EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT QUEENSTOWN

CIV-2014-059-000133
[2016] NZDC 3321

BETWEEN	HARI AROHA RAPATA Appellant
AND	NEW ZEALAND LAND TRANSPORT AGENCY Respondent

Hearing: 12 February 2016

Appearances: Appellant appears in Person
C Butchard for the Respondent

Judgment: 23 March 2016

JUDGMENT OF JUDGE K G SMITH

Introduction

[1] This is an appeal by Mr Rapata of a decision made by the New Zealand Transport Agency (Transport Agency) to revoke his Passenger endorsement (P endorsement) on his driving licence with effect from 22 April 2014 for a period of three years.

[2] Mr Rapata has a general right of appeal to this Court from that decision.[1] Every appeal must be brought not later than 28 days after the date on which the appellant was notified of the decision appealed against or within such further period as the Court may allow.[2] Mr Rapata did not file his notice of appeal on time. Consequently, as well as an appeal, Mr Rapata also seeks an extension of time.

[1] Land Transport Act 1998, s 106
[2] Land Transport Act 1998, s 111

[3] Both the application for an extension of time and the appeal were heard together.

Background

[4] On 15 April 2014, the Transport Agency wrote to Mr Rapata informing him of its adverse decision about the P endorsement on his driver's licence. The Transport Agency's letter said:

> "YOU ARE ADVISED that pursuant to the authority delegated to me by the New Zealand Transport Agency, and after duly giving you notice of my proposal to do so, I, Stewart Edward Guy, Senior Adjudicator, HEREBY:
>
> (1) Disqualify and Prohibit you from driving any vehicle being used in a passenger service only for a period of three (3) years;
>
> (2) Revoke your driver licence No. AQ794632 in respect of the Passenger endorsement only; and
>
> (3) Disqualify you from holding or obtaining a Passenger endorsement for a period of three (3) years."

[5] The decision took effect from 22 April 2014. The same letter informed Mr Rapata his submissions had been taken into account and had reduced the period of disqualification from six years to three years. The Transport Agency's letter also informed Mr Rapata of his right of appeal under s 106 Land Transport Act 1998 (the Act).

[6] Mr Guy's decision was made during an annual review of Mr Rapata's P endorsement. Those endorsements are granted for either one year or five years, depending on the choice made when applying and paying the appropriate fee. Those P endorsements issued for five years are reviewed annually.

[7] Annual reviews are undertaken in accordance with ss 30C and 30D of the Act. An annual review begins with an initial check by a Transport Agency employee

who either allows the endorsement to remain in place or refers it to an adjudicator for further consideration.

[8] Mr Rapata was first granted a P endorsement in 2001. His endorsement was extended in subsequent years. Eventually, on 18 January 2012, Mr Rapata applied for the renewal of his P endorsement for a period of five years. That application was granted.

[9] As part of an annual review, and following an initial check, Mr Rapata's P endorsement was referred to Mr Guy on 3 March 2014. Mr Guy reviewed the totality of Mr Rapata's driving history available to him before reaching the decision in his letter of 15 April 2014.

[10] Mr Rapata has a substantial history of driving-related offences. That history spans from 1976 to August 2014.

[11] On 17 August 1976, Mr Rapata was disqualified from driving for 18 months. Shortly afterwards he was apprehended driving while disqualified. He was convicted and sentenced to a further 18 months' disqualification. On 25 January 1978, Mr Rapata was sentenced to a further disqualification of two years, five months and 12 days after having been caught a second time driving while disqualified.

[12] On 25 January 1978 Mr Rapata was convicted of driving a motor vehicle in a dangerous manner.

[13] In total, there were 14 speeding–related offences in that history. In one of those offences, on 9 December 2012, Mr Rapata had been apprehended travelling at 47 kilometres per hour over the posted speed limited. Other speeding–related offences involved exceeding the posted speed limit by 18, 21, 25 and 30 kilometres per hour.

[14] On 14 December 2010 and 1 December 2013 Mr Rapata was apprehended operating his vehicle without a current warrant of fitness. On three occasions he received an infringement notice for failing to produce his driver's licence. He was served with an infringement notice for failing to use a seat–belt, operating a vehicle

with an insufficiently covered load, and for driving a vehicle which was subject to a temporary exemption from continuous licensing when the vehicle was not licensed to operate on a road.

[15] Mr Rapata had also been charged with careless use of a motor vehicle at a time when he was driving a bus.

[16] On six separate occasions Mr Rapata was issued with warning letters advising him that his accumulated demerit points meant he risked having his licence suspended. On 19 July 2000, Mr Rapata's licence was suspended for three months because he had exceeded the allowed number of demerit points.

[17] This history of traffic–related offences was an issue for Mr Guy in considering whether or not Mr Rapata was a fit and proper person to have a P endorsement on his driver's licence. Some credit was given for an incident–free period between 1978 and 1991 but that was not sufficient to sway the decision in Mr Rapata's favour.

[18] Mr Rapata also has a history of criminal offending although most of this record is now very old. In June 1976, Mr Rapata was convicted of wilful trespass. In August 1976 he was convicted of aiding the taking of a motor vehicle. There was a dishonesty offence in April 1977. In May 2009, Mr Rapata was convicted of speaking threateningly. At the same time (and presumably arising from the same incident) he was convicted of common assault.

[19] At the time Mr Guy made his decision two further charges were pending although they were subsequently withdrawn. One was for allegedly behaving threateningly and the other was alleged offensive/disturbing use of a telephone.

[20] Two driving-related events on 5 December 2013 seem to have been instrumental in the adverse outcome of this review of Mr Rapata's P endorsement. Both stemmed from a routine police stop while Mr Rapata was driving a taxi in Queenstown. Mr Rapata undertook an evidential breath–screening test which indicated he had consumed alcohol but at a level under the legal limit. However, Mr Rapata's taxi was ordered to be removed from the road because two front tyres did not meet the requirements for a certificate of fitness. As a result, Mr Rapata lost

his job as a contract driver, because the taxi company applied a zero tolerance policy towards alcohol use.

[21] Finally, Mr Rapata had received several Transport Agency letters warning him that his P endorsement was at risk. Those letters were dated 27 September 2002, 11 June 2003, 9 February 2007 and 23 February 2011.

[22] Mr Guy summarised his decision–making by saying he took into account the totality of Mr Rapata's record. Mr Guy said he placed little or no weight on Mr Rapata's convictions prior to 2010, but did take into account the pending charges referred to in paragraph 19. Mr Guy took into account five matters in his decision:

(a) The Queenstown incident.

(b) A long and persistent history with traffic offending amounting to 25 convictions and infringements in total, with 20 of them in the last 13 years. Many of those matters were for speeding including five imposed while driving a passenger service vehicle.

(c) There were active criminal charges.

(d) There had been four occasions in which warning letters had been written to Mr Rapata about his P endorsement being at risk.

(e) In the letter written by Mr Rapata providing his submissions in response to receiving notice his P endorsement was being reviewed, he had stated his preference to exceed the 90 kph open–road speed limit for buses on the basis that, from his experience, 100 kph was safer.

Mr Rapata's appeal

[23] Mr Rapata appealed on the basis that he is a fit and proper person and supported his appeal with an affidavit. Mr Rapata considers the adverse decision by the Transport Agency to have been prejudiced, meaning predetermined or biased not other unlawful grounds of discrimination.

[24] Supplementing Mr Rapata's main argument that he is a fit and proper person is a general sense of unfairness he feels for the way in which the review was undertaken and what was taken into account. For example, Mr Rapata considers it was unfair for the Queenstown incident to be taken into account, because he had not committed any offence by driving having consumed some alcohol but being under the legal limit.

[25] Mr Rapata argues the roadworthiness of the taxi he was driving should not be held against him, because he was a contract driver with limited responsibility for the state of the vehicle. In his opinion the taxi's roadworthiness was a matter for its owner. Mr Rapata also considers he was unfairly treated over this incident because he had previously received a warning about it from the Transport Agency, so taking it into account on this review was punishing him twice.

[26] Mr Rapata is concerned his submissions about the open–road speed limit for buses were misunderstood. He was not stating an intention to speed, but was merely advocating his preference for a change to the open–road speed limit for buses.

[27] Mr Rapata accepted the traffic record relied on by Mr Guy is correct.

Mr Rapata's personal circumstances

[28] Mr Rapata is 55 years old. For most of his adult life he has been connected with the transport industry. He presently holds a responsible job as Fleet Manager for a national company. He is not required to hold a P endorsement for that job, but he nevertheless is concerned that the loss of this endorsement reflects adversely on him and could impact on his ability to obtain future income.

[29] Mr Rapata owned a tour coach business in Queenstown in 2007. He has worked with other tourism businesses where it was necessary to hold a P endorsement.

[30] Mr Rapata said he was disappointed to be disqualified from driving buses because that work had been a huge part of his life. Not only has he had a career in driving buses, and in the tourism industry generally, members of his family earn a living in that industry.

[31] Mr Rapata gave evidence about his early years which, he said, might have had him heading in the wrong direction and getting involved with the wrong crowd. However, in his more recent years, he has been active in the Māori community in Invercargill and Queenstown. Generally, Mr Rapata described a personal life and responsibilities which he believes qualify him as being a fit and proper person to have a P endorsement on his licence.

[32] Finally, Mr Rapata was concerned that his record, stretching back as it does to the 1970s, was disproportionately taken into consideration. He considers there is nothing new or outstanding in his record that should lead to his P endorsement being revoked and to him being disqualified and prohibited from having that endorsement for three years.

The right to appeal

[33] Section 106 of the Act provides a general right of appeal to the District Court as follows:

> **106 General and right of appeal to District Court**
>
> (1) Any person who is dissatisfied with any decision made under this Act by the Agency in respect of the grant, issue, revocation, or suspension of a Land Transport document sought or held by that person may appeal to a District Court against that decision.
>
> (2) The Court may confirm, reverse, or modify the decision appealed against.
>
> (3) …

[34] The procedure for appeals is contained in s 111 of the Act. That section provides:

> **111 Procedure**
>
> (1) Every appeal under this Act to a District Court must be brought, by way of originating application, not later than 28 days after the date on which the appellant was notified of the decision appealed against, or within such further period as the District Court may allow.

> (2) In dealing with an appeal under this Act, a District Court may hear all evidence tendered and representations made by or on behalf of any party to the appeal that the court considers relevant to the appeal, whether or not that evidence would be otherwise admissible in that court.
>
> (3) Every such appeal must be made and determined in accordance with the District Courts Act 1947 and the rules of court made under that Act, but the application of that Act and those rules is subject to the other provisions of this section.
>
> (4) Subject to [ss 107, 111A and 111B], the decision of the District Court on any appeal under this Act is final.

[35] Rule 18.19 of the District Court Rules provides that appeals are by way of rehearing. On a rehearing, this Court can give such judgment as the original decision-maker could have given if a case had come before it as now presented, including subsequent changes in law and evidence.[3]

[36] The onus which applies in this case is described in *Austin, Nichols & Co Inc v Stichting Lodestar*.[4] In that case the Supreme Court said at [4]:

> …The appeal is usually conducted on the basis of the record of the court or tribunal appealed from unless, exceptionally, the terms in which the statute providing the right of appeal is expressed indicate that a de novo hearing of the evidence is envisaged … In either case, the appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal. It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it. [Footnotes omitted]

[37] The Court also determined at [5]:

> The appeal court may or may not find the reasoning of the tribunal persuasive in its own terms. The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. It may take the view that it has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment. An appeal court makes no error in approach simply because it

[3] *Brown v NZ Transport Agency* CIV–2010–012–808; *Wilson v Neva Holdings Ltd* (1993) 6 PRNZ 654

[4] [2008] 2 NZLR 141

pays little explicit attention to the reasons of the court or tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case. [Footnotes omitted]

[38] Finally, the Court said at [16]:

Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence**,** rather than forming its own opinion. [Footnotes omitted]

Fit and proper test

[39] Under s 30C of the Act, the test to be applied is as follows:

30C General Safety Criteria

(1) When assessing whether or not a person is a fit and proper person in relation to any transport service, the Agency must consider, in particular, any matter that the Agency considers should be taken into account—

(a) in the interests of public safety; or

(b) to ensure that the public is protected from serious or organised criminal activity.

(2) For the purpose of determining whether or not a person is a fit and proper person for any of the purposes of this Part, the Agency may consider, and may 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 the following matters:

(a) the person's criminal history (if any):

(b) any offending by the person in respect of transport-related offences (including any infringement offences):

(c) any history of serious behavioural problems:

(d) any complaints made in relation to any transport service provided or operated by the person or in which the person is

involved, particularly complaints made by users of the service:

(e) any history of persistent failure to pay fines incurred by the person in respect of transport-related offences:

(f) any other matter that the Agency considers it is appropriate in the public interest to take into account.

(3) In determining whether or not a person is a fit and proper person for any of the purposes of this Part, the Agency may consider—

(a) any conviction for an offence, whether or not—

(i) the conviction was in a New Zealand court; or

(ii) the offence was committed before the commencement of this Part or corresponding former enactment; or

(iii) the person incurred demerit points under this Act or a corresponding former enactment in respect of the conviction; and

(b) the fact that the person has been charged with any offence that is of such a nature that the public interest would seem to require that a person convicted of committing such an offence not be considered to be fit and proper for the purposes of this section.

(4) Despite subsection (3), the Agency may take into account any other matters and evidence as the Agency considers relevant.

The respondent's decision

[40] When Mr Guy made his decision that Mr Rapata was not a fit and proper person, he considered an extensive history of traffic–related offending that was ongoing. That record was directly relevant to public safety in s 30C(1)(a) of the Act, involving repeat incidents of excessive speed, careless driving and constant infringements. That record speaks for itself and shows a disregard for public safety where vehicle speed is concerned.

[41] Mr Rapata's submissions commenting on open–road speed limits for buses underscores Mr Guys' concern about public safety because the attitude those submissions displays suggests a preparedness to drive to any tolerance allowed by

police, rather than at the posted speed limit. That attitude may explain the number of speeding offences in Mr Rapata's traffic history.

[42] The Queenstown incident is more marginal when considered against s 30C(1)(a). Mr Rapata was not in breach of the Act for having consumed some alcohol and there is no evidence that his driving before being stopped was impaired. However, Mr Guy was entitled to take into account the fact that the taxi Mr Rapata was driving was not roadworthy, bearing in mind s 30C(1)(a) and considerations of public safety.

[43] His traffic record shows not only a long history of offending, but that record has not noticeably abated over time.

[44] He has continued to attract driving–related infringements even though he knew, or ought to have known, his P endorsement was in jeopardy because of his driving record. On 19 March 2014, Mr Rapata was fined $150 as a result of being charged as either being the driver, or having a passenger in a vehicle, not wearing a seat–belt. On 23 August 2014, he was charged with driving a vehicle on a road with a temporary exemption from continuous licensing resulting in a fine of $150 and 20 demerit points.

[45] Given Mr Rapata's poor driving record, and his attitude to speed, the revocation of his P endorsement was almost inevitable. There is nothing to support the contention by Mr Rapata that the decision made was prejudiced in the sense of having been predetermined or motivated by bias.

[46] In the course of his oral presentation, Mr Rapata began to argue he may have been the victim of unlawful discrimination based on race. No evidence in support of that argument was presented and there is no basis for it.

[47] Nothing Mr Rapata has argued has persuaded me Mr Guy's decision was wrong or inappropriate.

My assessment

[48] I am satisfied Mr Rapata does not meet the test for being a fit and proper person to presently have a P endorsement on his driving licence. He may qualify for

that status at the end of the three–year period of his disqualification if he remains incident–free.

[49] I would put aside both the pending charges and the Queenstown incident where it relates to alcohol use, but that is not enough to assist Mr Rapata's appeal.

[50] Even discounting some of the offending reaching back into the 1970s and 1980s as now very old, what cannot be overlooked is that his offending is persistent and has continued. That offending is directly relevant to public safety under s 30C(1)(a).

[51] Stepping back and assessing the position as at the date on which the appeal was heard, the evidence is overwhelmingly against Mr Rapata being determined to be fit and proper to hold a P endorsement.

[52] An ironic twist to this case is that Mr Rapata's delay in pursuing his appeal has helped create an incident–free interval he may be able to use to support a future application.

Result

[53] The decision by the Transport Agency is confirmed. Mr Rapata is not a fit and proper person to have a P endorsement on his driving licence.

[54] Mr Rapata's appeal and his application for leave to appeal are dismissed.

[55] Costs are reserved. In the absence of agreement, the respondent is to file a memorandum within 15 working days and Mr Rapata is to have 15 working days to reply.

K G Smith
District Court Judge