IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-954

UNDER	the Judicature Amendment Act 1972, Part 30 of the High Court Rules, Civil Aviation Act 1990 and Privacy Act 1993
BETWEEN	THE NEW ZEALAND AIRLINE PILOTS' ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED Plaintiff
AND	THE CIVIL AVIATION AUTHORITY OF NEW ZEALAND First Defendant
AND	THE DIRECTOR OF CIVIL AVIATION Second Defendant

Hearing: 20 June 2011

Counsel: R E Harrison QC with R R McCabe for Plaintiff
M J Andrews with S J R Jennings for Defendants

Judgment: 13 July 2011 at 2.30 pm

JUDGMENT OF THE HON JUSTICE KÓS

Contents

Introduction

[1] When a pilot applies for a licence, he or she must declare any criminal convictions held. A copy of the pilot's criminal record history must be attached to the licence application. The pilot must also consent to the Civil Aviation Authority gathering information relating to criminal investigations, charges and convictions.

[2] Pilots must also continue at all times to:

(a) be fit and proper persons to hold their licences.[1] That is a condition of the licence, imposed by statute; and

(b) disclose any "information" "relevant" to that condition.[2]

[3] Now the Authority wants to check up on the performance of that condition. The Ministry of Justice has agreed to provide the Authority and its Director with criminal record information for a sample set of pilots selected at random.

[4] The essential question in this application for judicial review is whether the Director is entitled to ask for that information, and in that way?

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1 Civil Aviation Act 1990, s 9(3). All section references are to that Act, unless otherwise stated.
2 Section 49(1)(c).

The claim

[5] The plaintiff pilots' union says that the Director is not authorised by the Act to conduct random sampling of criminal record information in that way. The defendants rely on s 10(3) of the Civil Aviation Act 1990 in establishing the random sampling scheme. But the pilots say that provision does not authorise the scheme.

[6] Secondly, the pilots say that criminal record information is "personal information", governed by the Privacy Act 1993.[3] And that even if the Director is permitted to seek the information, Principle 11 would still prohibit disclosure by the Ministry – unless s 7(1) of the same Act applies. That is, unless there is a provision elsewhere that "authorises …personal information to be made available". The pilots say s 10(3) does not authorise release by the Ministry - and that there is no other authorising provision. This second argument is closely entwined with the pilots' primary invalidity argument.

[7] Thirdly, the pilots say that the random sampling is an unreasonable search or seizure for the purposes of the New Zealand Bill of Rights Act 1990. This third argument is entirely independent of the primary illegality argument.

The defence

[8] The defendants say that the Authority's core function is to promote civil aviation safety in New Zealand, and to monitor adherence with safety requirements. They say that pilots are duty bound to declare convictions relevant to their continuing fitness to hold licences, and the Director is duty bound to monitor the sufficiency of declaration. Random sampling is considered the most efficient, cost effective and least administratively burdensome option for monitoring compliance.

[9] As to its legality, the defendants say that such sampling is permitted under s 10(3) of the Act. They say that provision empowers the Authority to request, and authorises the Ministry to supply, criminal record information on a random sample

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[3] This is conceded by the defendants.

basis. Therefore, the defendants say, there is no breach of Principle 11; the defendants' actions are saved by s 7(1) of the Privacy Act 1993.

[10] Finally, the defendants say that if random sampling does constitute a search and seizure (which they do not concede), it is not unreasonable. There is no legitimate expectation of privacy in relation to criminal record information; it is public information and something the pilots are required to disclose in any event.

Issues

[11] The principal question in this case is one of statutory interpretation: does s 10(3) of the Act authorise the Director to seek pilots' criminal record information where the subject pilot is identified at random? (Issue 1)

[12] If the answer to that question is "no", that is the end of the matter. If the answer is "yes", then other issues arise:

(a) Issue 2: If the Director is authorised by s 10(3) of the Act to seek the criminal record information, is the Ministry nonetheless prohibited from releasing it (so that release would breach pilots' rights under the Privacy Act 1993)?

(b) Issue 3: Does the proposed random sampling scheme breach pilots' rights under the New Zealand Bill of Rights Act 1990 - in particular s 21's prohibition against unreasonable search and seizure?

Other options for criminal record information gathering

[13] It should be noted that if the answer to issue 1 is "no", that does not necessarily mean the Director is prohibited from obtaining the information he seeks. This is a challenge to the *mechanism* that the Director has employed. But there may be other mechanisms available. In particular:

(a) Section 7(3) provides that a licence issued by the Director is subject to such conditions as he or she considers appropriate. Conceivably such conditions might include continued disclosure and consent to access criminal record information.

(b) Section 15 provides that the Director may require pilots to undergo such inspections (and monitoring) as the Director considers necessary in the interests of civil aviation safety. Again that may permit random sampling of criminal record information.

[14] The case was not presented on that basis, however; I merely note these as alternative possibilities. Mr Rodney Harrison QC, for the pilots, reserved his position in relation to them. But he did accept, in his written submissions, that there are other "express powers [or] non-statutory means of gathering information, such as differently-worded consent and application forms" available to the defendants.

[15] There are other mechanisms used already by the defendants to gather pilots' criminal record information:

(a) The annual or six monthly medical certificate application submitted by pilots already requires disclosure of convictions for "alcohol or drug-related offences", including a drink-driving offence. Full details must be provided. The application form includes a consent in these terms:

> I consent to the disclosure to the Director of information about convictions for alcohol or substance abuse from the Land Transport Safety Authority or other organisations.

So the Authority can already access alcohol or drug-related criminal record information from state agencies on a repeated and regular basis. The relevant "other organisations" can only sensibly be read as including the Ministry. The Authority is entitled to ask the Ministry for that subset of pilots' criminal record information.

(b) Criminal record information is also obtained under security clearance procedures: see [37].

[16] Finally, although not directly relevant, I note that commercial airline operators may implement alcohol and drug testing as part of pilots' conditions of employment. Air New Zealand has done so. In 2004 the Employment Court held Air New Zealand was entitled to insist on random drug testing in "safety sensitive areas", and non-random tests where there was reasonable cause to suspect that an employee's behaviour was an actual or potential source of harm.[4]

[17] Before reviewing the three issues I will sketch, briefly, the random sampling procedure adopted by the Director, and the statutory scheme under the Act.

Random sampling procedure adopted

[18] In 2008 a commercial airline pilot was prosecuted for making a misleading statement in a medical examination form. As just noted, the form required the pilot to declare whether he had been convicted of an alcohol or drug-related offence. The pilot declared that he had not. In fact he had two convictions for excess breath alcohol. Considerable media attention was given to this case in February 2010. The Associate Minister of Transport sought information from the Director about monitoring pilots with alcohol and drug issues. The Authority told the Minister:

> The CAA is satisfied that the present regulatory system has worked well at ensuring that only people who do not use recreational drugs and who use alcohol safely and in moderation have been able to exercise the privileges of a pilot licence. The system is, however, heavily dependent on individuals acting responsibly and "self disclosing" information relating to their drug and alcohol use, and on their employers voluntarily putting in place robust systems for monitoring and addressing alcohol and drug abuse issues.

[19] The focus of the advice soon moved to considering options for enhanced monitoring of pilots in relation to alcohol and drug-related issues. The regular medical certification disclosure and consent regime was adverted to. Mr Christopher Ford, the Authority's Acting General Manager deposes, however, that the consent

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[4] *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614.

wording "is not wide enough to authorise access to the conviction information the Director needs to fulfil his statutory duties". Precisely why that is so is not at all clear. The consent is certainly adequate to enable the defendants to check pilots' alcohol and substance abuse-related convictions on a regular basis.

[20] Reasonably early in the process, the Authority identified s 10(3) as a mechanism enabling a wider range of criminal record information to be sampled on a random basis. The Director told the Minister "it is important to note that the use of s 10(3) entails a case by case approach." He also said:

> Having direct access to relevant information about a pilot's criminal convictions and driving offences would be the simplest way of ensuring the CAA could obtain the information it needs to discharge its obligations under the [Act]. As advised ... the Privacy Act provides for designated agencies to have access to information held on the Ministry of Justice's database about particular individuals, including criminal convictions and driving offences. Schedule 5 of the Privacy Act lists the agencies and the information they are entitled to access. The NZTA is listed; the CAA is not. The CAA has previously argued for inclusion in the Schedule but was unsuccessful.

[21] Ultimately, what has been adopted is this: the Authority seeks full criminal record information from the Ministry of Justice up to five times per annum, in relation to 100 pilots chosen at random. They are drawn from among the approximately 10,000 airline transport and commercial pilot licence holders. A memorandum governing access has been entered with the Ministry. The stated purposes for obtaining the information are:

- Identifying any criminal convictions which might warrant further investigation as to the safe exercise of privileges to which an individual's medical certificate relates, or affect an individual's 'fit and proper person' status within the meaning of section 10 of [the Act]; and

- Verifying the accuracy of information previously provided by a certificate/licence applicant and/or holder; and

- Identifying any trends indicating information gaps within the CAA medical certification and licensing system; and

- Informing CAA assessment as to the need or otherwise for changes to the medical certification and licensing system, particularly in respect of sampled or routine verification of information disclosed by applicants on the medical certificate application form or aviation document application forms.

[22] The Authority consulted the Union on its proposal. The Union was, and is, ardently opposed to it. The details of that consultation need not concern us. Apart from a residual irrationality argument, this application for judicial review is brought wholly on an illegality basis. Procedural impropriety is not pleaded.

[23] So far the new sampling procedure has been used once, in February 2011. It disclosed one new criminal conviction. The pilot concerned had already disclosed it to the Authority. Further sampling has been suspended pending the issue of this judgment.

Statutory scheme

[24] Aircraft pilots are required to hold a licence, known to the Act as an "aviation document". Pilots' licences may be issued subject to such conditions as the Director considers appropriate in each case.[5] Applications for pilots' licences are made to the Director.[6] The Director specifies the appropriate forms. Those forms currently provide for the applicant to attach his or her criminal record history. It also provides consent, in favour of the Director, to collection of details of any criminal investigations, charges or convictions.[7] It is unlikely that the consent given in the form is of a continuing nature. On its face it is not. Certainly the Director has not treated it as continuing.

[25] Under s 8(3) every holder of a pilot's licence must maintain the currency of the address for service notified to the Authority.[8] This explicit updating provision is to be contrasted with what is provided in s 9.

[26] Section 9 deals with the grant of a pilot's licence. The Director is to grant the application if satisfied, inter alia, that the applicant "is a fit and proper person to have control or to hold the document".[9] Section 9(3) is important:

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5 Section 7(3).
6 Section 8(1).
7 Save as to which the clean slate scheme applies, under the Criminal Records (Clean Slate) 2004.
8 Under section 8(2).
9 Section 9(1)(b)(ii).

> It shall be a condition of every current aviation document that the holder ... continue to satisfy the fit and proper person test specified in subsection (1)(b)(ii).

Quite what that entails is unclear. There is no equivalent of s 8(3). But it is important to read s 9(3) in conjunction with s 49(1)(c):

> [Every person commits an offence who] being the holder of an aviation document, fails, without reasonable excuse, to provide the Authority or the Director information known to that person which is relevant to the condition specified in s (9)(3) of this Act.

[27] The substantive duty of continuing disclosure is thus buried in an offence provision. Less attractive drafting is hard to imagine. The provisions, read in conjunction, clearly require:

(a) continuing satisfaction by pilots of the fit and proper person test in s 9(1)(b)(ii); and,

(b) continuing disclosure by pilots of "information" which is "relevant" to their continuing fitness obligation.

I discuss the difficulties inherent in this drafting later.[10]

[28] Section 10(1) sets out a number of criteria that the Director shall have regard to in "determining whether or not a person is a fit and proper person for any purpose under this Act". Some of those matters include whether a person has a conviction for any "transport safety offence". That expression is not defined. The list in s 10(1) is not exclusive.[11]

[29] Section 10(3) is at the centre of this case. It provides:

> The Director may, for the purpose of determining whether or not a person is a fit and proper person for any purpose under this Act,–
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> (a) seek and receive such information (including medical reports) as the Director thinks fit; and

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[10] At [53]–[55].

[11] Section 10(2).

(b) consider information obtained from any source.

Two questions arise: first, *when* may the Director make such a determination? Secondly, do the words "for any purpose under this Act" relate to the determinative act of the Director, or the fitness and propriety of the pilot? I will return to these questions in due course.

[30] Section 11 then provides a set of protections that apply where a Director proposes to make a decision that a person is not a fit and proper person for any purpose under the Act.[12] In short, the provision requires due notification and the opportunity to make submissions. A right of appeal also exists.[13] Section 12(2) requires participants to comply with conditions attached to licences.

[31] A pilot's licence continues in force from grant until suspension, revocation, replacement (by a different licence) or surrender. Licenses are not, therefore, renewed on any regular basis, unlike medical certificates. Airline transport and commercial pilots' medical certificates have a maximum duration of one year for pilots under age 40. Pilots aged 40 years and over must renew their medical certificates six-monthly.[14]

[32] Section 15(1) provides for general (not "for cause") safety monitoring and inspection of licence holders, including pilots:

> The Director may in writing require any person who—
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> (a) Holds an aviation document …
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> ….
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> to undergo or carry out such inspections and such monitoring as the Director considers necessary in the interests of civil aviation safety and security.

[33] That power is be contrasted with s 15A[15] which is a "for cause" investigation provision, where the Direct believes an investigation is necessary because he or she

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12 See also s 10(5)–(7).
13 Section 66.
14 Unless the pilot is flying with a co-pilot.
15 Inserted by the Civil Aviation Amendment Act 2002.

has reasonable grounds to believe that licence conditions have not been complied with, or privileges or duties under the licence are being carried out in a "careless or incompetent manner". Those requirements do not feature in s 15.

[34] The Director may suspend licences (or impose conditions) if considered necessary in the interests of safety and any one of four other criteria apply.[16] One of these is non-compliance with licence conditions. Another is that the holder has failed to comply with s 49.[17] The Act also provides for the revocation of licences.[18] It provides criteria for action taken to suspend, modify or revoke a licence.[19] The provisions to some extent mirror ss 10 and 11 in relation to applications for the grant of a licence.

[35] There is a separate part of the Act, Part 2A,[20] which deals with medical certification. So far as is material, s 27C provides an explicit continuing (or up-dating) disclosure duty on the part of a licence holder if he or she:

> ... is aware of, or has reasonable grounds to suspect, any change in his or her medical condition or the existence of any previously undetected medical condition that may interfere with the safe exercise of the privilege as to which his or her medical certificate relates ...

That too may be contrasted with the opacity of ss 9(3) and 49(1)(c).

[36] There are a number of specific provisions in Part 2A enabling the Director to requisition information.[21] One such provision contemplates, expressly, a degree of "random selection".[22] But that relates to monitoring of medical certificates. In the event that a licence holder fails without reasonable cause to comply with an information requisition, the licence may be revoked.[23] Powers to suspend in the event of perceived non-safety also exist.[24] And I have noted already the conviction

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16 Section 17(1).
17 Including the obligation to provide relevant information for the purposes of the duty in s 9(3).
18 Section 18.
19 Section 19.
20 Inserted in 2002 by the Civil Aviation (Medical Certification) Amendment Act 2001.
21 Section 27B(5)(b), s27D(2), s27H(1), (3) and (4).
22 Section 27H(3)(a)(i).
23 Section 27I(11).
24 Section 27I(1) and (2).

disclosure obligations in the six-monthly or annual medical certification application, and the continuing consent given to the defendants to access criminal record information relating to alcohol or substance abuse convictions.[25] Sections 27D(2) and 27H(4) authorise those requirements.

[37] Section 49(1)(c) I have already referred to. The other provision I should refer to in this short survey is s 77F, which provides that a Director may carry out security checks. In the course of these the Director may seek and receive relevant information. Evidence before me showed that the Director had been using this provision to collect criminal record information on airline pilots on a three yearly basis.

Issue 1: Does the Act empower the Authority's random sampling?

Why statutory authority matters

[38] We should start by noting why the question of statutory authority matters so much. All parties accept it does matter. The defendants, for instance, say that they expressly rely on the Director's power in s 10(3) to seek criminal record information. The Director does not suggest that any power apart from s 10(3) enables him to randomly sample pilots' criminal record information. Two things should be noted.

[39] First, the Director's own powers are trammelled by s 72I(2). He or she has only such powers as are conferred by statute. One particular *function* may be noted: the Director must "monitor adherence, within the civil aviation system, to any regulatory requirements relating to safety and security".[26] But of itself that does not authorise access to criminal record information. Nor does it empower the Ministry to give it to him.

[40] Secondly, inasmuch as the parties accept that the criminal record information held by the Ministry of Justice is "personal information" for the purposes of the

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[25] See [15].
[26] Section 72I(3)(c)(i).

Privacy Act 1993, the Ministry may not release it unless either the exceptions in Principle 11 apply, or the action is saved by s 7(1) of the Privacy Act. But the Director eschews the former: "[Principle 11]'s own exceptions probably do not apply". The Director relies solely on the saving of s 7(1). It provides:

> Nothing in principle 6 or principle 11 derogates from any provision that is contained in any enactment and that authorises or requires personal information to be made available.

[41] Thus the issue of statutory authority is at the heart of this case. Does s 10(3) "authorise or require" criminal record information to made available to the Director?

Does s 10(3) "authorise or require" criminal record information to made available to the Director?

[42] Section 10(3) applies only when the information is sought for the purpose of the Director determining whether a person is "a fit and proper person for any purpose under this Act". As already noted, the provision gives rise to two key issues: first, *when* may the Director make such a determination? Secondly, do the words "for any purpose under this Act" qualify the Director's determinative purpose or the pilot's fitness?

[43] I will return to the second question.[27] As to the first, as I understand the defendants' case, it is that the Director makes a "fit and proper person" determination on each of the four following occasions:

(a) In considering applications for grant or renewal of a licence.[28] That is provided for expressly.

(b) From time to time, "on an ongoing basis". This intermediate, or post-licence, assessment is said to be "a key part of the Director discharging his duty to ensure aviation safety". The statutory

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27 At [63].

28 Section 9(1)(b)(ii).

authority therefor is to be inferred from Part 1 of the Act, but is not set out explicitly

(c) In considering, in some circumstances, whether to initiate a "for cause" investigation under s 15A(1)(a) – if there is reason to believe there is non-compliance with s 9(3).[29]

(d) Likewise, in acting under s 17(1)(b) or (c) to suspend or modify a licence – again if the Director is satisfied that there has been non-compliance of that kind.

[44] It is (b) that this case focuses upon.

What the pilots say

[45] Mr Harrison submitted that the power conferred on the Director by s 10(3) may be used for its specified purpose only, from which he advanced two key points:

(a) The specified (and therefore permitted) purpose in s 10(3) is confined to the Part 1 purpose provided in the Act. Mr Harrison submitted that the wide range of specifically-conferred powers of information gathering under the Act meant that there could be no possible justification for interpreting s 10(3) as a power of general application or wide ambit. The primary thrust of Mr Harrison's argument was that random sampling per se was not permitted under Part 1 of the Act.

(b) The stated purposes for sampling recorded in the Ministry of Justice memorandum,[30] and reflected in the affidavit evidence, suggested the defendants were seeking to go well beyond simply determining

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[29] No such pre-assessment is required to initiate an investigation under s 15(1), as opposed to s 15A(1).

[30] See [20].

whether a particular participant satisfied the fit and proper person test under the Act.

[46] I consider the latter submission is soundly based, when looking at the evidence. If I disagree with Mr Harrison's first proposition, it will be necessary to consider whether the additional non-"fit and proper person" purposes taint the exercise of the power under s 10(3) to such an extent as to invalidate it.[31]

[47] Mr Harrison also pointed to the fact that s 27H empowers a licence holder to provide medical information if the Director is "monitoring licence holders on the basis of random selection from the register of current medical certificates" and has reasonable grounds to believe that the information is necessary for certain investigative purposes. So the Act does contemplate random sampling, explicitly. But in that provision alone.

What the defendants say

[48] For the defendants, Mr Matthew Andrews advanced four broad submissions.

[49] First, the defendants submit that aviation safety is the paramount concern of the Act. The continuing duty to satisfy the fit and proper person test in s 9(3) and the continuing duty of disclosure under s 49(1)(c) are part of a wider scheme to promote aviation safety. Mr Andrews submitted that the Director, when considering whether a person continues to be a fit and proper person, or meets required medical standards, relies on having access to information (including criminal record information) "to make that assessment".

[50] The submission of course begs the question as to what "assessment" the Director is entitled to make, and when. The defendants respond by saying that as a consequence of s 9(3)'s continuing duty on pilots, it "must" be one of the Director's functions and duties "to monitor that on-going compliance under s 10(3)". Hence the second of the four instances noted in [43] above. Mr Andrews submitted:

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[31] See [68]–[70] below.

> The second defendant is principally undertaking the random sampling initiative to assess, on an on-going basis, whether individuals are fit and proper people.

The choice of the word "principally" is noteworthy. I have already recorded Mr Harrison's submission that the agreement with the Ministry entertains use of information for purposes other than merely making a fit and proper person determination in a particular case.

[51] Secondly, Mr Andrews submitted that random sampling would encourage improved voluntary compliance with disclosure obligations. That argument is fine as far as it goes, but I should note that the number of pilots sampled annually means that a pilot has only a 1 in 20 chance of being reviewed in any particular year.

[52] Thirdly, the defendants acknowledge that:

(a) The presence of a conviction does not necessarily mean that a pilot is not a fit and proper person. The defendants characterise it as "an indicator". They say that the conduct surrounding the conviction may be more relevant than the fact of the conviction itself.

(b) The fact of non-disclosure (i.e. in breach of s 49(1)(c)) does not necessarily mean a pilot is not a fit and proper person either. The defendants concede that further inquiries are almost always likely to be needed.

[53] This third submission, which must be right, confirms that pilots are placed in a potentially invidious situation by ss 9(3) and 49(1)(c). Section 8(3), for instance, is perfectly clear as to what updating information pilots must provide. But the updating obligation under ss 9(3) and 49(1)(c) is more opaque. What is required is the disclosure of "information" that is "relevant" to whether a pilot continues to be a "fit and proper person" to hold his or her licence. Given the two qualifications acknowledged by the defendants, the pilot is required to make a relevance assessment in order to comply with s 49(1)(c) (and thereby, s 12(2)).

[54] So a conviction for excess breath alcohol might well be seen to be relevant. Such convictions have to be disclosed in any event when applying for a medical certificate.[32]

[55] What, though, of a conviction for breaching a domestic protection order? The defendants contend that such a conviction would be relevant, as it may be indicative of a wider problem or a state of stress. Whether that would be relevant to the pilot's fitness and propriety, or to his medical certification, is not obvious. And what of a less material offence? To take an example posited by Mr Harrison, what of a pilot charged under s 32 of the Summary Offences Act 1981 with urinating in a public place? And what of non-criminal offences – public welfare infringement offences[33] – for example serial traffic infringements? Section 49(1)(c) is not confined to criminal conviction information.

[56] Fourthly, Mr Andrews submits that the Act contains detailed natural justice provisions that would apply if the Director proposes to take into account prejudicial information in making his "determination" or "assessment". He refers in particular to ss 10(5) - (7) and 11.

Analysis

[57] The Civil Aviation Act 1990 followed an independent report[34] commissioned by the Government of the day in 1988. The report recommended fundamental changes to the civil aviation regulatory regime. In short, it proposed a greater degree of self-regulation. The ensuing Bill adopted the core recommendations of the report. Government was to set safety standards, rather than "lean over the shoulder of everyone involved in the aviation industry".[35] The explanatory note to the Bill records that "the Ministry will carry out a monitoring function rather than an inspectorial function in relation to civil aviation", "the participants in the civil

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32 See [15(a)] and [36].

33 *Cooke v Auckland Transport* HC Auckland, CRI-2010-404-454, 20 June 2011 per Brewer J at [20].

34 The Swedavia-McGregor Report (April 1988).

35 Hon W P Jeffries, Minister of Civil Aviation, (20 March 1990) 506 NZPD 1069 (first reading debate).

aviation system will be primarily responsible for ensuring their own compliance" and that "applicants for certain civil aviation documents will have to satisfy a 'fit and proper person' test". As to what is now section 10, the note records it to set out the criteria to be met by applicants for certain civil aviation documents.

[58] A much-reduced level of Government inspection and supervision was therefore intended: the Government would set safety standards, and monitor compliance by direct inspection or by audit.[36] As the Minister put it, when introducing the Bill:[37]

> As proposed by the Swedavia-McGregor report, and set out in the Bill, the Government will have three main roles in civil aviation. First, it will control entry to the civil aviation system through the use of certificates, licenses, and other documents to appropriate standards that emphasise high levels of safe performance. All licensing and certification decisions of that kind will be open to appeal through the court system. The new procedures that are already being developed for pilot licensing emphasise the importance of safety practices as well as detailed technical knowledge. In particular, aviation organisations will be required to develop, as part of their approval procedures, documented safety management procedures that comply with the aims of the basic safety rules.
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> Once participants are in the aviation system the government's role will be to monitor their operations in that system. That is the principle of safety audit. Once operators – whether they be clubs, maintenance engineering organisations, or airlines – have appropriate management systems, they will be responsible for safe operations, which will be suitably audited at appropriate intervals. If such monitoring shows that a system is functioning properly and is maintaining safety, no further action will be required. There will be no endless checks simply for the sake of checking. Safety audits will be designed to ensure that individual and organisational responsibility for safety is reflected in high levels of quality management.
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> However, if monitoring identifies problems or potential problems, the Government must be able to respond in an appropriate way without undue delay.

[59] I am alive to Lord Steyn's caution that a Minister's words are in a sense just the executive telling the legislature what the former thinks.[38] But New Zealand has generally taken a more liberal view of the receipt of extrinsic materials in the

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36 Hon W P Jeffries, (24 July 1990) 509 NZPD 3105-06 (second reading debate).

37 506 NZPD 1069-70.

38 Lord Steyn, "Pepper & Hart: A Re-examination" (2001) 21 OJLS 59.

construction of statutes[39] and contractual instruments[40] than have judges of the United Kingdom. What the Minister says is relevant, and indicative of the purpose of the governing party at least. It is not, of course, determinative in any way. The Court's task remains to ascertain the meaning of a provision from its text, and in light of its purpose and context.[41] In this case the Minister's speech reinforces contextually the evident textual emphasis of the new Act on close control of entry into the civil aviation system, with audit and monitoring processes to identify non-compliance thereafter.

[60] That being said, the core purpose of the Act is the promotion of civil aviation safety.[42] It would not be consistent with that purpose for the twin duties of pilots to maintain fitness and disclose relevant information, imposed by ss 9(3) and 49(1)(c), to be marooned, shorn of effect. Such might be the case if compliance cannot be checked. There is statutory utility in the Director being able to review compliance.

[61] But the issue is whether s 10(3), via an intermediate determination of fit and proper person status, is a permissible mechanism to secure that purpose. There are other mechanisms available. The pilots concede that that is so. The power to require inspections or monitoring under s 15 itself provides a discipline, if that power is exercised. Moreover, the origins of the Act suggest that an expansive view of regulatory function was not in Parliament's collective mind.

[62] Turning from purpose to text, consistent with the Bill as introduced, section 10 is within Part 1 of the Act. The heading of Part 1 is "Entry into the civil aviation system". Section 5(3) of the Interpretation Act 1999 repeals the former prohibition against reliance on part headings. Part headings can be an indication as to meaning, and the inclusion of s 10 in Part 1 under that heading suggests at least an early, rather

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39 See for example *Marac Life Assurance Ltd v CIR* [1986] 1 NZLR 694, 701.

40 For example in receiving parol evidence of negotiations: *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (SC); cf *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 (HL).

41 Interpretation Act 1991, s 5(1); *R v Secretary of State for Environment, ex parte Spath Holme Ltd* [2001] 2 AC 349 (HL), 392 per Lord Bingham.

42 See for example, the title to the Act, and ss 72AA and 72B(2)(a).

than a continuing, temporal focus.[43] The point cannot be taken too far; obviously s 9(3) contains a continuing duty that runs for the life of the licence. So does s 8(3).

[63] The defendants' argument is dependent on the Director seeking the criminal record information as part of, and for "the purpose of determining whether or not [the pilot] is a fit and proper person for any purpose under this Act". In my view the words "for any purpose under this Act" relate to the pilot's fitness, rather than the Director's determinative process. It is, literally, the pilots' "fitness for purpose" which is the issue in section 10(3). The formula is repeated elsewhere in the Act. See for example s 10(1) and 11(1) (the definition of "adverse decision"). The latter in particular confirms the words "for any purpose under this Act" relate to the pilot's fitness.

[64] Looking at the text more generally, the scheme of the Act is that pilots make a single application for a licence. The licence does not need to be renewed unless something interrupts its continuity.[44] The same licence obtained at age 20 may still be held at 60. The applicant must satisfy the "fit and proper person test". On the face of the Act, they are tested once – when they submit their application. With it must go a "Fit & Proper Person Questionnaire", the general authority for which is found in s 8(1). The questionnaire contains a good deal of information, and includes consent to further investigation. The Director then makes a determination as to whether the applicant meets the test. Satisfaction is a *sine qua non* for licensing. Thereafter the licensed pilot must continue to satisfy the test. But there is no new form to fill in. Just the continuing disclosure duty interred in s 49(1)(c). There is no need to remake the determination.

[65] The single assessment of fitness contemplated under ss 9 and 10 is to be contrasted with medical certification under Part 2A. As noted above,[45] airline transport and commercial pilots' medical certificates have a maximum duration of

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[43] See Burrows & Carter, *Statute Law in New Zealand* (4th ed, Lexis Nexis, Welington 2009) 237–238.

[44] This was a change introduced by the Act. Prior to 1990 pilots' licences had to be renewed periodically. The "non-terminating" licence approach had worked satisfactorily in the United States for some years and was adopted in the 1990 Act.

[45] At [31].

six months or one year, depending on age. An explicit updating obligation is imposed on pilots to disclose changes "in … medical condition … that may interfere with the safe exercise of … privileges".[46] Alcohol and substance abuse-related convictions are required to be disclosed by way of an administrative requirement, and statutory authority for that requirement appears to exist.[47] Investigations (including as a result of random monitoring) are provided for, as is suspension and revocation of medical certificates.[48] The significance of this is simply that intermediate review of status is provided expressly in the case of medical certification, unlike the determination of fitness.

[66] There is a measure of formality in the determination of fitness made on application for a licence. Apart from the material proffered by the applicant, and the consent given to further information-gathering, there is a panoply of protections dictated by the Act. Potentially prejudicial information must be disclosed to the applicant, and an opportunity to respond given.[49] Any proposed determination that an applicant is not a fit and proper person is subject to a duty to disclose proposed grounds, and the right to make both submissions and to appeal.[50] The processes are different from those applying to a Part 2 determination (under sections 17 – 19), and the protections given under s 19 also differ from s 11.[51]

[67] What, then, happens if the licensed pilot errs from the true path of righteous aviation and incurs a significant conviction for, say, excess breath alcohol while ground borne? The answer is that s 17 – in Part 2 – then applies. If the pilot has declared the conviction, it is a s 17(1)(b) matter. If not, s 17(1)(c). The Director then acts under ss 17 and 19. If the Director considers the erring pilot's conviction means he or she can no longer be seen as compliant with licence conditions or s 12 (and thereby s 9(3)), the Director makes a decision under s 19(2). It is now a

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46 Section 27C(1).

47 See [36].

48 Sections 27H and 27I.

49 Section 10(5). If information is not disclosed for security reasons, review procedures under the Privacy Act 1993 or Official Information Act 1982 are to apply: section 10(7).

50 Section 11(2).

51 Although ss 11 and 19 have many features in common, the core difference is that a Part 2 decision may take effect ahead of the opportunity to make submissions: s 19(5).

question of whether modification, suspension, or revocation[52] is necessary in the interests of (aviation) safety.[53] There is no suggestion the Director must first make an intermediate redetermination of fitness under ss 10 and 11 in Part 1. The procedure is not a dual one, and the protections in ss 11, 17(7) and 19, while broadly consistent, are not identical.

[68] It seems to me improbable that Parliament intended a distinct intermediate fitness assessment in the manner the defendants contend for. Such a determination would be comparable in some respects with medical certification. But it would be irregularly initiated – depending on whether the pilot disclosed a material conviction (or other relevant non-conviction information), or the Authority discovered that the pilot had failed to do so. Doing so involves revisiting a status previously declared, and in which the pilot can be said to have a vested interest.[54] No such redetermination or revisitation is provided for on the words of the Act. No formal disclosure process by the pilot would precede it, unlike under s 9. Fertile scope would exist for dispute over whether the conviction (or other information) indeed should have been disclosed, and (once disclosed) constitutes unfitness.[55] Then there is the difficulty associated with dualism: the intermediate determination would seem to invoke the s 10(5) and 11(2) disclosure and response rights before the Director could make a determination of unfitness. That determination would then be subject to appeal, presumably.[56] And then, having made that further determination, this time of unfitness, the Director may suspend under section 17(1)(b). With the result that the section 19 protections would then apply. Thought through, the defendants' argument creates more problems than it appears to solve.

[69] The defendants placed some reliance on s 16(2) of the Interpretation Act 1999. That provides that a duty or function imposed by an Act may be performed from time to time. Mr Andrews suggested that this meant the power in s 10(3) might

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52 If the prerequisite of an investigation has occurred: s 18(1).

53 Sections 17(1) and 18(1).

54 See [69].

55 That issue of course will also confront the parties under s 17(1)(b).

56 Although s 11(6)(b)(iii) contemplates appeal rights only where an application is not granted, the Director maintained in his submissions before me that the s 11 protections would apply to the contended-for intermediate determination.

thus be exercised from time to time. Section 16(2) reflects a long-standing common law rule of statutory interpretation. As McGrath J noted in *Zaoui v Attorney General*[57] the provision (and common law rule) has limited effect in situations where exercise of a power creates vested rights. It is first and foremost a question of construction as to whether the provision creates a continuing power or one which, once exercised, depletes. Where the exercise of the power creates rights upon which citizens rely, a Court is more likely to find the power a depleting one. In the present case, the process a pilot must undergo in order to be found to be a fit and proper person is extensive. The consequence is that, subject to continuing medical certification, the pilot is permitted to fly. That creates a right of both recreational and economic value. It is not my reading of s 10 that it contemplates that decision being revisited by the further exercise of the power in s 10(3) – which is first (and in my view only) exercised on the pilot's submission to the test at the time of formal application for grant or renewal of a licence.

[70] As I have already noted, Parliament cannot have intended a dual determinative process, under Part 1 (s 10(3)) first, and then Part 2. If an issue as to post-licence unfitness arises, then that is a matter to be dealt with under Part 2, as I have described in [67] above. There is no need for the additional, unexpressed intermediate determination contended for by the defendants. The real rationale for the contention is to enable information-gathering. But that is to put the cart before the horse. And it is unnecessary, given the powers in ss 7 and 15, and the existing ability to access alcohol and drug-related criminal record information.[58]

[71] In my view, therefore, the "fit and proper person" determination contemplated in section 10(3) occurs only when there is an application for grant or renewal of a licence. The Act does not contemplate an intermediate determination as to fitness postdating grant of the licence applied for (other than on a renewal application). Nor does such a determination occur where a Part 2 decision is being made as to whether to initiate a "for cause" investigation under s 15A(1)(a) or to suspend or modify a licence under s 17(1)(b) or (c).

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57 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [52].

58 See at [13]–[15].

[72] In other words, of the four potential determinative events identified in [41] above, only the first is legitimate.

Collateral purposes

[73] As noted earlier,[59] the express scope for which the information was sought by the Director goes well beyond the determination of whether a pilot remains a fit and proper person. Explicitly it extends also to the current status of a pilot's medical certification, and the basis on which it was obtained. Mr Harrison submitted that the defendants were seeking to utilise s 10(3) to review or "monitor" medical certification status, despite the express provisions in relation to monitoring of and obtaining information from medical certificate holders conferred on the Director by Part 2A of the Act.

[74] It is clear that the existence of a collateral purpose does not invalidate the exercise of a statutory power, so long as the power is exercised primarily for proper purposes contemplated by the Act. Common law has long recognised that the possessor of a statutory power may do other things fairly incidental to express purposes.[60] In *Attorney-General v Ireland*[61] the Court of Appeal made clear that if the additional purpose, however, "ran counter to", "thwarted" or "circumvented" the proper statutory purpose, a reviewable illegality could arise. To that list could be added the word "subvert". That is, where the official authorised purpose is really window-dressing for other unauthorised purposes, which are the dominant purpose for the administration action concerned.

[75] In the present case, it is perhaps arguable as to whether the additional purposes identified in the memorandum[62] are so extensive as to circumvent or subvert the proper purpose. But the issue is academic, because no proper purpose existed in the first place. If, as I find, the power in s 10(3) is effectively spent once the licensing application is processed and granted, it is immaterial what other

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59 At [20].

60 *Ashbury Railway Carriage & Iron Co Ltd v Riche* (1875) LR 7 HL 653 (HL); *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473 (HL).

61 *Attorney-General v Ireland* [2002] NZLR 220 (CA).

62 At [20] above.

purposes (such as using the information obtained to review medical certification) existed and how dominant they were in the administrator's mind. The relevance of those collateral purposes would have been to drag down an otherwise valid purpose, bearing in mind also the context of s 7(1) of the Privacy Act 1983, which commands a conservative approach to collateral purpose. Here, in the absence of a valid purpose in the first place, it is all beside the point.

Issue 2: Would the release of the criminal record information (if authorised by s 10(3)) nonetheless breach pilots' rights under the Privacy Act 1993?

[76] I have concluded that s 10(3) does not authorise the Director to obtain or use pilots' criminal record information for the purposes contemplated by the February 2011 memorandum entered by the Authority and the Ministry. The defendants accept, also, that none of the express exceptions to Principle 11 in the Privacy Act 1993 apply here.

[77] As Mr Harrison acknowledged, these two premises make the second issue "academic". The consequence of my finding on the first issue, in combination with the defendants' concession, is that procurement of pilots' criminal record information by the Authority under the memorandum entered with the Ministry would breach pilots' rights under the Privacy Act 1993.

[78] It is not necessary for me to consider the pilots' further argument that s 10(3), if it "authorises" the Director to obtain (and use) the information, does not however authorise the Ministry to release it. There is good sense in a submission that section 7(1) is directed at the holder of relevant personal information, rather than the agency seeking to access it. But inasmuch as I have held that s 10(3) does not authorise the Director to seek the information in the first place, the issue is moot.

Issue 3: Does the proposed random sampling scheme breach pilots' rights under the New Zealand Bill of Rights Act 1990 - in particular s 21's prohibition against unreasonable search and seizure?

[79] Absent my finding on the pilots' primary illegality argument, this case had raised a finely balanced issue as to whether the Director's action in obtaining criminal record information from the Ministry amounts to a search or seizure for the purposes of s 21 of the New Zealand Bill of Rights Act 1990. There is a yet-undetermined issue as to whether s 21 applies to non-law enforcement activities. The leading academic authorities are split. The two Drs Butler would restrict s 21 to law enforcement activities only.[63] In part their reasoning rests on Richardson J's conclusion, in *R v Jefferies* that the Act does not give a general guarantee of privacy.[64] On the other hand, Mr Scott Optican considers that:[65]

> [T]he plain terms of s 21 do not limit it to government searches and/or seizures conducted only in relation to some type of criminal offending. Nor is there any particularly good reason to limit application of s 21 in such a way.

[80] In *R v Ngan*[66] police officers had been called to a motor accident. First, they rescued Mr Ngan from his vehicle, which was inverted, and sent him off to hospital. Then they set about gathering up the contents of the wrecked car, some of which had scattered out onto the road. There was rather a lot of cash lying around; almost $10,000 in fact. There was also a sunglasses pouch on the road. When opened it proved to contain drugs. The trial Judge accepted it had been opened simply to confirm its contents for the record. Mr Ngan said it was an unlawful search for the purposes of s 21, and that the evidence of the drugs being found should be excluded. When the case reached the Supreme Court, McGrath J indicated that he would not limit s 21 to criminal investigative activities only. To do so would exclude "situations where the state undertakes examinations and investigative activities of a

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63 Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis, Wellington, 2005) at 543 to 544.

64 *R v Jefferies* [1994] 1 NZLR 290 (CA) at 301.

65 Rishworth, Hushcroft, Optican and Mahoney, *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 419.

66 *R v Ngan* [2008] 2 NZLR 48 (SC).

kind that significantly intrudes physically on private zones, albeit for purposes other than gathering evidence".[67] But after careful analysis of the facts and authorities, he concluded that merely taking stock of property scattered about an accident scene was not a search at all in terms of s 21. Tipping J, on the other hand, expressly left that aspect open, principally because the Crown had not argued that it was not a s 21 search.[68] The majority (including, for this purpose, Tipping J) treated the opening of the pouch as a search, but one that was both lawful and reasonable.[69] The police action clearly was not undertaken in the course of a criminal investigation. The case can therefore be seen to support the Optican, rather than Butler, view.

[81] A further issue that would have arisen in the present case is the extent to which s 21 applies to remote accessing of documentary records. Such access does not involve intrusion into a citizen's tangible property interests, but may well involve (as this case does) the obtaining of "personal information" in terms of the Privacy Act 1993. The Privy Council was "content to assume" that the Commissioner of Inland Revenue was conducting a s 21 search when requesting trading information from the New Zealand Stock Exchange under a statutory power.[70] That case, and others involving remote telecommunications interception,[71] involve the provision of information under direction (i.e. an actual or apparent search or interception warrant). It is less clear what the position is where the information is supplied voluntarily upon request (albeit one underpinned by actual/or purported statutory authorisation).[72]

[82] These are issues that Courts will have to grapple with at some point. It is more appropriate that the arguments are tested and weighed in a context in which the Court's conclusion is not mere obiter dicta. I do not propose to rush in where the

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67 At [110].

68 At [41]. The report may thus be in error in suggesting otherwise: [2008] 2 NZLR 48, 53 at lines 25-26. Tipping J also indicated that his stance should not be construed as suggesting "any particular attraction" for the view expressed by McGrath J.

69 At [22].

70 *New Zealand Stock Exchange v CIR* [1992] 3 NZLR 1 (PC).

71 *R v Javid* [2007] NZCA 232; *R v Te Kahu* [2006] 1 NZLR 459 (CA); *R v Cox* (2004) 21 CRNZ 1 (CA); *R v Zutt* (2001) 19 CRNZ 154 (CA).

72 See *R v Javid* [2007] NZCA 232 at [45(c)].

Supreme Court has opted not yet to tread. No further factual finding is needed of me in my capacity as trial Judge. Mr Harrison accepted that, were he to prevail on the first issue, I should not rule on the third issue. He has, and I do not.

Disposition

[83] There will be judgment for the plaintiff.

[84] A declaration is made that the random sampling of pilots' criminal record information, undertaken in accordance with the memorandum entered by the Authority and the Ministry in February 2011, is unlawful.

[85] An order is made prohibiting the defendants from continuing to engage in random sampling of pilots' criminal record information in accordance with the memorandum entered by the Authority and the Ministry in February 2011.

[86] The plaintiff is entitled to costs. The parties have 15 working days to reach agreement. Absent agreement, the plaintiff is to file a memorandum within 10 working days. The defendants will have 10 working days to respond.

[87] I remind the parties, and any reader of the last section alone of this judgment, that my finding does not necessarily mean that the Authority and its Director are prohibited from obtaining access to pilots' criminal record information. They are entitled already to access pilots' criminal record information relating to alcohol or substance abuse convictions. Other statutory mechanisms exist to obtain a wider range of criminal record information.[73] What my judgment holds is that the defendants are prohibited from using s 10(3) of the Act for that purpose, once a pilot is duly licensed.

Stephen Kós J

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[73] See [13]–[15] above.