

an investigation by NZTA. Accordingly, at the time of this appeal, Mr Kapoor has been prevented from driving a taxi for approximately nine months.

[3] Mr Kapoor seeks that NZTA's decision be reversed or, in the alternative, modified because he considers he is a fit and proper person to be the holder of a passenger endorsement and vehicle recovery endorsement on his licence.

[4] This appeal proceeded before me on the basis of Mr Kapoor's originating application with supporting affidavit, an affidavit in opposition from Mr Michael Beedell, the Manager Adjudications for NZTA based in Auckland and written submissions provided in advance of the hearing by both parties. Those submissions were addressed in argument before me. In addition, I was provided with a copy of CCTV footage available from Mr Kapoor's taxi, recorded on the evening of 2/3 October 2015.

Legal Position

[5] The parties were in agreement that the principles governing appeals of this type under the Land Transport Act are summarised in the decision *Brown v NZTA*¹. They are as follows:

- (a) The appeal is a re-hearing;
- (b) There is a wide discretion to accept evidence with consideration guided by relevance;
- (c) The standard of proof is the civil standard;
- (d) The statutory criteria is the essence of the appeal;
- (e) The Court is necessarily constrained by the material submitted to it;
- (f) The more important the question, the more cogent the evidence is expected to be; and
- (g) Ultimately, it is for the appellant authority to be satisfied of the applicability of the statutory criteria to the facts.

¹ *Brown v NZTA* DC Dunedin CIV-2010-012-808, 15 April 2011 at [34]

[6] It was held in *Brown* that the onus is on the appellant to satisfy the Court it should differ from the decision under appeal. However, the Court went on to say that given that the ultimate decision was a question of judgement in applying the facts to the law, unless in a state of equipoise, the onus will not generally be of much importance.

[7] The Land Transport Act is the regulatory framework governing taxi drivers. Pursuant to ss 30C and 30D, it requires that the holder of a P endorsement be a “fit and proper” person. Factors NZTA takes into account in determining whether someone is a “fit and proper” person in this context are set out in those sections. It is clear that NZTA is required, in particular, to consider any matter that it considers should be taken into account in the interests of public safety. A range of other matters may also be considered. This appeal proceeded on the basis that the central issue is whether Mr Kapoor is a fit and proper person in the context of the s 30C requirement.

[8] The decision of NZTA subject to this appeal, as set out in the proposal dated 23 December 2015 from Mr Beedell on behalf of NZTA to Mr Kapoor, set out a number of grounds upon which Mr Kapoor was not considered a fit and proper person. It was common ground before me, however, that the primary consideration was the conduct of Mr Kapoor on the evening of 2/3 October 2015.

[9] As the parties summarised the position, it is essentially a matter of me considering the evidence presented and determining whether Mr Kapoor meets the requirements of a fit and proper person, such that he should be entitled to hold a P endorsement and a V endorsement.

[10] A number of previous decisions of this Court were referred to and provided to me by the parties in their submissions. One of particular interest, given the focus of this appeal, is that of *Darwesh v NZTA*². In this decision at [5], the Court noted:

“Public safety is the principal criterion in assessing whether or not a person is a fit and proper person in relation to any transport service. The interests of public safety are not served by a taxi driver who abuses his position by

² *Darwesh v NZTA* (unreported) DC Christchurch, CIV 2010-009-3110, 19 July 2012, Judge Moran.

taking sexual advantage of a teenage girl who is vulnerable, not just by virtue of her age, but who was upset, broke and intoxicated”.

[11] While I am satisfied that the conduct of Mr Kapoor was not of the same nature as that in *Darwesh*, I accept that the statement of principle is accurate. The primary focus in this appeal, as it was, no doubt, in the NZTA decision, is that of public safety.

[12] Of further interest is the decision *Hopkins v LTNZ*³. In *Hopkins*, at [39], the learned Judge observed:

“It is possible that Ms Green saw an opportunity of trading some degree of affection or intimacy with Mr Hopkins in return for free taxi rides. I doubt that she would be the first young woman to perceive that possibility. If that is right, then she knowingly put herself at risk; but it is, I consider, the special responsibility of taxi drivers to be conscious of their responsibilities and duties. In their case acquiescence or consent to some degree of sexual activity is immaterial to the question of whether they are a fit and proper person. As has been said in other cases, taxi drivers are in a position of trust and their cab should be a safe refuge. The conduct towards passengers must be beyond reproach”.

[13] Also of particular relevance is the decision *Chaparian v NZTA*⁴. In *Chaparian*, the Court set out how the NZTA should apply the criteria under ss 30C and 30D. It stressed the importance of avoiding a “tunnel vision focus”. In particular, the Court observed that an examination “in the round” will (just as the statute surely intends) result. Some elements will be of greater significance than others⁵.

[14] It is appropriate to record, in relation to NZTA’s decision, that no criticism can be levelled at Mr Beedell. Mr Beedell followed an entirely appropriate process in putting an initial proposal to Mr Kapoor and requesting his feedback. The Barrister instructed by Mr Kapoor responded by letter of 19 January 2016. In this letter, stating that he was acting on instructions, the Barrister advised that Mr Kapoor would not seek to review the decision to suspend his passenger endorsement for a period of three years. Further, that he would not seek to operate a taxi during that period. He did, however, on Mr Kapoor’s behalf, respectfully request that the

³ *Hopkins v LTNZ* (unreported), DC Nelson, CIV-2008-042-000080, 22 April 2009, Judge Broadmore.

⁴ *Chaparian v NZTA*, DC Auckland, CIV-2011-004-1685, 10 October 2011.

⁵ At para [37].

decision to suspend his licence in relation to Classes 2, 3, 4 and 5 be reviewed, advising that Mr Kapoor sought the opportunity to earn a living through alternative employment involving driving.

[15] The Barrister concluded his letter, submitting that Mr Kapoor's inappropriate actions could be suitably sanctioned by the imposition of a three year suspension in relation to his passenger endorsement but that he be permitted to retain the classes of licence permitting him to still gain employment as a driver in an alternative industry.

[16] The decision of NZTA, conveyed by letter of 3 February from Mr Beedell to Mr Kapoor's Barrister, was accepting of the Barrister's submissions. As a result, it is hard to criticise that decision itself.

[17] It is, however, important to note that this appeal proceeds by way of a hearing de novo. Accordingly, while I have regard to the decision of NZTA, I consider the matter afresh, based upon the evidence provided to me.

Incident of 2/3 October

[18] It was common ground in the appeal before me that were it not for the incident on 2/3 October, NZTA would not have made the decision it made. As a result, the major focus of the parties' submissions at the hearing before me was on that matter.

[19] Just prior to the hearing of this appeal, Mr Kapoor made an application for third party discovery so as to obtain a copy of the CCTV footage from his taxi on the evening of 2/3 October. For reasons that it is unnecessary to go into, the footage had not previously been available. Indeed, it was not seen by Mr Beedell at the time of him making his decision. It had, however, been reviewed by the police. The CCTV footage was made available to me to review after I had heard counsels' submissions. Counsel had viewed it and their submissions took it into account.

[20] On behalf of NZTA, Mr Elliott submitted that upon review of the CCTV footage, I should conclude that the summary of that footage, made by Constable

Patten and recorded in his statement of 23 October 2015, was accurate. Mr Khan urged me to review the CCTV footage in the context of Mr Kapoor's statement to the police. That statement, dated 16 October 2015, was made voluntarily to the NZTA. It was made in the initial presence of Mr Kapoor's then Barrister.

[21] I have now viewed the CCTV footage. I accept Mr Elliott's submission that the descriptions of the content of that footage (and the timings) in Constable Patten's statement are accurate. I note at this point that while the matter was initially considered by the police in the context of potential criminal charges, based upon Constable Patten's review of the CCTV footage, no charges were laid. That was undoubtedly the correct decision. After review of the CCTV footage, it is clear that the events occurred entirely on a consensual basis.

[22] The question is, accordingly, a straightforward one. On review of the statement of Mr Kapoor, the statement of Constable Patten and my own review of the CCTV footage, was the conduct of Mr Kapoor that evening appropriate for a taxi driver? Put a different way, can it be said in the context of the requirement for NZTA to have a focus on public safety that Mr Kapoor acted other than in the manner of a fit and proper person to be a taxi driver.

[23] I am in no doubt, having reviewed the CCTV footage, that Mr Kapoor is not a fit and proper person to be a taxi driver. His conduct that evening was simply not acceptable for a person in his position of responsibility. NZTA's decision was appropriate.

[24] While Mr Khan submitted that Mr Kapoor's conduct was understandable, given the difficult circumstances in which he found himself, I simply cannot accept that submission. Mr Khan submitted that we are not able to hear any audio on the CCTV footage. He urged me to accept Mr Kapoor's description of the events and that his attempts to stop the female passenger's actions that evening verbally should be accepted. Further, that looking at the CCTV footage, it is clear that Mr Kapoor was endeavouring to bring the situation to an end without using excessive force, which could have seen the situation escalate. He encouraged me to consider the circumstances of a taxi driver in South Auckland faced with such a difficult situation.

[25] I do not consider that the CCTV footage shows someone attempting to bring the situation to an end in the way in which Mr Khan submitted. To the contrary, it is clear from the footage that the actions of the female passenger and the involvement of Mr Kapoor extended for a lengthy period of time. I accept that they are accurately summarised in the statement of Constable Patten. In particular, the sexual activity that commenced at approximately 23.20 continued until 23.26, some six minutes. There is no basis on which I could conclude that Mr Kapoor was endeavouring to bring that situation to an end, or was not an active participant in it. Had he truly wished to bring the situation to an end, then there was simply no need for him to have got into the rear of the taxi at that time and no need for him to have continued his involvement in the activities for the length of time he did.

[26] An aggravating factor of considerable significance in my view is the decision of Mr Kapoor to subsequently accept a further fare from a male passenger when the female passenger was still in a state of some undress in the rear of the taxi van and clearly not safely secured in the taxi van. Not only was this inappropriate from a privacy perspective but continued to expose the female passenger to considerable safety risk. Those actions, in and of themselves, were not those that NZTA would expect from a fit and proper person operating a taxi.

[27] I therefore accept the submission of NZTA that, having regard to the conduct of Mr Kapoor that evening, as well as to his traffic history, this is a clear case where Mr Kapoor has shown a lack of sufficient moral integrity and rectitude of character to engage in the services of a taxi driver without posing a significant risk to the public.

[28] By way of alternative submission, Mr Khan submitted that if I was to conclude that Mr Kapoor had not acted as a fit and proper person (as I have), then the period of disqualification and revocation, three years, was excessive. I do not agree. Limited case law is available on this point but on the basis of that provided to me, I am satisfied that a three year period is appropriate in these circumstances.

[29] I decline the appeal and confirm the decision of NZTA of 4 March 2016 to:

- (a) Disqualify and prohibit Mr Kapoor from driving any vehicle being used in a transport service (other than a rental or goods service) for three years;
- (b) Revoke Mr Kapoor's driver licence in respect of its passenger and vehicle recovery endorsements; and
- (c) Disqualify and prohibit Mr Kapoor from holding or obtaining a passenger or vehicle recovery endorsement for three years.

R McIlraith
District Court Judge