

EDITORIAL NOTE: SOME NAMES AND/OR DETAILS IN THIS JUDGMENT
HAVE BEEN ANONYMISED.

**IN THE DISTRICT COURT
AT WELLINGTON**

**CIV-2016-085-000994
[2017] NZDC 12955**

BETWEEN	DINESH CHAND Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing: 24 March 2017

Appearances: M W Anderson and R Stoop for the Appellant
K Howard for the Respondent

Judgment: 19 June 2017

DECISION OF JUDGE W K HASTINGS

[1] This is an appeal by Mr Chand against a decision of the New Zealand Transport Agency (NZTA) to decline to renew Mr Chand's passenger (P) endorsement. The NZTA was not satisfied that Mr Chand was a fit and proper person to hold a P endorsement as required by ss 30C and 30D of the Land Transport Act 1998.

[2] On 6 March 2015, the New Zealand Transport Agency (NZTA) wrote Mr Chand a letter indicating it would grant Mr Chand a P endorsement on a "without prejudice" basis. The letter stated:

Please be advised that should you incur any additional convictions/infringements and/or come to our attention in the future, **revocation proceedings may** be taken against you. Therefore the Passenger Endorsement of your driver licence DD[number removed] will be granted on a 'without prejudice' basis.

(emphasis in the original letter)

[3] After taking the appropriate steps, Mr Chand was granted a P endorsement on 5 May 2015.

[4] At the time he was granted the P endorsement, Mr Chand had a criminal and infringement history that was known to the NZTA. With respect to his infringement history, he had committed 25 infringement offences between August 1989 and February 2012, 16 of which were for speeding. He accumulated 7 of these infringement offences in the ten years prior to his application for a P endorsement, five of which were for speeding. With respect to his conviction history, he was also convicted in 2002 for exceeding the 100 km/h speed limit by 63 km/h. In addition, he had five convictions for receiving entered on 7 May 2003 for offending that took place between 1 September 2001 and 25 June 2002. He received a sentence of nine months' imprisonment and was granted leave to apply for home detention.

[5] On 29 January 2016, Mr Chand applied to renew his P endorsement. By this time, Mr Chand had committed one more infringement offence for speeding on 22 December 2015. He then acquired two more convictions on 24 May 2016, one for obtaining by deception and one on a representative charge of dishonestly using a document between 2011 and 2015. These convictions concerned benefit fraud. On 20 September 2016, Mr Chand was sentenced to six months' community detention, 100 hours community work, and ordered to make reparation. The pre-sentence report recommended community detention instead of home detention so that Mr Chand could continue to work as a taxi driver.

[6] Stewart Guy, Senior Adjudicator at the NZTA, was the person who declined Mr Chand's application to renew his P endorsement on the ground that he was not a fit and proper person to hold a P endorsement. Mr Guy deposed in his affidavit of 25 January 2017 that when he decided to grant Mr Chand's P endorsement in 2015,

10.15 These convictions [5 convictions for receiving stolen property between September 2001 and June 2002] were incurred some 13 years before the Appellant was first granted a Passenger endorsement in 2015. At the time of granting, it would have been reasonable to assume that his criminal offending had ceased, and as a result that offending would receive much less weight in an assessment of fitness and propriety.

10.16 However, the effect of that offending is revived by the convictions entered on the 20th September 2016, with those convictions again involving dishonesty on the part of the Appellant. This makes establishing a reasonable period of reform particularly difficult.

[7] Mr Guy deposed that he became aware of Mr Chand's charges on 12 May 2016, asked him about them when Mr Chand rang him on 26 May 2016, and offered to delay reviewing his application until the criminal charges were resolved. Mr Guy issued a notice of proposal to decline to renew the P endorsement on 15 June 2016 inviting submissions. Mr Guy then declined Mr Chand's application on 22 September 2016. Mr Couchman, Mr Chand's lawyer at the time, wrote to Mr Guy on 14 November 2016 with submissions which were considered Mr Guy notwithstanding that he had already made his final decision. Mr Guy, having given himself the opportunity to twice consider Mr Chand's application, wrote on 1 December 2016 that Mr Couchman's "detailed and helpful" submissions did not persuade him to change his mind.

[8] Essentially, having warned Mr Chand about the consequences of receiving further convictions and infringements in 2015, Mr Guy declined Mr Chand's application on the basis of his review of all of Mr Chand's history, a review that was triggered by Mr Chand's acquisition since the warning letter of one new infringement offence and two new dishonesty convictions.

[9] Sections 30C and 30D of the Land Transport Act set out the criteria the NZTA must consider when deciding if a person is fit and proper to hold a P endorsement:

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.

30D Additional criteria for small passenger service vehicles and vehicle recovery service

Without in any way limiting the matters that the Agency may consider under section 30C(2), when the Agency is assessing whether or not a person is a fit and proper person in relation to any passenger service involving the use of small passenger service

vehicles, or to any vehicle recovery service, the Agency must consider, in particular,—

- (a) any history of serious behavioural problems:
- (b) any offending in respect of offences of violence, sexual offences, drugs offences, arms offences, or offences involving organised criminal activities:
- (c) any offending in respect of major transport-related offences, particularly offences relating to safety or to road user charges:
- (d) any persistent offending of any kind:
- (e) any complaints in respect of the person or any transport service operated by the person that are of a persistent or serious nature.

[10] Mr Anderson submitted that Mr Chand's history was deemed to be acceptable for the purpose of issuing a P endorsement in 2015, and that since that time, he incurred only one other infringement and two dishonesty convictions which are not of a kind Parliament considered to be of crucial importance to a person's suitability to drive small passenger vehicles. He submitted that the offences listed in s 30D have in common a specific concern for the physical safety of the passenger. Mr Anderson submitted that it is the extent of the offending that has occurred after the warning was given, rather than the fact of convictions or infringements, that should be considered. When the dishonesty offending is explored in more depth, it appears from the summary of facts that overpayments of benefits were received from 25 November 2011 to 7 June 2015. Under re-examination, Mr Chand said that at the time he received his P endorsement in May 2015, he was receiving no income from his other businesses. Mr Anderson submitted that the only offending undertaken by Mr Chand since the warning letter of 6 March 2015 was the speeding infringement, and this was insufficient to warrant a finding of unfitness so soon after a decision was made that Mr Chand was fit and proper.

[11] Ms Howard for the NZTA on the other hand submitted that Mr Chand was granted a P endorsement in 2015 by the narrowest of margins as evidenced by the warning in the letter of 6 March 2015. She submitted that Mr Chand's subsequent dishonesty convictions caused his previous dishonesty convictions to regain some relevance and triggered two of the criteria in s 30D, as they were evidence of a

“serious behavioural problem” in s 30D(a) and “persistent offending” in s 30D(d). She submitted that persistence is also established by the reference in the 2015 summary of facts to an overpayment of benefit between June 1995 and May 1996 which was not prosecuted. She acknowledged that Mr Chand’s most recent serious traffic offending alone would not have warranted revocation action, but submitted that had the NZTA known of Mr Chand’s dishonesty offending for which he was convicted in September 2016, the NZTA would not have granted the P endorsement the first time he applied for it.

[12] This is not a judicial review of the procedure Mr Guy used to determine Mr Chand’s fitness. The function of this Court is to decide whether or not Mr Chand is, as of the date of the hearing,¹ and on the balance of probabilities,² a fit and proper person to hold a P endorsement.

[13] Mr Anderson submitted that Mr Guy placed too much weight on Mr Chand’s infringements, particularly when compared with other decisions. One of those decisions is *Nofoaiga v NZTA*.³ Judge Harrop decided that Mr Nofoaiga was a fit and proper person despite having accumulated 11 infringement offences in the ten years prior to the appeal hearing because nearly three years had passed since his last speeding infringement and 18 months since being convicted for driving while suspended and failing to answer bail. That case can be distinguished however on the basis that Mr Chand obtained a speeding infringement in December 2015, 15 months before the date of this hearing, and two dishonesty convictions consistent with his previous dishonesty convictions. Significantly, however, Judge Harrop noted that Mr Nofoaiga had initially received a P endorsement for five years (Mr Chand’s was for a shorter period) and had not received a “without prejudice” warning letter (unlike Mr Chand). Judge Harrop said at [20]:

In my view if Mr Nofoaiga had received a warning letter and then committed further infringements that would have been an aggravating feature of this case.

¹ *Shire v NZTA* CIV-2011-085-000860, 14 March 2012, Wellington DC.

² *Brown v NZTA* CIV-2010-012-808, 15 April 2011, Dunedin DC.

³ [2016] NZDC 16576.

[14] I accept that that Mr Chand's profit from his other endeavours was irregular during the period of his most recent offending. It is, however, the failure to report income that is at the heart of the offending, and the overpayments he received to which he was not entitled continued, according to the summary of facts, to 7 June 2015, three months after the warning letter of 6 March 2015. Further, the warning letter stated that additional "convictions" coming to the Agency's attention might warrant revocation proceedings. In Mr Chand's case, convictions were entered on 24 May 2016, which was after Mr Guy became aware of the criminal proceedings, during the period in which Mr Chand's application to renew was being considered, and before Mr Guy issued the notice of proposal to decline. During that period, when Mr Chand rang on 26 May 2016 to inquire about his application, Mr Guy deposed that Mr Chand was "extremely vague about what had occurred on the 24th May at his court appearance, to the extent that I felt he was being deliberately vague about the matters".

[15] In assessing whether or not a person is "fit and proper" in relation to any transport service, s30C(1) requires the Agency to take into account anything it considers should be taken into account "in the interests of public safety" or "to ensure that the public is protected from serious . . . criminal activity". Sections 30C(2) and 30D then set out more specific criteria the Agency may consider in assessing fitness and propriety, including the person's "criminal history (if any)", and "any persistent offending of any kind". The specific criteria must be interpreted in light of the purpose of the sections, which is to ensure public safety when the Agency decides who is fit and proper to receive, in this case, a P endorsement to which s 30D is directed. Although many of the criteria refer to "transport-related offences" (ss 30C(2)(b) and 30D(c)), "offences of violence, sexual offences, drugs offences, arms offences, or offences involving organised criminal activities" (s 30D(b)) which relate more directly to issues of public safety, the remit given to the Agency is broad, and includes references to "any other matter that the Agency considers it is appropriate in the public interest to take into account" (s 30C(2)(f)), "any conviction for an offence" (s 30C(3)(a)), as well as "persistent offending of any kind" (s 30D(d)). The Agency may also consider matters that extend beyond offending, including the fact of being charged with an offence (s 30C(3)(b), complaints (ss 30C(2)(d) and 30D(e)) and "any history of serious behavioural

problems” (ss 30C(2)(c) and 30D(a)). The central issue in the context of this case therefore is whether, in the context of Mr Chand’s previous offending and behaviour, and his convictions for dishonesty offending received after he was warned about incurring further convictions, Mr Chand is a fit and proper person to hold a P endorsement.

[16] Dishonesty offending does not fall within the specific examples of offending listed in ss 30C and 30D, but the respondent submits that it falls within the more general criteria in s 30C(2)(f), 30C(3)(a), 30D(d), and, as a behavioural problem, within ss 30C(2)(c) and 30D(a). In *McGregor v Director of Land Transport Safety*⁴ the Court was faced with offending similar to this. The issue in that case as stated by Judge Hole was whether “two periods of sustained deliberate dishonesty, over a year or so in each instance and about nine years apart, cumulatively render the appellant unfit to hold a taxi driver’s licence?” In Mr Chand’s case, the two sets of convictions are 13 years apart. The offence dates of the first set of five convictions span ten months, from 1 September 2001 to 25 June 2002. Judge Wharepouri’s sentencing notes⁵ with respect to the second set of convictions record that the “material non-disclosure” to the Ministry of Social Development took place between 2011 and 2015. In addition, there is a reference in the summary of facts for the second set of convictions to an overpayment of benefit between June 1995 and May 1996 that was not prosecuted, which makes three sets of behaviour involving dishonesty.

[17] Although Mr Chand deposed that he told the Ministry of Social Development that he no longer needed a benefit, a fact that appears to distinguish his situation from *McGregor*, he nonetheless remains convicted of dishonesty offending after having received a letter warning him of the possible consequences of further convictions. Against the background of Mr Chand’s previous dishonesty behaviour, and in light of the broad range of matters the Agency may consider in ss 30C(2)(c), 30C(2)(f), 30C(3)(a), 30D(a) and 30D(d), it was open to Mr Guy, and it is open to this Court, to consider the new offending in light of Mr Chand’s past behaviour, and in light of the similar nature of that behaviour. As Judge Hole said, “a taxi driver is

⁴ MA179/00, 25 October 2000, Judge G S Noble)

⁵ [2016] NZDC 18528.

in a position of trust regarding passengers and particularly dealing with those who are vulnerable”. Judge Moran made a similar comment in *Baker v New Zealand Transport Agency*⁶ at [24]: “a man who is driving buses is put in positions of trust with employer’s property, employer’s cash, and no doubt the property of passengers.” Behaviour involving dishonesty is something that can be taken into account in assessing whether a person is fit and proper because it goes to public safety and falls within the broad range of matters the decision-maker must take into account. I agree with Mr Guy that cumulatively considered, Mr Chand’s two sets of dishonesty convictions do not make him a fit and proper person to hold a P endorsement.

Decision

[18] For these reasons, the appeal is dismissed.

W K Hastings
District Court Judge

⁶ CIV 2008-076-000344, Timaru District Court, 10 November 2008.