Qadir v Department of Transport [2015] NTSC 75

PARTIES:	QADIR, Mohammad Nawaz v DEPARTMENT OF TRANSPORT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 12 of 2014 (21421529)
DELIVERED:	11 NOVEMBER 2015
HEARING DATES:	17 SEPTEMBER 2015
JUDGMENT OF:	KELLY J
APPEAL FROM:	J NEILL SM

CATCHWORDS:

APPEALS – Natural justice – Procedural fairness – Adjournments – Application for adjournment by self-represented litigant made on hearing day – Application dismissed by magistrate – Applicant failed to comply with Court directions – Applicant did not take the opportunity to present his case – Appellant did not identify an error of principle in the magistrate's decision to not grant the adjournment – Appeal dismissed

APPEALS – Natural justice – Appellant denied the opportunity to present oral evidence – Appellant failed to identify evidence that would have been led – Appellant explained the matters put against him – Persistent interruption by magistrate in appellant's cross-examination – No material effect on outcome of the proceedings – No denial of procedural fairness – Appeal dismissed

APPEALS – Errors of law – Hearings *de novo* – Appellate court to assess evidence at the time of the hearing *de novo* – Magistrate assessed evidence at the time of the initial application – Magistrate may have reached a different conclusion if the correct test was applied – Appeal allowed

APPEALS – Evidence – Relevant and irrelevant evidence –– Magistrate did not consider irrelevant or inadmissible evidence – Ground not considered

Commercial Passenger (Road) Transport Act ss 5, 8, 9, 12, 13, 77, 78
Justices Act s 177(2)(f)

Aon Risk Services Australia Limited v Australian National University 239 CLR 175; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* 135 CLR 616; *Chin v Teague* [2014] NTCA 5; *Re Coldham; Ex parte Brideson (No 2)* 170 CLR 267, applied

Briginshaw v Briginshaw (1938) 60 CLR 336, referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; *Blazevski v Judges of the District Court of New South Wales* (1992) 29 ALD 197; *Dawson v Deputy Commissioner of Taxation* (1984) 71 FLR 364; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409; *Ex parte Australian Sporting Club Ltd; Re Dash* (1947) 47 SR (NSW) 283; *House v The King* (1936) 55 CLR 499; *Seears v McNulty* (1987) 28 A Crim R 121; *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70; *Southern Cross Motors Pty Ltd v Australian Guarantee Corporation Ltd* [1980] VR 187; *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6, followed

REPRESENTATION:

Counsel:

Appellant:	M Crawley
Respondent:	L Nguyen

Solicitors:

Appellant:	De Silva Hebron
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Qadir v Department of Transport [2015] NTSC 75
No. LA 12 of 2014 (21421529)

BETWEEN:

MOHAMMAD NAWAZ QADIR
Appellant

AND:

DEPARTMENT OF TRANSPORT
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 11 November 2015)

[1] The appellant, Mr Mohammad Qadir, was an accredited operator of commercial passenger vehicles pursuant to the *Commercial Passenger (Road) Transport Act* ("the Act"). The Director of Commercial Passenger (Road) Transport[1] ("the Director") refused to renew the appellant's accreditation because he was not satisfied that the appellant was a fit and proper person to continue to hold an accreditation. Mr Qadir appealed unsuccessfully to the Local Court and has now appealed to this Court against the Local Court decision.

[1] appointed under s 5(1) of the Act

Relevant legislative provisions

[2] A person who proposes to operate a commercial passenger vehicle must be accredited under the Act.[2] An accredited operator may apply for a licence under the Act[3] and operate a motor vehicle under the Act in accordance with the conditions specified in the accreditation.[4] In the appellant's case, his accreditation entitled him to operate a taxi or taxis. An accreditation is effective for five years (unless sooner cancelled or suspended), after which time the accredited person who wishes to remain accredited must apply to the Director for renewal.[5]

[3] In considering an application for renewal of accreditation the Director must take into account the matters that would be taken into account if the application were for a new accreditation.[6] Those matters are set out in s 9 of the Act. Among the matters to be taken into account in determining an application for renewal of accreditation is whether the applicant is a fit and proper person to continue to hold an accreditation. The Act provides that the Director shall not renew the accreditation of a

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2 Section 8

3 There are many different kinds of licence under the Act, for example taxi, private hire car, mini-bus, motor omnibus, and others.

4 Section 13

5 Section 12

6 Section 12(4)

person who is considered by the Director not a fit and proper person to continue to hold an accreditation.[7]

[4] The term "fit and proper person" is not defined in the legislation, but in considering whether the applicant for renewal is a fit and proper person to continue to hold accreditation, the Director must have regard to:

(a) whether or not the person has shown a pattern of committing offences; and

(b) any other circumstances concerning the person that the Director considers relevant.[8]

The Director's decision and the appeal to the Local Court

[5] On 14 April 2014 the Director refused to renew the appellant's accreditation on the basis that the Director considered that he was not a fit and proper person to continue to hold such accreditation.

[6] On 30 April 2014 the appellant lodged an appeal against that decision pursuant to s 77 of the Act. Under the Act an appeal is to the Local Court and must be by way of hearing *de novo*.[9]

[7] The matter was originally listed for a pre-hearing conference before the Registrar on 12 June 2014, at which time it might have been expected

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7 Section 9(3)

8 Section 9(3C)

9 Section 77(8)

that the parties would be given a date for hearing of the appeal, and directions may have been made fixing a timetable for the filing of affidavits if it was thought desirable for the evidence in chief to be given in that form. However, in the meantime, in the mistaken belief that his accreditation would cease on the Director's refusal to renew it, on 6 May 2014 the appellant made application to the Local Court for a stay of execution of the Director's decision. In fact the Act preserves the *status quo* pending the determination of any appeal: where an appeal has been lodged within time against a decision not to renew an accreditation, that decision is of no effect until the appeal is determined.[10]

[8] The appellant's application for a stay was set down for hearing on 12 May 2014. On that date, he was advised that a stay was not necessary and the magistrate listed the substantive appeal for hearing on 16 July 2014. (Presumably the pre-trial mention before the Registrar on 12 June 2014 was vacated.)

[9] On 16 July 2014, the appellant applied for an adjournment of the substantive appeal. The appellant did not, on that date, give any reason for the adjournment application, but it was not opposed, and the magistrate indicated that he would not have had time to deal with the appeal that day in any event. Counsel for the respondent advised the court that "there are a number of affidavits that have to be filed today" but that "for all intents and purposes, the respondent is ready to

10 Section 78(a)

proceed". His Honour adjourned the hearing of the appeal to 11 September 2014 and made directions that both parties file and serve any affidavits on which they intended to rely by 28 August 2014. After the magistrate made those directions, the appellant asked: "One question, does the stay continue?" … "The stay on the licence, does it continue?" He was assured by his Honour: "Yes, until it is finalised, the stay operates."

[10] On 26 August 2014,[11] an agent of the respondent delivered four affidavits relied on by the respondent to the residential address of Mr Mohammad Qadir, giving them to a woman apparently over the age of 18. The respondent filed an affidavit of service annexing a photograph of the woman to whom the documents had been delivered.[12]

[11] At the hearing of the appeal in the Local Court, the appellant denied having received these documents. However, on 27 August 2014, there were communications between the appellant and the Department of Transport, including an email from Mr Greg Turner of that Department to the appellant attaching a copy of the court order, and stating that the appellant did not have to wait for the Department to file its papers until he filed his own, and another email from Mr Turner to the appellant

[11] It appears that most of these affidavits had been prepared before the original hearing date of 16 July. No explanation has been offered as to why the respondent delayed giving them to Mr Mohammad Qadir until 26 August. I am not sure that this is consonant with the spirit, at least, of the model litigant principles.

[12] Counsel for the respondent (from the bar table) identified this woman as Mr Mohammad Qadir's mother. He did not deny it.

saying that the affidavits had been served on his mother. I infer from that, that the appellant contacted the Department the day after the affidavits in question had been delivered to his house, and that he either asked for more time or made some other complaint about the time for filing and serving his affidavits.

[12] On 27 August 2014, the respondent filed its affidavits. The appellant did not file or serve any affidavits, or bring an application for an extension of time within which to do so.

[13] It should be observed that, as a matter of practical reality, at this point the appellant had nothing to gain from his appeal proceeding to hearing and, potentially, much to lose. If he won his appeal, he would have his accreditation renewed, but that would get him nothing he did not already have while the appeal remained unresolved – ie the right to continue operating taxis. On the other hand, if he was unsuccessful in his appeal, the Director's decision would take effect and his accreditation would be lost.

The hearing in the Local Court

[14] On 11 September 2014, the matter came on for hearing before Mr John Neill SM. Mr Mohammad Qadir appeared in person and applied for an adjournment. Counsel for the respondent, Ms Nguyen, took his Honour briefly through the procedural history of the matter (set out above) and

his Honour said: “Mr Qadir, this is the second time you have applied to vacate the hearing date. Why?”

[15] The appellant proceeded to give a number of contradictory and implausible reasons. At first he said, “Because at first I had a lawyer but he couldn’t do my appeal hearing.”

[16] When it was pointed out to him that that was back in July he said: “Yes, but I’ve been trying to get another lawyer. I had a recent loss in the family.”

[17] His Honour asked, “How does that stop you getting a lawyer?” and the appellant explained that he had been going to Daly River “to help with the funeral arrangements there and dig the grave and that”.

[18] His Honour asked, with what seems to be some incredulity, “You’re saying you’ve been at Daly River every day since 16 July?”

[19] The appellant’s reply was non-responsive. He said, “I’ve been trying to dig a grave by hand.” Eventually he admitted that he had not been doing that every day since 16 July.

[20] When his Honour said that he did not accept that explanation for the failure to produce affidavits, the appellant said, “I’ve been assaulted recently as well.” He admitted that he had not been in hospital but said that the assault prevented him from attending to the business of the appeal because he “couldn’t cope with it”.

[21] His Honour asked if he had any medical information to back that up, and the appellant said: “I don’t have it on me because the doctor won’t release it to me.” He said the doctor told him that because it’s going to court, only the police can get a certificate. His Honour pointed out that you can always get a certificate from your own doctor.

[22] His Honour then asked about the date on which the appellant had received this injury. He said, “Just last month, recently.” When his Honour said, “It’s all too vague,” the appellant added further detail, “On a Friday morning – a Saturday morning.” His Honour said, “But you don’t have a date?” and he said “On the 16th,” presumably meaning 16 August (a Sunday).

[23] His Honour asked what steps the appellant had taken to get a lawyer and the appellant was unable to give any details, simply general comments along the lines of, “I’ve been ringing around to look for a good lawyer but haven’t found one,” and, “Trying to find a good lawyer to do the matter but not a lot of lawyers want to do this sort of work, civil matter,” (which is nonsense and in any case seems to contradict his other excuses about being unable to attend to the matter at all).

[24] Later the appellant said he could not get a lawyer at a reasonable price to which his Honour said, “Well if you can’t afford one, you can’t afford one.” That prompted the following exchange:

MR QADIR: Then I need to get an adjournment.

HIS HONOUR: What for?

MR QADIR: To finalise my documents.

HIS HONOUR: Why didn't you finalise your documents before today? What's going to change if I give you an adjournment?

MR QADIR: A lot.

However, the appellant did not give any details about what material he wanted to place before the court, any reasonable explanation as to why he had not done so before, or any concrete proposal about how long he would need to prepare.

[25] It should not come as a surprise that the appellant's application to vacate the hearing date was refused.

[26] In his reasons for decision following the hearing his Honour gave the following brief reasons for rejecting the application to vacate the hearing date.

> Before we started today, Mr Qadir applied to adjourn the hearing today because he had not obtained legal advice and he had not complied with the order of Magistrate Carey made 16 July last to file affidavit material he intended to rely on at the hearing today. I considered the history of this appeal and heard Mr Qadir on his own behalf in support of that application to adjourn and I declined to adjourn the appeal that's hearing today. The matter has been around for too long. The explanations provided today for Mr Qadir not paying attention to his own urgent business relevant to his own matter of supporting himself were simply not persuasive at all. Accordingly, the hearing has proceeded today.

[27] When the hearing began, the appellant claimed that he had never received the respondent's affidavits. This seems extremely unlikely given the affidavit of service annexing a photograph of the woman to whom the documents were delivered at the appellant's house, and his Honour said: "Mr Qadir, I'm not satisfied by your statement from the bar table that you've never received these documents." However, his Honour granted an adjournment until 11.00 am to enable the appellant to read the documents on the assumption (which he said was not a finding) that he had not read them before.

[28] The hearing proceeded, Ms Nguyen tendered the respondent's affidavits and made the deponents available for cross-examination. At the end of the respondent's case, his Honour said:

> Mr Qadir, now the only affidavit material we have from you was filed with your original appeal and that was declared on 30 April 2014 – sorry, that's the stay. Is a separate one filed with the appeal? No, there is no separate one filed with the appeal. All you say in the affidavit filed with your stay is that you say you're a fit and proper person and you don't agree with the decision. There's an attachment A which is the letter from Paul Rajan which is already before the court. So those are the matters of evidence in your case. We're now ready to proceed to submissions.

[29] Counsel for the respondent made submissions to his Honour and then the appellant.

[30] After Ms Nguyen had made her submissions on behalf of the respondent, the magistrate described the affidavit of the Director as "an accumulation of fluff upon fluff upon fluff", and continued:

> You've taken me to a number of very real matters and they are the suspensions, cancellations, disqualifications,[13] the false representations in the letter of 15 February 2014,[14] the non-compliance
>
> with some regulations in the industry to deal with data collection,[15] the complaint of 2 July 2010 and of course the criminal record matters.[16] These are all matters of substance.

[31] The magistrate invited the appellant to make submissions about "the suspensions, cancellations and disqualifications you've had over recent times, the last three or four years; your letter of 15 February 2014 and why I shouldn't regard that as a deliberate attempt to mislead, you saying that you've had no convictions since 2012; your non-compliance with regulations about data collection; the complaint in the letter of 2 July 2010; and the biggest of all, the matters in your criminal history in the last three years or so". His Honour told the appellant that none of the other matters that had been put against the appellant satisfied him and he was not going to give them any weight.

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[13] The evidence showed that the appellant's driver's licence had been cancelled by the court twice for driving offences and suspended eight times for non-payment of fines and once for accumulation of demerit points.

[14] The appellant had supplied the Department with a police certificate showing a number of convictions, the latest being in 2012. In fact he had a further conviction in August 2013 for driving with a medium range blood alcohol level for which he was convicted and disqualified from driving for six months. This was not listed on the certificate. On 15 February 2014, in a letter to the Department, the appellant wrote, "I have not been in trouble with the law since my last conviction that was dated in 2012".

[15] In her submissions, Ms Nguyen referred to evidence of "a very large history of non-compliance with taxi regulations" and to "letters sent to Mr Qadir in relation to his non-compliance of returning data sheets to the department when they've requested it".

[16] On 25 February 2010 the appellant was convicted of breach of bail. In 2011 he was fined for exceeding the speed limit and for driving with an expired label. On10 February 2012 he was convicted of hit and run driving causing serious harm for which he was sentenced to a term of imprisonment for 15 months fully suspended. On 31 July 2012 he was convicted of possessing a dangerous drug in a public place. On 21 August 2013 he was convicted of driving with a medium range blood alcohol level and disqualified from holding a drivers licence for six months. In August 2013 he also lost four demerit points for exceeding the speed limit by between 30 and 45 kph.

[32] The appellant made the following submissions in relation to those matters.

(a) He said the misrepresentation in the letter of 15 February 2014 was caused by a typing error and “I’m not trying to mislead anyone”.

(b) Asked about why he did not respond to correspondence from the Department dated 2 July 2010 concerning a complaint against him, the appellant said it had been addressed to “Kybra Street” and he lived in “Kybra Court” and “that’s probably why I didn’t receive the letter”. [His Honour was unimpressed.]

(c) Asked why he had to be chased up eight separate times for data he was obliged to supply the Department, the appellant said he had “issues”. [Again, his Honour was unimpressed.]

(d) In relation to the Department’s submission that he had failed to respond to a particular complaint, he gave the following contradictory explanations.

(i) He had asked the city radio network he was with to respond to them and he understood that the director at that time, (or the manager), had done that.

(ii) He wasn’t the driver at the time and he had sacked that driver.

(iii) He didn’t think it was necessary to respond to the Department telling them that.

(iv) He thought he had responded at the time, but obviously he didn't.

(e) In relation to the suspensions, cancellations and disqualifications referred to in the respondent's affidavits, the appellant made vague and largely incomprehensible remarks about an arrangement he had had which had failed, either because of insufficient funds or because he thought new fines had been added to the arrangement but they hadn't been.

(f) The magistrate asked him about "the criminal matters" and the following exchange occurred:

> HIS HONOUR: What about some of the criminal matters? I've just read the sentencing remarks of Magistrate Trigg about your fail to stop *[conviction]*. One of the things Magistrate Trigg commented on was the fact that it was very unlikely that you had been drinking because the evidence before him was that you were a man who did not drink.
>
> MR QADIR: At that time I wasn't a drinker.
>
> HIS HONOUR: But I see that within 12 months you picked up drink driving.
>
> MR QADIR: Yes, after depression from that court case I started drinking after that and having nightmares of what happened, remembering the incident, so that's why I started drinking from that. I couldn't cope (inaudible) alcohol. Is there anything else?
>
> HIS HONOUR: No, those are the matters I've been particularly concerned about. As I've already told you, I'm not going to give any weight to the gossip and innuendo which otherwise fills this.

(g) The appellant ended his submissions by pointing out that he was the youngest operator in the industry. His Honour asked if he had anything further to say, and the appellant said no.

The decision of the Local Court

[33] The magistrate dismissed the appeal and confirmed the decision of the Director declining to renew the appellant's operator accreditation. In his reasons for that decision, his Honour applied the *Briginshaw*[17] standard of proof to the allegation that the appellant's letter of 15 February 2014 was deliberately misleading and found he was not satisfied to the requisite degree that this was the case. His Honour said that he regarded the appellant's history, including the suspensions, disqualifications and cancellations of his licence, as "one that reflects not well upon his driving or upon his paying attention to the payment of fines". His Honour also found that the appellant's non-compliance with regulations was "a very poor reflection indeed upon Mr Qadir's attention to business" and his failure to respond to the complaint of 2 July "reflects poorly on Mr Qadir as an accredited operator".

[34] His Honour then went on to consider the criminal matters – not paying any regard to the appellant's juvenile criminal history. In doing so, his Honour placed particular emphasis on the Department's guidelines, while acknowledging that they are "guidelines only".

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17 *Briginshaw v Briginshaw* (1938) 60 CLR 336

[35] Although his Honour expressly stated that the Department's Guidelines were only guidelines, the approach adopted by his Honour was to treat the Guidelines as, in effect, imposing periods of disqualification. For example, in considering the "hit and run" conviction, his Honour said:

> A 15 month fully suspended sentence was imposed. Under Table 1, "Fit and Proper Assessment", where it says, "any other offence punishable by imprisonment" under the heading "to be considered fit and proper", it says that the applicant must be offence free for one year after any prison term, whether served or not. The prison term in this case was 15 months. It wasn't served but that's not the point.
>
> So, one year after that, we're looking at two years and three months. Two years and three months from 10 February 2012 would take us to 7 May 2014, and on – if that was given a strict application, Mr Qadir couldn't have been considered for a renewal of his accreditation before 7 May 2014. The decision taken by Mr Rajan of course was in April 2014 and it was in part in reliance on that conviction. [emphasis added]

[36] His Honour went on to consider the other two offences in a similar fashion.

> The next piece of criminal history which we need to consider is the conviction for possessing a dangerous drug in a public place. That conviction was imposed on 31 July 2012. Under the heading "to be considered fit and proper" it says, "You must be offence free for two years after conviction. That would take us to 30 July 2014, once again well and truly after the decision not to renew accreditation in this case.
>
> The third such matter for consideration is the new evidence before the court today which was not before Mr Rajan, namely the drink driving conviction of August 2013. General offences including drink driving would require that the application be offence free for a minimum period of 12 months according to Table 1, "Fit and Proper Assessment". 12 months from 21 August 2013 takes us to 20 August 2014. Again, same relevance, namely that at the time of the

application, at the time of the decision, Mr Qadir was arguably not eligible to be considered for a renewal.

[37] His Honour then made some remarks about the nature of the offences and concluded:

> Taking the three of them together and the way that they are meant to be taken into account by a decision maker, it is clear that at the time of the application, weighing those three convictions together with the particularised history of suspensions, cancellations and disqualifications, with the non-compliance with the regulations about data collection, with the failure to respond to the complaint of 2 July 2010, in my view, Mr Qadir, you were not at the time you made this application for renewal - at the time of the decision of Mr Rajan, you were not a fit and proper person for that renewal.
>
> It might be a different story if you applied again now because all of those periods of ineligibility following the convictions have now passed, the most recent of them passing on 20 August just gone. That's a matter between you and the Department of Transport. But I am satisfied that I should confirm the decision of Paul Rajan of the Department of Transport dated 14 April 2014 declining to renew your operator accreditation and I do affirm that decision and I dismiss your notice of appeal filed 30 April 2014. [emphasis added]

[38] In my view it was not open to his Honour to apply the Guidelines in this fashion for two reasons. First, a decision about whether an applicant is a "fit and proper person" for a particular role or purpose requires a consideration of the qualities necessary to fulfil the role or purpose. It would also generally require some consideration of the person's moral integrity and rectitude of character as well as the applicant's knowledge, ability and honesty as it relates to the role in question.[18] The decision maker (whether the Director or the Local Court on appeal) is not entitled

[18] *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70

to simply apply the Guidelines mechanically. Although government policy is a relevant consideration to a decision maker charged with exercising a discretion (as, in this case are the Department Guidelines), the decision maker must nevertheless apply his or her mind to the relevant criteria and exercise an independent judgment,[19] in the appeal before his Honour, a judgment about the appellant's moral integrity, knowledge, ability and honesty in his role as an accredited taxi operator.

[39] Second, it seems to me that the approach adopted by his Honour of simply adding the time specified to the date of conviction for the particular offence, and treating that, in effect, as a period of disqualification from applying for renewal of accreditation, involves a misreading of the Guidelines. For example, on 10 February 2012, the appellant was convicted of a "hit and run" driving offence causing serious harm. He was sentenced to imprisonment for 15 months fully suspended. The Guidelines say to be considered a fit and proper person after such a conviction the applicant must be offence-free for one year after the prison term whether or not it was served (in this case one year + 15 months from the date of the conviction). It is not just a case of adding one year and 15 months to the conviction date and applying that mechanically as a "period of disqualification". The appellant did <u>not</u> remain offence free in the interim. The decision maker would need to take into account the fact that the appellant offended again about two

19 See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, p 419

months later; and again about 15 months later. (He possessed a dangerous drug in a public place on 6 April 2012 for which he was convicted on 31 July 2012, and on 21 August 2013 he drove with a medium range blood alcohol for which he was convicted and disqualified from driving for six months.) The same analysis would need to be applied to the further offences. In no case did the appellant remain "offence-free" for any considerable period of time.

The appeal to the Supreme Court

[40] However, there has been no appeal (or cross appeal) against his Honour's decision based on any such error of approach. Mr Mohammad Qadir has appealed against the decision of the Local Court on the following grounds:

(1) The court erred in law and denied the appellant procedural fairness in refusing the appellant's application for an adjournment.

(2) The court erred in failing to afford the appellant the further opportunity to put affidavit evidence before it or to give oral evidence in lieu.

(3) The court erred in law in failing to determine whether the appellant was a fit and proper person for the purposes of s 12 of the Act as at the time of the rehearing.

(4) The court erred in admitting into evidence material irrelevant to the re-hearing being undertaken by it and without first seeking the appellant's response to its admissibility.

Ground 1: Did the court err in law and deny the appellant procedural fairness in refusing the appellant's application for an adjournment?

[41] Counsel for the appellant submitted that the magistrate had wrongly described the matter as "dragging on" since, realistically, 11 September 2014 was the first date on which this matter could have proceeded. The court was unable to hear the matter on the date when it was first listed and the respondent's affidavits were not filed until 27 August 2014; the appellant indicated that he had yet to complete an affidavit of his own and wanted time to do so; he was unrepresented, and seeking further opportunity to instruct a solicitor.

[42] Counsel also sought to make something of the fact that there had not been personal service of the respondent's affidavits and the appellant had denied having received them; that English was not the appellant's first language and that he was given only an hour to read voluminous affidavits and decide which deponents (if any) he wished to cross-examine. However, his Honour determined that service had been validly effected in accordance with the relevant rules of court and, in light of the affidavit of service, he did not accept that the appellant had not received the affidavits.

[43] The essential gravamen of the complaint about the refusal of the application to adjourn the proceeding was that it meant the appellant was not given an opportunity to file any further affidavits of his own and was thus effectively denied the opportunity to present his case.

[44] I do not agree that this was the case. The appellant had an opportunity to present his case. He did not take it. He did not comply with the directions made on 16 July to file and serve his affidavits by 28 August. On 26 August he was served with the respondent's affidavits and he did not prepare any affidavits in response before the hearing date on 11 September, or make application for an extension of time within which to do so. Nor did he give any plausible explanation for his failure to prepare affidavits within the time directed.

[45] Counsel pointed out that his Honour refused the application to adjourn without asking the attitude of the respondent to the application. His Honour was not bound to do so. His Honour was entitled to take the view that the matter had been set down for hearing and should proceed regardless of whether the respondent was inclined to be indulgent to the appellant.

> … Undue delay can undermine confidence in the rule of law. To that extent its avoidance, based upon a proper regard for the interests of the parties, transcends those interests. Another factor which relates to the interests of the parties but transcends them is the waste of public resources and the inefficiency occasioned by the need to

> revisit interlocutory processes, vacate trial dates, or adjourn trials either because of non-compliance with court timetables ...[20]

[46] In *Aon Risk Services Australia Limited v Australian National University,* French CJ cited with approval the judgment of King CJ in *Dawson v Deputy Commissioner of Taxation,*[21] to the effect that (subject to over-riding considerations of justice) judges have a responsibility to ensure that "the limited resources which the State commits to the administration of justice are not wasted by the failure of parties to adhere to trial dates of which they have had proper notice".[22]

[47] French CJ continued:

> ... the mischief engendered by unwarranted adjournments and consequent delays in the resolution of civil proceedings goes beyond their particular effects on the court in which those delays occur. ... the public interest in the efficient use of court resources is a relevant consideration in the exercise of discretions to amend or adjourn.[23]
>
> ... Also to be considered is the potential for loss of public confidence in the legal system which arises where a court is seen to accede to applications made without adequate explanation or justification, whether they be for adjournment, for amendments giving rise to adjournment, or for vacation of fixed trial dates resulting in the resetting of interlocutory processes.[24]

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20 *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 at [24]; 239 CLR 175, p 189 per French CJ

21 (1984) 71 FLR 364, p 366

22 *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 at [25]; 239 CLR 175, p 189

23 *Ibid* at [27]; p 191

24 *Ibid* at [30]; p 192

> Although intervention will be justified if a serious injustice has been occasioned by a refusal of an adjournment, it is nonetheless unusual for superior courts … to interfere with decisions of summary courts to grant or refuse adjournments.[25]

[48] In any event, the decision not to grant an adjournment being a discretionary one it is not open to me to interfere with that exercise of the learned magistrate's discretion unless it is shown that the magistrate committed an identifiable error in principle, or that the decision is so plainly unreasonable that the learned magistrate must have misdirected himself, or been guided by an erroneous principle.[26]

[49] I do not think that natural justice required the appellant to be given another opportunity to prepare affidavits. He was given adequate notice of the hearing date, directions were made giving him adequate time to prepare any affidavits he wished to rely upon, and he was served with the respondent's affidavits within time. Moreover, as I have already said, he offered no reasonable explanation for his failure to prepare. No other error of principle has been identified and I do not consider the decision not to allow an adjournment to be unreasonable, taking into account the considerations set out in *Aon*.

[50] This ground of appeal must fail.

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[25] *Blazevski v Judges of the District Court of New South Wales* (1992) 29 ALD 197, p 200 per Kirby P; *Chin v Teague* [2014] NTCA 5 at [24]

[26] *House v The King* (1936) 55 CLR 499, p 505; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

Ground 2: Did the court err in failing to afford the appellant the opportunity to give oral evidence and in restricting the appellant's cross examination to the extent that he was unable to give his version of events?

[51] The alleged failure to afford the appellant a further opportunity to put affidavit evidence before the court really forms the basis of Ground 1 which has been dealt with.

[52] Counsel for the appellant submitted that, having denied the appellant an adjournment to put his evidence in affidavit form, his Honour should have permitted the appellant to give oral evidence and pointed out that that course of action was suggested by counsel for the respondent at the hearing. In oral submissions, counsel for the appellant also complained that there had been unreasonable interference with the appellant's cross-examination of witnesses. Counsel submitted that this failure to allow oral evidence, in combination with the refusal of the adjournment application (and the unreasonable restrictions on cross-examination) meant that the appellant was effectively precluded from putting his version of events and that this amounted to a denial of natural justice.

[53] It would certainly have been preferable if the learned magistrate had allowed the appellant to give oral evidence, especially when this was not objected to by counsel for the respondent – indeed she suggested that he be allowed to do so. It may well be that in another case such a combination of factors would lead to the conclusion that there had been

a denial of natural justice. However, at the hearing in the Local Court, the appellant did not say what evidence he wanted to place before the court. On the hearing of this appeal, I asked counsel for the appellant what evidence the appellant would have put before the Local Court if he had been given the opportunity. Counsel was unable to provide me with any details of anything the appellant wanted to put in evidence, other than to say that he might have put the circumstances of the three offences relied upon by his Honour in reaching his decision in context. What that context might be and how it might have affected his Honour's decision was not stated.

[54] Considering the submissions made by the appellant at the hearing in the Local Court, I am unable to conclude that there was a denial of procedural fairness in the circumstances. In effect, the appellant gave his explanations, such as they were, (including references to factual matters not in evidence)[27] about the matters urged against him in his submissions. I have, in any event, allowed the appeal on other grounds.

[55] At the hearing in the Local Court, the appellant attempted to cross-examine two of the respondent's deponents with much interruption from his Honour who tried to explain to the appellant that cross-examination should consist of asking the witness questions, not simply putting his version of events to the witness in statement form. The following

[27] For example, he said that the reference to not being in trouble since 2012 was a typographical error and should have read 2013, and he gave a fairly garbled account of having "an arrangement" in place for the payment of fines which failed for some reason.

example is from the attempted cross-examination of the Director of Transport, Mr Rajan.

> MR QADIR: We'll go to para 14 *[of Mr Rajan's affidavit]* It says that … I supplied you with false information in the letter dated 15 February 2014 stating that I've not been in trouble with the law since my last conviction in 2012. I believe that was a typing error.
>
> MR RAJAN: A typing error in …
>
> MR QADIR: The date, 2012. It should've been 2013. I'll just point that out.
>
> …
>
> HIS HONOUR: It's no good, Mr Qadir, you asking Mr Rajan whether you made a typing error.
>
> MR QADIR: No, I'm telling him that that was a typing error because I wasn't able to respond.
>
> HIS HONOUR: Why are you telling the witness something? He's here to give the court evidence. He can't tell us that you've made a typing error.

[56] Counsel for the appellant has submitted that this impermissible restriction on the appellant's cross-examination, combined with the failure to vacate the hearing date to enable the appellant to put his version of events in affidavit form, and his Honour's insistence on confining his consideration to matters in evidence in the affidavits, effectively precluded the appellant from putting his version of events at all.

[57] Mr Crawley for the appellant relies on these statements by his Honour:

> HIS HONOUR: Mr Qadir, you'll get two chances. One chance is to ask questions of Mr Rajan, and obviously the point of that is to ask him, 'What are you talking about here?' or 'What do you mean by that?' or things like that. But it's not appropriate that you in effect tell him your version of events, because that's not what he's here for. He's here to answer questions.
>
> HIS HONOUR: All I'm going to judge this on is the information actually put before the court. If you want to ask witnesses questions about any other information, you're just opening up the can of worms further.

[58] The latter comment was made by his Honour by way of interrupting Mr Rajan's answer to the appellant's question: "It says here that you conducted an assessment of this information (inaudible) guideline informing your decision, so what did you assess exactly, fit and properness?"

[59] Looking through the transcript, there is almost no question by the appellant, and no answer by a witness, that was not interrupted by his Honour. Also, it is true, as Mr Crawley submitted, that his Honour's instructions to the appellant about how he should go about cross-examining the witnesses were unduly restrictive. It is not the purpose of cross-examination to get the witness to clarify his evidence, but to challenge it, and indeed to put the version of events contended for by the cross-examiner, provided it is put in the form of a question and provided it is on a topic about which the witness can meaningfully comment.

[60] The learned magistrate may not have expressed it well, but I believe that what his Honour was trying to do in the exchange in [55] above, was to get the appellant to ask questions rather than stating his case to the witness. It would have been preferable if his Honour had helped the appellant to reformulate his statements as questions which essentially put his case to the witness and sought concessions. However, I do not think the failure by his Honour to do this had a material effect on the outcome of the appeal in the court below. His Honour did not in fact "insist on confining his consideration to matters in the affidavits" as alleged by the appellant; he allowed the appellant to refer in his submissions to factual matters not in evidence and to put his case that way.

Ground 3: Did the court err in law in failing to determine whether the appellant was a fit and proper person for the purposes of s 12 of the Act as at the time of the re-hearing?

[61] In my view the appeal on this ground must be allowed.

[62] The learned magistrate was hearing an appeal against a decision of the Director refusing to renew the appellant's accreditation. Under the Act such an appeal must be by way of hearing *de novo*.[28]

[63] "An appeal *de novo* is not strictly speaking an appeal at all, because the court which is hearing the appeal exercises original rather than true

[28] Section 77(8)

appellate jurisdiction."[29] "The appellate body, when hearing an appeal *de novo*, applies the law as it is at the date of hearing."[30] As such, the function of the court hearing such an appeal is "to form its own independent opinion of the evidence on the material put before it, and give judgment as if it were sitting as a court of first instance".[31] The court hearing an appeal conducted as a hearing *de novo* must consider the circumstances as they exist at the time the appeal is heard and make such order as ought to be made at the date of the appeal having regard to the relevant facts as they exist at that time.[32]

[64] It is clear that his Honour applied a different test. In handing down his decision, his Honour referred to the evidence, in particular to three convictions, and said:

> Taking the three of them together and the way that they are meant to be taken into account by a decision maker, it is clear that at the time of the application, weighing those three convictions together with the particularised history of suspensions, cancellations and disqualifications, with the non-compliance with the regulations about data collection, with the failure to respond to the complaint of 2 July 2010, in my view, Mr Qadir, you were not at the time you made this application for renewal - at the time of the decision of Mr Rajan, you

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29 Dean Mildren, *The Appellate Jurisdiction of the Courts in Australia* (Federation Press, 1st ed, 2015) p 10, citing *Ex parte Australian Sporting Club Ltd; Re Dash* (1947) 47 SR (NSW) 283; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* [1976] HCA 62, 135 CLR 616, p 621

30 *Ibid*, p 12, citing *Re Coldham; Ex parte Brideson (No 2)* [1990] HCA 36; 170 CLR 267, p 273 per Deane, Gaudron and McHugh JJ

31 *Seears v McNulty* (1987) 28 A Crim R 121, p 128 per O'Leary CJ

32 *Southern Cross Motors Pty Ltd v Australian Guarantee Corporation Ltd* [1980] VR 187, p 190-191; *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6, p 8

were not a fit and proper person for that renewal.[33] *[emphasis added]*

[65] This may have been influenced by the following exchange between counsel for the respondent and his Honour:

> HIS HONOUR: Is this an appeal de novo?
>
> MS NGUYEN: Yes, your Honour. The legislation specifies that it is an appeal de novo.
>
> HIS HONOUR: In that case the evidence will have to come from your side first - - -
>
> MS NGUYEN: Yes, your Honour.
>
> HIS HONOUR: - - - to satisfy the court that the order was properly made and to see whether you have satisfied the original onus.
>
> MS NGUYEN: Yes, your Honour.
>
> HIS HONOUR: And then we'll consider the affidavit material of Mr Qadir - - -
>
> MS NGUYEN: Certainly, your Honour.
>
> HIS HONOUR: - - - once I'm satisfied that you've established the onus.
>
> MS NGUYEN: Yes, and as I understand it, your Honour, your Honour is to place yourself in the shoes of the decision maker at the same time as (inaudible) de novo.

[66] The application of the wrong test may not have mattered if it were apparent that there had been no material change in circumstances between the date of

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[33] Transcript (11 September 2014), p 74

the original decision and the date of the appeal. However, it is not clear that that is the case here. Following straight on from the passage set out in [64] above, his Honour said:

> It might be a different story if you applied again now because all of those periods of ineligibility following the convictions have now passed, the most recent of them passing on 20 August just gone. That's a matter between you and the Department of Transport. But I am satisfied that I should confirm the decision of Paul Rajan of the Department of Transport dated 14 April 2014 declining to renew your operator accreditation and I do affirm that decision and I dismiss your notice of appeal filed 30 April 2014. *[emphasis added]*

[67] From this one can infer that there was a real possibility[34] that his Honour would have come to a different decision if he had applied the correct test. Accordingly the appeal must be allowed on this ground.

[68] Accordingly the appeal must be allowed on this ground.

Ground 4: Did the hearing magistrate err in admitting into evidence material irrelevant to the re-hearing without first seeking the appellant's response to its admissibility?

[69] It is not necessary for me to consider this ground of appeal. Perhaps the magistrate ought to have asked the appellant whether he objected to any of the material in the affidavits, although it is doubtful whether the appellant, being without legal representation, would have had the capacity to exercise his right to object to the admission into evidence of inadmissible material in any meaningful sense. In any event, counsel for

[34] See *Development Consent Authority v Phelps* (2010) 27 NTLR 174; [2010] NTCA 3 at [23].

the appellant has (rightly) conceded that no substantial miscarriage of justice flowed from any such failure. In handing down his decision, his Honour specifically stated that he had not paid attention to matters in the respondent's affidavits that "did not descend into any particularities in any useful way" and which consisted of "hearsay, suspicions and matters which I was unable to weigh myself".

[70] ORDERS:

(1) The appeal is allowed on Ground 3.

(2) The matter is remitted to the hearing magistrate for determination in accordance with the principles governing appeals *de novo*.

[71] I emphasise that I am not ordering a re-hearing, simply remitting the matter for determination by the Local Court. How the matter is to be conducted from here on in will be a matter for his Honour, assisted, no doubt, by submissions from counsel.