ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF THE APPLICANT'S NEPHEW.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-574
[2014] NZHC 1141

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
AND	
IN THE MATTER	of EMMA MARION GIBBS Applicant
BETWEEN	NEW ZEALAND LAW SOCIETY Respondent

Hearing:	8 May 2014
Appearances:	D P H Jones QC & C S Morris for Applicant P N Collins for Respondent
Judgment:	27 May 2014

JUDGMENT OF KEANE J

This judgment was delivered by on 27 May 2014 at 4.30pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors/Counsel:
DPH Jones QC, Auckland.
Cook Morris Quinn, Auckland.
P Collins, Auckland.
New Zealand Law Society, Auckland.

[1] Emma Gibbs, a former police officer, applies for an order admitting her as a barrister and solicitor of this Court. The New Zealand Law Society has declined to give Ms Gibbs a certificate that she is a fit and proper person for admission and, as the law requires, opposes her application.

[2] Between September 2007 – August 2010 Ms Gibbs accessed the New Zealand Police national intelligence application database (NIA), in all 27 times, to check on the status of her former sister in law, M, and later that of two persons living at the same address as M, one of whom appears to have become M's partner.

[3] Ms Gibbs first accessed the database between 2007 – 2009 to discover whether there was substance to her brother's fear that his young son, who was in M's day to day care, might be exposed to methamphetamine use and perhaps manufacture.

[4] In November 2009, Ms Gibbs discovered that M was living with persons charged with, or recently sentenced for, possessing methamphetamine. Her brother was then applying to the Family Court to be granted primary care of her nephew, and she gave that information to his lawyer.

[5] After Ms Gibbs' brother obtained primary care in April 2010, and M was arrested and charged in May 2010 for methamphetamine manufacture and use, Ms Gibbs continued to access the NIA. She wanted to check the state of the criminal proceedings against M, and M's then partner. She also wanted to gain some sense when her brother's proceedings, which she was funding, were likely to end.

[6] In late 2009 or early 2010 Ms Gibbs or her brother filed in those proceedings a document referring in a summary way to the offending those living with M were then charged with, or had recently been sentenced for; and M later complained to the New Zealand Police. As a result, Ms Gibbs was subject in February 2011 to an internal police inquiry and found culpable of serious misconduct.

[7] Ms Gibbs was held to be liable to dismissal, but she was not dismissed. At her own request she was demoted from sergeant to constable. She took study leave

and in June 2013, after 18 years of service, she resigned hoping to pursue a career in law.

NZLS Committee decision

[8] On 12 June 2013 the NZLS Practice Approval Committee declined Ms Gibbs the certificate of character she had applied for, to be admitted as a barrister and solicitor, for three reasons essentially.

[9] First, the Committee found, Ms Gibbs had accessed the NIA to advance her family's interest and her own, in breach of the code of conduct of the New Zealand Police and of the rights to privacy of M and her two co-offenders.

[10] Second, the Committee found, Ms Gibbs' misconduct extended over a considerable time, three years, when she was of mature age and had been with the police for 15 years; and also that, when she accessed the NIA most intensively in 2009, she misled her immediate superior when asking for his consent.

[11] Third, the Committee found, when Ms Gibbs applied to the NZLS for a certificate of character, in order to be admitted as a barrister and solicitor, she was not at first candid with the NZLS, or with her referees. She minimised her misconduct.

Admission regime

[12] Under the Lawyers and Conveyancers Act 2006, the right to practise in and before any Court or tribunal is confined to barristers and solicitors of this Court; and this Court has exclusive jurisdiction to decide whether to grant a candidate for admission the status of a barrister and solicitor.[1]

[13] To secure admission Ms Gibbs had to qualify within the first category identified in s 49(2). She had to be amongst those candidates who:

> (a) have all the qualifications for admission prescribed or required by the New Zealand Council of Legal Education; and

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[1] Lawyers and Conveyancers Act 2006, s 48.

(b) are fit and proper persons to be admitted as barristers and solicitors of the High Court; and

(c) meet the criteria prescribed by rules made under s 54.

[14] To secure admission in the usual uncontested way, Ms Gibbs had also to obtain two certificates.[2] One was a certificate of completion from the New Zealand Council of Legal Education. As to that there was no issue. Ms Gibbs graduated LLB (Hons) in September 2013, she completed her professional legal studies, and she was granted that certificate.

[15] The other certificate was that in issue, a certificate of character from the NZLS, the effect of which under s 51(2) would have been, in the absence of proof to the contrary, that Ms Gibbs was to be deemed a fit and proper person to be admitted as a barrister and solicitor and to meet any further criteria prescribed by the rules made under s 54.

[16] If Ms Gibbs had obtained that second certificate, as well as the first, her admission as a barrister and solicitor would have been assured once she had taken the oath prescribed. Those certificates would have enabled this Court to be 'satisfied' that she was qualified for admission; and, once this Court was 'satisfied' as to that, it would have been obliged to make the order of admission she applied for.[3]

[17] As a result of not obtaining that second certificate, however, Ms Gibbs became obliged to apply for admission to this Court, on notice to the NZLS; and the NZLS became obliged to file and serve a notice of opposition supported by affidavit.[4] This Court then became obliged to determine her application at a contested hearing at which the NZLS was represented.[5]

[18] Neither the Act, nor the Rules, impose on Ms Gibbs any formal legal onus but, inherently, she does carry an evidential onus. This Court must be 'satisfied' that she is a fit and proper person to be admitted as a barrister and solicitor. It must

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2 Section 50; Lawyers and Conveyancers Act (Lawyers: Admission) Rules 2008, r 5(1)(a), (b).
3 Section 52(2).
4 Lawyers and Conveyancers Act (Lawyers: Admission) Rules 2008, r 64(a).
5 Rules 64(b); 8.

'make up its mind' that she is.[6] She must establish that she is both fit and proper to be admitted in the face of any evidence called for, or any submissions made by, the NZLS as contradictor.

[19] Under the statutory regime that used to apply an application for admission had to be supported by a certificate of character 'unless the Judge otherwise directed'.[7] That led Harrison J, in *Singh v Auckland District Law Society*,[8] to hold that admission without a certificate of character had to be exceptional and that a Judge, who decided such an application, had to give some weight to the NZLS decision to refuse a certificate.

[20] Under the law as it is now the NZLS's decision to decline a certificate of character triggers a contested hearing on the merits. That decision, in itself, is not under appeal or review. It remains relevant only as a precondition. The grounds on which a certificate was declined must, however, remain germane to the extent that they have merit.

[21] In this case, I should add, the Practice Approval Committee, which declined Ms Gibbs a certificate of character, convened by telephone conference and did not accede to her request to appear before it. I have had the advantage of evidence from Ms Gibbs and from others in her support; and I have seen her and her witnesses cross examined.

[22] Finally, if I do decide to accede to Ms Gibbs' application, I am only able to make an order admitting her as a barrister and solicitor if she takes the oath prescribed in my presence.[9] There must then be what is usually called an admission ceremony.

A fit and proper person

[23] Section 55 prescribes, without being exhaustive, 12 matters which the NZLS, in the first instance, or this Court if need be, may take into account when deciding

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6 *R v White* [1998] 1 NZLR 264 (CA); *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).
7 Law Practitioners Act 1982, s 46; Law Practitioners Admission Rules 1987, r 6.
8 *Singh v Auckland District Law Society* [2002] 3 NZLR 392 at [26](d) (HC).
9 Lawyers and Conveyancers Act (Lawyers: Admission) Rules 2008, r 8(2).

whether a candidate is a fit and proper person, the first of which is whether he or she is of 'good character';[10] an undefined term, which must speak for itself.

[24] The matter most directly in point, which the Practice Approval Committee evidently took into account when declining Ms Gibbs a certificate of character, is that set out in s 55(1)(g):

> whether the person—
>
> (i) is a subject of current disciplinary action in another profession or occupation in New Zealand or a foreign country; or
>
> (ii) has been the subject of disciplinary action of that kind that has involved a finding of guilty, however expressed:

[25] Another matter, which assists indicatively, and is consistent with the cases in point, is that set out in s 55(1)(c):

> whether the person has been convicted of an offence in New Zealand or a foreign country; and, if so,—
>
> (i) the nature of the offence; and
>
> (ii) the time that has elapsed since the offence was committed; and
>
> (iii) the person's age when the offence was committed:

[26] These prescribed matters are not determinative even when they are relevant. This Court, or the NZLS, may hold a candidate to be fit and proper even if one of these matters does apply, or the candidate does not satisfy any criteria the rules may prescribe.[11] Conversely, a candidate may be found not to be fit and proper, even though he or she falls outside the s 55 matters and the rules.[12]

[27] The issue whether a candidate is fit and proper, of necessity, must be considered more broadly; and on the fundamental basis stated by the Court of Appeal in the early case *Re Lundon*,[13] when it said this:

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[10] Lawyers and Conveyancers Act 2006, s 55(1)(a).
[11] Section 55(2).
[12] Section 55(3).
[13] *R v Lundon* [1926] NZLR 656 (CA) at 657–658; *Singh v Auckland District Law Society*, above n 8.

> The relations between a solicitor and his client are so close and confidential, and the influence acquired over the client is so great, and so open to abuse, that the Court ought to be satisfied that the person applying for admission is possessed of such integrity and moral rectitude of character that he may be safely accredited by the Court to the public to be entrusted with their business and private affairs.

[28] In *Re M* Panckhurst and Chisholm JJ identified four relevant considerations two of which especially apply in this case.[14] First, they said, 'the focus is necessarily forward looking'; adding, 'the function of the Court is not to punish the applicant for past conduct'. Fourth, they said, the focus must also be on 'the facts of the case in the round' and not just on the misconduct the NZLS has decided is disqualifying; in that case previous convictions.[15]

[29] A further factor is whether, as was said in *Re Owen*,[16] 'the frailty or defect of character indicated by … [the misconduct] can … be regarded as entirely spent', and 'safely ignored'. That calls for an assessment of the misconduct against the candidate's character generally, and his or her conduct since the misconduct.

NZLS submissions

[30] First, the NZLS contends, Ms Gibbs' misconduct in accessing the NIA 27 times between September 2007 – August 2010 was serious misconduct. Under the code of conduct binding Ms Gibbs she was only entitled to access the NIA, in the course of duty, and in the public interest. She accessed the NIA to serve her personal interest.

[31] Second, the NZLS contends, Ms Gibbs accessed the database, at a mature age and after many years experience as a police officer. In her later more intensive access to the database she had the rank of sergeant, or was about to assume that rank. She persisted when she must have been aware that her conduct was wrong.

[32] Third, the NZLS in its formal submission does not say, as the Practice Approval Committee did, that Ms Gibbs deliberately misled her superior in 2009 when she accessed the NIA most intensively. But it does continue to contend that

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14 *Re M* HC Christchurch M73/97, 19 June 1998.
15 At [21]–[23].
16 *Re Owen* [2005] 2 NZLR 536 (HC) at 543, [35]; *Re Burgess* [2011] NZAR 453.

she did not obtain from her superior his informed consent. In that sense he was misled.

[33] Fourth, the NZLS contends, less than four years have passed since Ms Gibbs' last access to the NIA in July 2010 and this Court cannot yet be confident that her misconduct can be safely ignored.

[34] Fifth, the NZLS contends, when Ms Gibbs applied, and secured references for her application, she was less than candid. She minimised her misconduct by stating that it was confined to September – December 2007. It extended until 2010, and she accessed the NIA most intensively in November 2009 and passed on information to her brother's lawyer.

[35] Sixth, the NZLS contends, if Ms Gibbs were admitted as a barrister and solicitor she might misuse, for personal advantage, privileged information confided to her by her clients. That is, and has to be, the NZLS'S ultimate concern; and, against that concern and the others the NZLS advances, I turn to her misconduct.

Candidate's misconduct

[36] On 3 September 2007 Ms Gibbs' brother telephoned her. He and M had separated two years before and their young son, then aged three, was in M's primary care. He was living in a nearby city and only had contact with his son every second weekend. His concern was that M might be using drugs and exposing his son to risk.

[37] Ms Gibbs, a police prosecutor in Auckland, accessed the NIA that day. What she obtained, if anything, is not clear. M was not then, apparently, charged with any offence. Nor apparently was anyone then living with her. But Ms Gibbs emailed a police sergeant in the town where M was living and asked that her brother's concern be investigated. That apparently came to nothing.

[38] On 4 December 2007 Ms Gibbs' brother again contacted her and again she accessed the NIA without any apparent result. This time she wrote to the Children Young Persons and Their Families Service, on police letterhead, stating her brother's concern that M appeared to have begun to use methamphetamine. M had lost her

fulltime job. She had suffered a sudden loss of weight. She had bad skin and she was sleeping for long periods throughout the day.

[39] In that CYPFS referral Ms Gibbs also said, again relying on what her brother had told her, that her young nephew no longer went to day care. That had abruptly stopped. He suffered eczema which required daily treatment. He had red and raw cuts and welts on his legs. Her brother taken him to the after hours emergency clinic for treatment.

[40] Two days later Ms Gibbs spoke to a youth aid officer in M's town, who agreed to visit M. He reassured Ms Gibbs that she need not have any concern about her nephew's safety. She was very relieved. But when she asked him to advise the CYPFS that he had visited M and what his findings were, he did not think that called for. This concerned her. It was a departure from usual police practice in care and protection cases.

[41] On 10 November 2008 Ms Gibbs accessed the NIA a third time. She cannot now recall why. But she believes that her brother must have remained concerned about her nephew. Then, on 19 November 2009, her brother telephoned her a fourth time, in a very distraught state. He told her that M was almost constantly in a drug induced state, that she was neglecting his son, and that his son was at risk.

[42] Ms Gibbs rang M and spoke to her for 50 minutes. M did not deny that she was using P frequently and said that she was in a 'bad situation'. She said that she wanted to change her life but was unable to. But when Ms Gibbs offered to visit her M insisted that she not come to the house, and brought the call to an abrupt halt.

[43] This convinced Ms Gibbs that her nephew was at risk and she spoke briefly to her then supervisor. She told him she intended to access the NIA about a child within her family, and to make a CYPFS referral. Her evidence was that he gave her his consent. He knew she had been a youth aid officer for nine years and that care and protection remained an aspect of her work. She assumed he trusted her. In retrospect she accepted that she did not give him and full and detailed account or

explore with him whether her concerns could be met by other officers in the course of their duty.

[44] In the NIA search Ms Gibbs made that day she discovered that two men living at M's address were either charged with or had been recently sentenced for possessing methamphetamine. Over the next two – three hours she accessed the NIA as it related to them and to M. That day also she wrote a second letter to CYPFS, stating that as a youth aid officer of ten years experience she believed her nephew was at risk.

[45] Ms Gibbs explained that her nephew was not attending school regularly and, when he did, he invariably arrived very late. Her nephew, she said, had described being often shut in a room for long periods while his mother smoked and slept. Her nephew had said that he did not have a bedroom and slept on a couch in the lounge. He disliked one of the men at the address, perhaps M's then partner, who called him 'teko', which translates to 'shit'.

[46] Ms Gibbs attached to that referral the material aspects of the offence histories of the two men living with M, which she had abstracted from the NIA that day. M's then apparent partner had extensive previous convictions, amongst which there were 14 for possession of all three classes of prohibited drugs, and of utensils. He had a recent conviction for possession of methamphetamine.

[47] On 20 November 2009 Ms Gibbs again accessed the NIA and then sent an email to CYPFS. She said that for the next two weeks her nephew would be safe because he would be with her brother or mother. She asked CYPFS to support her brother's application in the Family Court for primary care of her nephew, until M recovered.

[48] On 23 November 2009 Ms Gibbs again accessed the NIA and on 25 November 2009 sent an email to her brother's lawyer attaching the two CYPFS referrals. She did so, she said, in confidence. But the lawyer included in a document filed on behalf of Ms Gibbs' brother a summary reference to the charges the two men living with M then faced or had recently been sentenced for.

[49] In April 2010 Ms Gibbs' brother obtained primary care of his son but M continued to have fortnightly weekend contact until 10 May 2010 when she, and it seems her then partner, was arrested and charged with methamphetamine manufacture and use. As Ms Gibbs says she discovered from Fairfax NZ News On Line, and her brother verified, they had manufactured at the house and at a commercial building containing up to $400,000 worth of chemicals and equipment.

[50] On 10 May 2010, the day of M's arrest, Ms Gibbs accessed the NIA and she also did so on 17, 21 and 23 June, in that last instance four times. She accessed it finally on 11 July 2010. She says that she wanted to know how far the charges against M and the others involved had advanced. She was also concerned that the Family Court proceedings had still to conclude and she was funding her brother.

Disciplinary decision

[51] In a letter, dated 19 April 2009, the officer responsible for deciding whether Ms Gibbs was liable to dismissal wrote to her a letter in which he said this:

> I recognise the fact that you were driven by the protection of a child and have accepted your responsibility. I recognise from Dr Murray's report that you were under pressure and you are unlikely to repeat such an error. I also note your supervisor is highly supportive and, should the decision not be dismissal, the Prosecutions service would work with you constructively.
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> However, your actions were not a simple mistake in the heat of the moment and even recognising that not all your actions may have been measured, you had opportunities to attempt to use appropriate processes. … Your actions undermined the constabulary office of Youth Aid colleagues, particularly in not contacting Hamilton Youth Aid around November 2009.
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> I recognise that, with regard to the rationalisation of your actions, this may not have been to deceive the employer, but I cannot ignore the fundamental breach of the employment relationship which resulted from the public disclosure of highly sensitive Police information. Although you were motivated to protect a child, this was a member of your family and was a conflict of interest.
>
> Accordingly, although I have sympathy with the situation and the concerns that you held for your nephew over a period of time, I confirm that the appropriate outcome in all the circumstances should be dismissal.

[52] The officer concluded this letter by saying that he would not recommend that Ms Gibbs be dismissed until he had her further submission. She was not dismissed.

She was demoted from sergeant to constable and granted leave without pay to pursue her law degree. On her return she was to be confined for the first 12 months to a limited role within the prosecution service, and from that date also to be subject to a final warning for two years.

Conclusions

[53] Ms Gibbs' referees, those who have known her from an early age as family and school friends, and those in the New Zealand Police, are unanimous in their opinion that she is a person of complete integrity. They describe her as forthright, honest and compassionate. I accept their assessment. The issue remains whether Ms Gibbs' conduct within the police was so serious as to disqualify her from admission.

[54] Ms Gibbs' access to the NIA in 2009 – 2010 to pursue her personal inquiries was under the code of conduct to which she was then subject, serious misconduct in itself. She also accessed the NIA under a manifest conflict of interest without her superior's informed consent and without discussing with him a more orthodox police response. Potentially, if not actually, she brought the police into disrepute. She could have damaged their relationship of trust and confidence with the community.

[55] As against that, as the police decided, Ms Gibbs accessed the NIA out of a genuine and, as it turned out well founded, concern for her nephew's safety. She acted, as she would have, had she been investigating any care and protection issue. The two CYPFS referrals were in that sense conventional. Divulging those referrals to her brother's solicitor was less excusable. But her intent then was still to ensure that the risk to which her nephew was exposed was fully understood.

[56] In deciding not to dismiss Ms Gibbs for serious misconduct, the police appear to have accepted, as I do, that she made an uncharacteristic but very serious error of judgment, blinded by her concern for her nephew's safety; and that is the way in which her conduct was characterised at the time by Dr Murray, the psychologist, whose opinion then was evidently taken into account in the decision ultimately taken.

[57] I am also satisfied that Ms Gibbs did not, as the Practice Approval Committee decided she did, deliberately mislead her supervisor in November 2009 when she accessed the NIA most intensively. The inquiring officer appears only to have spoken to her about this. He appears not to have spoken to her superior. Her fault lay, he found, in failing to explain fully to her superior why she needed to access the NIA herself and why there could not or should not be a more orthodox police response.

[58] That finding accords with the reference her then superior recently gave her to support her application for a certificate of character. He said that he had known Ms Gibbs for 18 years and been her superior between 2008 – 2010 and that, in all that time, he 'had no reason to doubt her honesty or integrity'.

[59] I am also satisfied that Ms Gibbs did not minimise her misconduct when she applied to the NZLS for a certificate of character, even though she confined her misconduct to that in September – December 2007 before the code of conduct came into force.

[60] Ms Gibbs says, and I accept, that she prepared her application without going back to her records and accepts that she was careless, as she certainly was. She also says that she had attempted to obliterate from her mind the disciplinary hearing and the events that preceded it, because she had found them so distressing. As to that, I also accept Dr Murray's opinion, given in evidence, that this was a very usual response to past trauma and was not indicative of dishonesty.

[61] What to my mind, however, is decisive is that in her application Ms Gibbs did advise the NZLS that in February 2011 she had been found guilty of serious misconduct, and of the penalty, and she attached to her application a letter from the New Zealand Police titled 'notification of final decision'. She was entirely frank and the NZLS could not have been misled.

[62] I am therefore satisfied that Ms Gibbs' misconduct between 2007 – 2010 does not disqualify her from admission as a barrister and solicitor. I am equally satisfied that she will not, in the practise of her profession, breach any client confidence for

personal advantage and that she will, whenever faced with any ethical issue, take advice in a responsible way.

[63] In that, Ms Gibbs is fortunate. She has an offer of work from a firm of solicitors about to be formed; and the principal to whom she will be most closely accountable, who has recruited her, assured me in evidence that his intended partners are fully aware of her misconduct and of this present application, and remain happy to employ her. He himself, he said, has complete confidence in her. I accept his assessment.

[64] In the result, I will make an order admitting Ms Gibbs as a barrister and solicitor of this Court, after she has taken the prescribed oath before me, as the law requires, at an admission ceremony convened for the purpose.

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P.J. Keane J