfied upon each point."
>
> To much the same effect is the dictum of Smith J in *Angland v Payne* [1944] NZLR 610 at p 626.
>
> > ". . . the Judge must be 'satisfied'. This implies, I think, the weighing of the opposing contentions and the reaching by the Judge of a clear conclusion that a substantial ground exists. The Judge must pass beyond the stage of saying that there 'seems' to be a substantial ground. He must be 'satisfied' that there is a substantial ground."
>
> And Adams J in *Robertson v Police* [1957] NZLR 1193, 1195:
>
> > "The mind of the Court must be 'satisfied' - that is to say, it must arrive at the required affirmative conclusion - but the decision may rest on the reasonable probabilities of the case, which may satisfy the Court that the fact was as alleged, even though some reasonable doubt may remain . . . the Court is not at liberty to uphold the

> defence unless the evidence produces in its mind the required acceptance of the truth of the allegation."
>
> Thirdly, to read the phrase "is satisfied" as requiring proof beyond reasonable doubt would strain the construction of other sections of the Criminal Justice Act where the phrase is also used.

[16] The observation from *Blyth* that conclusions "may vary according to the gravity of the subject matter to which the conclusion relates" was echoed in the decision of the Supreme Court in *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 where the Court unanimously held there was no standard of proof in New Zealand intermediate between proof beyond reasonable doubt and proof on the balance of probabilities. Elias CJ held (at 15-16) that:

> [26] Under s 54 of the Dental Act, the Dentists Disciplinary Tribunal is required to be "satisfied" of professional misconduct. The formula that the court or tribunal must be "satisfied" is common in statutory conferral of judicial and disciplinary jurisdiction. It says nothing about the standard of proof. It simply means that the Tribunal must come to "the required affirmative conclusion".

[17] While McGrath J's citations from overseas authority are helpful (p 39-40 paras [98] and [100]:

> [98] The civil standard of proof generally applies in civil proceedings even if the facts in issue, including the consequences if they are proved, are serious. As Dixon J put it in a classic passage in *Briginshaw v Briginshaw*:
>
> > "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."

> [99] As proposed by the Australian Law Reform Commission, this approach has now been given effect in Australian evidence legislation. The approach in *Briginshaw* has also regularly been applied in New Zealand by the High Court as the appropriate standard of proof in cases concerning professional discipline.
>
> [100] A parallel line of cases in England over the last 50 years treated the balance of probabilities test in civil cases as flexible in its application in that jurisdiction.

[18] An important point which flows from that in relation to s 29A is that, if a "P" endorsement applicant had been convicted of one of the "specified serious offences" but remained eligible for the endorsement because they satisfied subs (3), it necessarily follows that the offence of which they have already been convicted must have been proved beyond reasonable doubt. But it would not be justified to apply a process of reverse reasoning that the same standard should be applied to that part of any "P" endorsement application in which an applicant seeks to satisfy NZTA that he or she can clear the s 29A hurdle: in proving that "P" endorsement applicants can satisfy s 29A that they do not have a disqualifying conviction and sentence, they need to "satisfy" the Agency that they are a "fit and proper person". In considering that question, the Agency needs to act in accordance with the authorities cited. Notwithstanding that public safety or security are of importance to NZTA in assessing applications for "P" endorsements, it would be wrong for the Agency, by invoking such factors, to elevate what is required to "satisfy" it beyond the criteria set out in *White*, *Z, Briginshaw* and *Blyth.*

[19] An additional observation must be that, given that "P" endorsement applicants are required to demonstrate absence of convictions, that is to say give evidence to satisfy NZTA of a negative, to elevate the proof required to "satisfy" it beyond the authorities would be wrong.

[20] The learned authors of *Matheson et al Cross on Evidence* (NZ Looseleaf edition) para 2.3.2 p 10, 301 cite *Gulson Philosophy of Proof,* p 153 that:

> Negative evidence … is always in some sort circumstantial or indirect and the difficulty of proving the negative lies in discovering a fact or series of facts inconsistent with the fact which we are seeking to disprove, from which it may be possible to infer its absence with anything like an approach to certainty.

That has been applied in a "P" endorsement application appeal (*Thet v New Zealand Transport Agency* DC AK CIV 2009-004-000664 22 September 2009 Judge Joyce QC).

[21] As is observed in Anderson Schum and Twining *Analysis of Evidence* (2nd ed 2005 p 74) "there is no order of precedence between positive and negative evidence as far as either their relevance or their probative force are concerned".

[22] The upshot of all of that is that proof of lacking the type of convictions disqualifying "P" endorsement applicants under s 29A must be decided in the same way and to the same standard as proof of the other matters required to be demonstrated, that is to say proof of all matters to be taken into account in deciding on "P" endorsement applications – including the absence of disqualifying convictions and sentences - should be to the standard of "satisfaction" as that term is explained by the authorities.

Evidence

[23] In this case NZTA had statements from Mr Moradi and documents saying he had never been convicted, either in New Zealand or overseas, of any of the offences listed in s 29A.

[24] In addition, when his appeal against refusal of his "P" endorsement application was allowed in the District Court, Judge Sharp had sworn evidence from him to the same effect.

[25] Furthermore, on 12 June 2008, Mr Moradi affirmed a Statutory Declaration in the following form:

> I Reza Moradi
>
> ...
>
> solemnly and sincerely declare that
>
> 1. I am unable to obtain a Police and Traffic Clearance from my home country **Iran** because I have left that country to avoid persecution as refugee.

> However, I have no Criminal Record or Traffic offence against me in my country and I have no Criminal Record in **any other country**.
>
> I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oath and Declaration Act 1957.

He filed that with NZTA on 3 July 2008.

[26] That notwithstanding, NZTA declined to accept the Statutory Declaration as providing proof of compliance with the requirements of s 29A.

[27] Whilst there is nothing in the Evidence Act 2006 as to the status to be accorded statutory declarations in proceedings to which the Act applies - and "P" endorsement applications are almost certainly not a proceeding under the Act - two matters are of importance:

a) That under the Land Transport Management Act 2008, s 9 of the Oaths and Declarations Act 1957 prescribing the persons before whom statutory declarations may be made was amended to give authorised employees of NZTA power to take such declarations. It is difficult to resist the implication that if the Ministry of Transport or NZTA wished to sponsor an amendment to the Oaths and Declarations Act 1957 in those terms, it was with the intention of NZTA utilising the statutory declaration procedure as part of its functions and giving statutory declarations appropriate weight in consideration of the matters before it, including the utilisation of such declarations by "P" endorsement applicants to satisfy the requirements of s 29A.

b) It is, of course, a criminal offence for a person to make a false declaration under the Oaths and Declarations Act 1957. Any such false declarations can result in the imposition of a term of imprisonment of three years or upwards (s 110 and 111 of the Crimes Act 1961). While NZTA might, with advantage, refer in the form of any Statutory Declarations it takes to the sanctions for making false declarations (*c.f.* Summary Proceedings Amendment Act (No.2) 2008

> ss 162 and 163) there is no obligation so to do but that does not mean NZTA should not give due weight to statutory declarations filed with it and to the criminal sanctions which could flow from falsity.

[28] Relevant to NZTA's stance in relation to documents produced by "P" endorsement applicants in an endeavour to satisfy s 29A in relation to the absence of overseas convictions, Mr Hodge, leading counsel for the appellant, advised that his understanding was that even where NZTA is given documents evidencing an applicant's convictions or lack of them and the document appears to be properly authenticated by the appropriate authorities, NZTA, in the case of some states, nonetheless goes behind the documents and makes further inquiries pursuant to its wide information gathering power, to check on the document's accuracy and authenticity.

[29] In his case, on 21 July 2008, NZTA sent Mr Moradi its provisional decision to decline to grant a "P" endorsement on the grounds it was not satisfied he was a fit and proper person to hold such an endorsement due to absence of satisfactory documentary proof of his lack of specified convictions so as to comply with s 29A.

[30] Through an Immigration Consultant, Mr Moradi made further submissions on the topic, but on 25 August 2008 NZTA issued a final decision declining to grant the "P" endorsement for the reasons set out in its 21 July letter.

[31] Mr Moradi appealed to the District Court and, when his appeal was successful, NZTA appealed to this Court as a point of law under s 111A of the Land Transport Act 1998.

Judgment under appeal

[32] Judge Sharp's oral judgment of 2 April 2009 correctly rehearsed the facts and law including the statutory and regulatory context before noting NZTA's stance that:

> [13] … if an applicant is unable to provide proof of a lack of disqualifying prior convictions or convictions which would give rise to

> concern by the respondent, that it is correct (indeed required) to decline an application such as this.

[33] She then reviewed the facts, including Mr Moradi's statement on oath that he was unable and unwilling to provide a police certificate concerning his absence of convictions for fear of persecution and his alternative claim that this was a form of discrimination. The evidence included an affidavit from an officer of the Refugee Status Branch of Immigration New Zealand confirming they do not make direct contact with the authorities of a refugee state because such contact might endanger the applicant or members of his or her wider family. The Refugee Status Branch, however, did say that having reviewed Mr Moradi's Immigration file there was "no other evidence of criminal offending by Mr Moradi in New Zealand or elsewhere".

[34] The judgment then proceeded to consider the discrimination claim in terms of the Human Rights Act 1993 and Mr Moradi's refusal to allow NZTA access to his Immigration file.

[35] The Judge's conclusion was that:

> [24] If a person such as Mr Moradi achieves refugee status, then he has satisfied (in this case) the Refugee Status Appeal Authority of his bona fides, of his credibility and of his need for asylum. In achieving this status I consider that the executive through its servant has enable a former citizen of another country to live and work in our country and achieve the rights and freedoms of all New Zealand citizens regardless of their background in their country of origin. If they 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 the respondent 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 Ac 1993 and the New Zealand Bill of Rights Act 1990. That, of course, is unlawful.

And, para [26]-[27]:

> … failure to accept the appellant's declaration as to lack of previous convictions is discriminatory.
>
> …The discriminatory act is in requiring them (if they wish to succeed in such an application) to provide better proof than a declaration under the circumstances.

[36] Recognising she was unable to direct NZTA to issue a "P" endorsement to Mr Moradi, she directed the Director of Land Transport to reconsider his application in the terms earlier cited.

Submissions

[37] Mr Hodge filed very helpful and comprehensive submissions and enlarged on those orally. It is unnecessary to record the detail but his prime submission was that NZTA was justified in not accepting statutory declarations from "P" endorsement applicants that they had no disqualifying convictions at face value because such declarations were no more than an applicant's self-reporting that such was the case. Quizzed whether that could be so given the formality of a statutory declaration and its possible criminal consequences, Mr Hodge nonetheless said that if applicants had a conviction to hide, they could not be relied on to be truthful in a statutory declaration.

[38] Relying on *Z* he submitted the nature of the inquiry required by s 29A's absolutist terms meant the standard proof ought to be regarded as more exacting, and statutory declarations should be regarded as merely one fact in the search for a "better quality" of evidence. That, he submitted, was particularly so given the underlying public safety issues which motivated Parliament into enacting s 29A.

[39] In such applications there were, he submitted, three possible answers: granted, not granted or unproven and therefore not to be granted. That remained the position even when account was taken of the fact that applicants were required to prove a negative.

[40] He accepted that, were his submissions to be accepted, there would inevitably be "hard cases" where persons who might otherwise have been regarded as deserving applicants for "P" endorsements were declined through lack of proof or lack of acceptable proof that they qualified under s 29A.

[41] Even New Zealanders who had spent appreciable periods overseas but not in paid employment – which might generate tax records proving lack of imprisonment or in countries unlikely to be able to produce reliable records - might miss out.

[42] Even so, he submitted, a failure to obtain a "P" endorsement would not preclude such applicants being involved in businesses involving vehicular carriage of the public as they could be proprietors.

[43] He also briefly addressed the immigration alternative and the Refugee Convention 1950 but accepted the Court's decision on the s 29A point was determinative.

[44] Mr Andrew, as *amicus curiae*, had filed scholarly submissions on the alternative discrimination ground carefully examining the Refugee Convention and appropriate texts and authorities on that question.

[45] However, he accepted that a decision on the s 29A question was determinative, and whether NZTA was able to show Judge Sharp was wrong or right rendered the discrimination/refugee matter otiose.

[46] Mr Moradi did not address the matters principally at issue in the appeal, but expressed his appreciation of the painstaking consideration at all stages of his application given by all involved.

Discussion

[47] Mr Hodge is correct in saying that while satisfaction of the other requirements for the granting of a "P" endorsement is a discretionary exercise by NZTA of its information gathering and other powers, s 29A is absolute. If an applicant is unable to prove they are not debarred in terms of s 29A their application must fail.

[48] The question therefore resolves itself into what standard of proof NZTA is obliged to apply to material furnished by "P" endorsement applicants seeking to avoid the bar s 29A poses.

[49] The answer is that it is NZTA's overall task to decide whether it is "satisfied" that the applicant for a passenger endorsement is a "fit and proper person". That applies as much to whether they are satisfied an applicant is not debarred by s 29A as to whether it is satisfied as to the other criteria bearing on the overall question. Satisfaction that an applicant can show they are not debarred by s 29A requires no other or greater standard of proof or quality of evidence than applies to the discretionary aspects of their application. NZTA is obliged to apply the same standards to all aspects. Whether NZTA is "satisfied" that the applicant is a "fit and proper person" is an evaluation which is required to be undertaken in accordance with the authorities earlier cited as to what amounts to satisfaction.

[50] Provision by an applicant of a statutory declaration with its possible consequential criminal sanctions is a factor to be placed by NZTA in the matrix of its overall decision on satisfaction. Given the criminal consequences, NZTA might regard the provision of such a declaration as an important facet in its consideration of its overall task. That is a matter for it. But there is no legal basis for NZTA to approach the discharge of its overall task by failing to give statutory declarations their proper weight in NZTA's overall assessment in deciding whether it is satisfied the s 29A bar has been surmounted.

[51] NZTA needs also to take account in its discharge of its primary function of the fact that applicants are endeavouring to prove a negative in seeking to avoid the s 29A bar, whether their efforts are by means of a statutory declaration or other means.

[52] That is not to downgrade the aspect of public safety and security which so clearly motivated Parliament in enacting s 29A and which is apparent from the terms of the section itself. The seriousness of that expression of public policy is a matter for NZTA to take into account but it ought not to result in the elevation of that aspect of NZTA's overall consideration of "P" endorsement applications beyond the

authorities and might, in statutory declaration cases, be measured against the sanction which could flow from incorrectness.

[53] That is also not to overlook Mr Hodge's submission that statutory declarations and other means employed by "P" endorsement applicants to avoid the s 29A bar are self-serving. But that must be a feature of every "P" endorsement application. It is just that some applicants are more clearly able than others to demonstrate s 29A does not apply to them.

[54] In the end, the fate of "P" endorsement applications should be the result of NZTA's decision as to whether or not it makes up its mind on this serious issue that it is "satisfied" within the meaning ascribed to that term by the authorities, that is to say, it must decide whether, on all the material - sworn and unsworn – properly for its consideration, the applicant is a fit and proper person to hold a "P" endorsement, and that includes whether in all the circumstances s 29A does not debar the applicant.

Result

[55] In the result, NZTA has failed to show Judge Sharp's judgment was in error of law. The appeal accordingly fails.

[56] In light of that conclusion, it is appropriate to record that, although for different reasons, this Court endorses the decision in *Thet* and declines to follow the decision in *Mahamed v Land Transport New Zealand* DC HAM CIV-2009-019-000175 11 June 2009 Judge Tompkins). During preparation of this judgment a copy of the draft decision of Woodhouse J in the appeal in that matter was made available. The issues and approach differ somewhat from the way in which much the same central point has been discussed in this judgment, but the opportunity is taken to say that this Court endorses the result in the *Mahamed* appeal: in a very real sense the *Mahamed* judgment and this one are complementary.

[57] Since Mr Moradi appeared on his own account and Mr Andrew's fees are being paid by the State, it is assumed that costs will not be an issue. However, if that is incorrect, memoranda may be filed.

[58] Counsel on both sides are thanked for their full and insightful submissions and clarification of the issues.

.....
HUGH WILLIAMS J.

Solicitors:
Crown Solicitor (Michael Hodge), P O Box 2213 Auckland 1140

Copy for:
Peter Andrew, P O Box 31, Shortland Street, Auckland 1140

Judge M-E Sharp, Auckland District Court

Case Officer: Vasantha.Kalbagal@justice.govt.nz