NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2017] NZLCDT 20

LCDT 013/17

IN THE MATTER of an Appeal under s 42 of the Lawyers and Conveyancers Act 2006

BETWEEN **ABHAY KUMAR SINGH**

Appellant

AND **THE NEW ZEALAND LAW SOCIETY**

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms C Rowe

Mr T Simmonds

Mr W Smith

Mr I Williams

HEARING at Auckland

DATE 24 August 2017

DATE OF DECISION 4 September 2017

COUNSEL

Appellant in person

Mr P Collins for the respondent

RESERVED DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING AN APPEAL UNDER S 42 OF THE LAWYERS AND CONVEYANCERS ACT 2006

Introduction

[1] This is an appeal against the refusal to issue a practising certificate to the appellant. Such decisions are made by the Practice Approval Committee (PAC) of the New Zealand Law Society, which declined the appellant's application on 4 April 2017. Advice of the decision of PAC was given to the appellant by letter of 6 April 2017.

[2] The appellant filed an affidavit in support of his appeal and was cross-examined on it before the Tribunal. The appellant called Gabor Cseh as a witness at the hearing. The witness is a neighbour of the appellant living in Kingston, Queensland. He gave evidence about his friendship with the appellant. He said that he did not know much about the problem the appellant faced in Fiji which led to the appellant's striking off the Roll of lawyers in Fiji. He has assisted the appellant with the running of a takeaway business in Queensland.

[3] The Tribunal finds that it is not assisted by Mr Cseh's evidence. He is not able to provide any insight into the appellant's practice as a lawyer or provide any relevant information that would assist the Tribunal to reach a decision on the appeal.

[4] The respondent filed two process affidavits by Sarah Inder who is the Regulatory Solicitor and Secretary to the PAC. She was not required for cross-examination.

Statutory Provisions

[5] The statutory provisions relating to this appeal are ss 41, 42 and 55 of the Lawyers and Conveyancers Act 2006 (the Act).

[6] Section 41 sets out the powers that the Society has to refuse to issue a practising certificate.

[7] Section 42 confers the right that a person has to appeal to the Tribunal against a decision declining to issue a practising certificate.

[8] Section 55 specifies the matters that may be taken into account in determining whether or not a person is fit and proper to hold a practising certificate.

[9] It is accepted that this appeal is dealt with by way of a hearing *de novo:*

> "….. As a result, it is the Tribunal's duty in such cases to reach its own independent findings and decision on the evidence which it hears or admits and while entitled to give such weight as appropriate to the opinion of the [respondent Law Society], it is in no way bound thereby. In brief, in a section 42 appeal, the Tribunal does not see that there is any presumption in favour of the decision under appeal. It considers that the Tribunal has to approach the matter afresh."[1]

[10] As will be apparent from the background facts this appeal is in the nature of a restoration application. The provisions of s 246 of the Act become a relevant consideration. The appellant has the onus of persuading the Tribunal that he is a fit and proper person to be readmitted to the legal profession.

Factual Background

[11] The appellant is 60 years old. He is a Fiji citizen and holds Australian Permanent Residence. He joined the Fiji Police Force in 1976 and rose to the rank of Police Sergeant. He served as a criminal investigator; special branch; police prosecutor; and was a lecturer at the Police Academy.

[12] He holds a diploma in law obtained from the University of South Pacific in 1990. He has an LLB gained from the University of Waikato in 1994. He graduated Master of Laws in Commercial Law from the University of Queensland in December 2004.

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[1] *SNH v New Zealand Law Society* [2009] NZLCDT 2 at [27].

[13] He was admitted to the Bar in New Zealand in June 1995. He practised in New Zealand from then until August 1996 when he returned to Fiji. He remains on the Roll of Barristers and Solicitors of the High Court of New Zealand. He was also admitted as a lawyer in Tasmania, Queensland and Fiji. He was a Notary Public in Fiji.

[14] On 24 July 2003 the appellant was charged by the Fiji Police with three counts of perverting the course of justice. He eventually pleaded guilty to one charge on 25 October 2006 and was convicted. Between the date of the charges and the date of the guilty plea, the appellant engaged in civil actions, appeals, applications seeking "constitutional redress", and delays in the criminal proceedings some of which were caused by the appellant and some caused by overruns in the court.

[15] The facts of the appellant's offending are not disputed and have been summarised by counsel for the Society. They are:

(a) The appellant was counsel for a criminal accused named Khan, due to go to trial on a corruption charge on 24 July 2003. Mr Khan was a public clerk described as a Land Transport Officer, dealing with the registration of motor vehicles. He was charged with "corruptly seeking" a payment from a Mr Narayan, for the registration of his second-hand car. It was said that Mr Narayan was asked for a $200 payment by Mr Khan.

(b) On 22 July 2003, just before trial, Mr Narayan told an investigating officer that he had been approached by the appellant. This was taken to mean that he had been approached to change his evidence against Mr Khan. At the request of the Police and on the advice of the Director of Public Prosecutions, Mr Narayan agreed to meet with the appellant again with a (presumably concealed) recording device.

(c) Mr Narayan met with the appellant on 23 July 2003. The two of them were travelling in a car together. The appellant counselled Mr Narayan to change his evidence. His earlier evidence was that Mr Khan had

taken $200 from him and placed it under a book that Mr Khan had pretended to read from a file in order to conceal his actions from another person who came into the office. Instead the appellant counselled Mr Narayan to say that he had hidden the money under a book or register because another person had come into the office and that he had never actually handed the money to Mr Khan. The appellant also counselled Mr Narayan to say that Mr Khan did not see him do any of this. That evidence, intended to be falsely given by Mr Narayan, went to the central issue of Mr Khan's culpability and whether he solicited the bribe.

(d) That was not all, because the incentive offered to Mr Narayan by the appellant was to participate in the fruits of a subsequent legal action the appellant intended to bring against the Police. From the context, this appears to have been an action seeking damages against the Police on behalf of Mr Khan, for malicious prosecution or similar.

[16] Following his conviction and sentence of 12 months imprisonment, the appellant appealed to the Court of Appeal of Fiji. The appeal was against both conviction and sentence. The Tribunal has read the full summary of facts recorded in the judgment of the Court of Appeal of Fiji and is satisfied that counsel's summary accurately captures the essence of the appellant's offending.

[17] The appeal against conviction was dismissed and the 12 months term of imprisonment was reduced to 6 months. The court in dismissing the appeal against conviction noted that the appellant had pleaded guilty on the agreed basis that he would appeal that conviction for the reason that the recordings of his conversation with Mr Narayan were inadmissible at trial. The appeal on that ground had earlier been refused as was an application for stay of proceeding.

[18] The appellant subsequently was granted leave to appeal to the Supreme Court of Fiji on the issue.

[19] The appellant completed his sentence on 2 July 2007. Having applied for a practising certificate, the Fiji Law Society refused to issue him a certificate. His

appeal to the High Court against the refusal was successful and he held a practising certificate for the years 2008 and 2009.

[20] On 25 January 2010, the Independent Legal Service Commission of Fiji convicted the appellant on two complaints. The first complaint of misconduct arose from his conviction in Fiji for attempting to pervert the course of justice. For that he was debarred for life. The second complaint related to the appellant's conflict of interest in acting for both parties to a land transaction. He was found guilty of unsatisfactory professional conduct and received a fine of $1,000.00.

[21] In the Fiji Court of Appeal, the period of debarment was reduced to 10 years. On further appeal by way of leave the period of debarment was reduced to six years.

[22] The appellant was readmitted to the Fiji Bar on 16 May 2016 and has practised in Fiji under the name of A K Singh Law since then.

[23] The Queensland Law Society refused to renew the appellant's practising certificate in June 2008 having considered that he was no longer a fit and proper person to continue to hold a practising certificate. Its reasons for refusal were:

(a) His conviction for the offence discussed above; and

(b) That he had failed to disclose that offending in his application for renewal of his Queensland Restricted Employee Practising Certificate dated 25 May 2007.

[24] Proceedings were taken by the Legal Services Commissioner before the Queensland Civil and Administrative Tribunal (QCAT) to have the appellant's name removed from the Roll. The Commissioner relied on the grounds in para [23] above and on the additional ground that the appellant had not given notice of the conviction to the Queensland Law Society within seven days.

[25] The decision of QCAT delivered on 9 April 2013 was that the appellant's name be removed from the Roll. In reaching its decision the Tribunal noted that:

(a) The appellant had not, until his final submission after the hearing on 12 December 2012, said anything about remorse for or genuine insight into his conduct and then only in the context that there were '*special factors'* in his case which meant that he had '*proved his worthiness'* and had '*learnt his lesson' and 'proved that he had a clean record for ten years';*

(b) He had taken every conceivable avenue of appeal in relation to his criminal conviction and the disciplinary proceedings there. As well, he had raised every conceivable argument to contest the proceedings before it all of which were without merit.

(c) The appellant did not show that he fully perceived and had real insight into the seriousness of his offending and that the elements of the offending involved an attempt to gravely subvert the proper administration of justice.

[26] The appellant's appeal to the Court of Appeal Division of the Supreme Court of Queensland against the order removing his name from the Roll was unsuccessful. In its decision of 17 December 2013 the Court took into account the following matters:

(a) The serious nature of the original offence and that seriousness was compounded by the fact that it was committed by a lawyer.

(b) The limited weight to be given to the appellant's late expression of remorse.

(c) That lay references were of limited value in deciding the critical issue of fitness to practise and public protection.

(d) That the original offending was compounded by his failure to disclose it to the Queensland admitting authorities and by conducting himself in a way which displayed *'neither the insight nor remorse expected of a competent and ethical legal practitioner'.*

The application for a New Zealand Practising certificate

[27] The appellant made application to the New Zealand Law Society on 21 November 2016 for the issue of a practising certificate. He stated that he was seeking employment in New Zealand as a barrister and solicitor. In answer to questions relating to convictions for crimes and disciplinary action, the appellant stated in a letter of 15 November 2016 that he had a conviction in Fiji on October 25 2006 *'for an offence that occurred in 2003".* He did not provide any detail about the matter. He did state that he was debarred from practise in Fiji for six years ending on 24 January 2016 and that he had been readmitted as from 16 May 2016.

[28] He went on to state that his name had been removed from the Roll in Queensland by reason of the offending that occurred in Fiji. He was silent as to the matters of failing to notify the Queensland authority about that offending.

[29] The PAC declined to issue a practising certificate and advised the appellant accordingly by letter of 6 April 2017. Its reasons for doing so were:

(a) The fact that he was removed from the Roll of Barristers and Solicitors in Fiji (although now reinstated).

(b) That he is currently removed from the Roll of Barristers and Solicitors in Queensland.

(c) That, by taking into account the Trans-Tasman Mutual Recognition arrangement, it was not appropriate to issue him with a practising certificate in New Zealand while he remained removed from the Roll in Queensland.

Submissions

[30] The appellant made the following submissions in support of his appeal:

(a) That the respondent was wrong to rely on the fact of his removal from the Roll of the Queensland Bar.

(b) That his name should not have been removed from the Roll in Fiji as the relevant orders should have been suspended.

(c) That the PAC failed to consider his present status in Fiji as a Barrister and Solicitor which confirms he is a fit and proper person from the year 2016 and that this Tribunal should now do so, it being required to look at the matter afresh.

(d) The decision of the Queensland Supreme Court confirming his removal from the Roll was made in December 2013 and that four years have elapsed since then.

(e) That the PAC failed to take into account the comments of the Supreme Court of Queensland about the possibility that he would one day be capable of restoration in that jurisdiction.

(f) That there was a failure to take into account that he was a Police Officer in Fiji before completing his law degree in New Zealand.

[31] The appellant was cross-examined by counsel for the Society and also answered questions from members of the Tribunal.

[32] He admitted and accepted that the summary of facts in relation to the offending in Fiji was correct. He described his offending as “one small thing” that he regrets. He said that it was one simple mistake. He emphasised that he had regret for the stupid thing he had done and which has ruined his whole life.

[33] The appellant, when pressed about his “recently discovered remorse” referred to in the decision of the Supreme Court of Queensland, acknowledged that he had been counselled to make an expression of remorse there having been told to “make a clean fist of it”. He said also that he had been firmly advised by his counsel in 2006 to finally plead guilty to the charge laid against him in 2003 and in respect of which he had exhausted all available remedies.

[34] The appellant was also questioned about his non-disclosure in his application to the Society of the full range of matters dealt with in Queensland and which led to his removal from the Roll. His answer was to the effect that the full detail was discoverable from the Court's decision. He had not made that available to the Society.

[35] The appellant admitted that he did not tell the Society about the matter of the land transaction referred to in para [20] above and for which a finding of unsatisfactory conduct was made against him. He also, after some pressing from the Tribunal, admitted that, in the civil proceedings he issued, he was seeking an award of damages in addition to a declaration that the evidence as to the recording of his voice was inadmissible.

[36] Counsel for the Society submits that the appeal must be dismissed. He has summarised his reasons as follows:

(a) The original offending was at the highest level of seriousness for a criminal defence lawyer, involving a grave betrayal of professional standards and of the appellant's status as an officer of the Court, striking at the heart of professional responsibility.

(b) His subsequent conduct is clear evidence of lack of insight and or genuine remorse.

(c) He is a peril to the public and the standing of the legal profession in New Zealand.

(d) He has repeatedly said the he will apply for restoration in Queensland and should do so first before being considered again here.

Decision

[37] The Tribunal accepts that this case resembles an application for restoration to the Roll under s 246 of the Act. The following principles stated in *Leary v New*

Zealand Law Practitioners Disciplinary Tribunal[2] are applicable. The High Court said in its judgment:

> "[42] Turning to the significant issues raised by this appeal, it is to be recalled that the pivotal question in a restoration application is whether, …..the applicant can satisfy the onus of persuading the Tribunal…….- that he is a "fit and proper person" to be admitted to the legal profession.
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> [43] Resolving that question necessarily, as the authorities show, requires the Tribunal to look forward in time and make a value judgment on that issue, drawing on evidence of an applicant's past actions.
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> [44] That exercise, too, necessarily requires an inquiry into the actions which led to the striking off, which, in its turn involves acceptance by an applicant that those actions occurred and that they transgressed the legal and ethical standards of the profession. Without recognising that the actions breached applicable standards and the consequences of the breach – particularly to the public; the Courts and to all practitioners – it would be difficult for the Tribunal to conclude the same actions would not be repeated should similar circumstances arise in the future."

[38] Based on the evidence before it, the Tribunal sees no reason to depart from the findings of the Queensland Court of Appeal as summarised in para [26] above. It agrees that the original offending was at the highest level of seriousness for a criminal defence lawyer.

[39] The equivalent legislation in New Zealand governing the appellant's offending is s 117(e) of the Crimes Act 1961. The penalty for such offending in New Zealand is liability to a term of imprisonment not exceeding seven years. That penalty needs to be contrasted against the penalty for such offending under the Penal Code of Fiji where it is specified to be a misdemeanour for which the penalty is imprisonment not exceeding two years or a fine of an unspecified amount or both.

[40] The Tribunal finds that it is proper to view the offence of perverting the course of justice by interfering with a witness and bribing the same more seriously than the Court in Fiji on this occasion.

[41] The Tribunal must look forward to make a value judgment on the issue as to whether the appellant is now a fit and proper person to be granted a practising

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[2] *Leary v New Zealand Law Practitioners Disciplinary Tribunal*, HC Auckland CIV 2006-404-7227.

certificate. In doing so it has regard to the offending; the actions of the appellant after that offending and the weight to be given to the appellant's expression of remorse for the offending.

[42] The Tribunal cannot disregard the appellant's protracted challenges to the original charge and that his admission of the charge came only after those challenges were exhausted. The admission was then only made in the context of being permitted to challenge the admissibility of the recording of his voice in the Supreme Court of Fiji.

[43] There is the additional concern that the appellant did not disclose to the Society in November 2016 the full range of matters dealt with by the Queensland Law Society which led to his removal from the Roll. His explanation for not doing so was that the Society could have found the information by reference to the decision of the Supreme Court of Queensland in December 2013. The Tribunal finds that explanation to be disingenuous.

[44] The Tribunal must evaluate the appellant's expression of remorse for his offending. The appellant told the Tribunal in his answers under cross-examination that his one simple mistake was a stupid thing that has ruined his whole life. The Tribunal finds that the appellant's expression of regret was focused on the effect his transgression eventually had only on himself. He did not display any true recognition of how that transgression inevitably affects the public perception of lawyers, thus making difficult any present-day judgement that he has changed such that he can be considered trustworthy in the future. This finding is reinforced when it is considered that his conduct continued over a period of years. It does not reflect acceptance or contrition. It supports the finding of the Queensland Court of Appeal that his remorse, to the degree expressed, was very belated.

[45] The appellant supplied references from legal practitioners in support of his appeal. The Tribunal agrees with the submission of counsel for the Society that they are largely ineffective. There is a lack of information given by the appellant to his referees about the history of his offences and a lack of knowledge of the pressures he is under from his present legal practice in Fiji.

[46] It was argued that the appellant should first apply to the Queensland authority for restoration to the roll because of the respect that should be shown to that jurisdiction because of the Trans-Tasman Mutual Recognition Act 1997. While that course may be desirable, the Tribunal does not consider it to be a necessary step. The appellant is on the Roll of barristers and solicitors in New Zealand. If he chooses to live in New Zealand, he is entitled to apply for a practising certificate. Whether or not a certificate is granted is another matter.

[47] The Tribunal has carefully considered the appellant's submissions but finds they do not address the pivotal issue of whether or not he is a fit and proper person to hold a practising certificate.

[48] The Tribunal concludes that that there is no evidence that the appellant is a fit and proper person to hold a practising certificate in New Zealand. It accordingly confirms the decision of the Society to decline the issue of a practising certificate to the appellant.

[49] The Society is entitled to its costs on the appeal. It is to file a memorandum in support within 10 working days from the date of this decision. The appellant is to respond to that memorandum within five working days thereafter.

DATED at AUCKLAND this 4th day of September 2017

BJ Kendall
Chairperson