IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA70/2019
[2020] NZCA 612

BETWEEN	JEREMY JAMES MCGUIRE Appellant
AND	SECRETARY FOR JUSTICE Respondent

Hearing:	17 September 2020
Court:	Cooper, Clifford and Collins JJ
Counsel:	Appellant in person G L Melvin for Respondent
Judgment:	2 December 2020 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The appellant, Jeremy McGuire, is a lawyer. In August 2015 Mr McGuire applied to the Secretary of Justice pursuant to the Legal Services Act 2011 (the 2011 Act) to become a provider of legal aid services in low-level criminal

proceedings.[1] The Secretary of Justice declined that application in October 2015. Mr McGuire sought a review of that decision pursuant to s 82 of the 2011 Act. The Review Authority confirmed the Secretary's decision.[2] In 2016 Mr McGuire commenced proceedings to judicially review the Secretary's 2015 decision.[3] In a judgment of January 2019, the High Court dismissed that application.[4]

[2] Mr McGuire now appeals against that High Court decision. He says the Secretary erred in fact and law when making her decision to decline his 2015 application, and that the High Court erred when, on review, it did not quash that decision on the basis of those errors. By way of relief, Mr McGuire asks us to declare the Secretary to have been in error and to set aside her 2015 decision.

Background

[3] The circumstances which give rise to this appeal are complex. They have been set out in detail in any number of decisions of the senior courts over recent years.[5] For our purposes the following very brief summary will suffice.

[4] Mr McGuire was approved in 2003 by the then Legal Services Agency (the LSA) to provide legal aid services under the Legal Services Act 2000 (the 2000 Act). In 2008 a legally aided client of Mr McGuire's claimed that, contrary to the provisions of the 2000 Act, Mr McGuire had sought payment of a fee additional to the grant of legal aid. As a result:

(a) Mr McGuire faced two professional disciplinary charges of unsatisfactory conduct; and

(b) in September 2010 the LSA cancelled his approvals to provide legal services under the 2000 Act.

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1 Known technically as "approval level 1 criminal proceedings", and more commonly by the acronym "PAL 1".

2 *McGuire v Secretary for Justice* NZRA 3/2015, 22 December 2015.

3 Section 83 of the Legal Services Act 2011 provides that a person may seek judicial review of the Secretary's decision only after applying to the Review Authority.

4 *McGuire v Secretary for Justice* [2019] NZHC 42 [Judgment under appeal].

5 See, for example, *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [13]–[40]; and Judgment under appeal, above n 4, at [3]–[12].

[5] In May 2013, following an unsuccessful challenge to the LSA's July 2010 cancellation decision but whilst those disciplinary proceedings were still underway, Mr McGuire applied under the 2011 Act for fresh approval as a provider of legal aid services in family and criminal proceedings, among others. That application was declined by the Secretary in November 2013, by which time Mr McGuire was only pursuing that application as regards family proceedings. Mr McGuire's challenge to the Secretary's 2013 decision, which ultimately reached the Supreme Court in 2018, was also unsuccessful.[6] It was whilst those proceedings challenging the Secretary's 2013 decision were still underway that Mr McGuire made his 2015 application.

[6] Section 77(1) of the 2011 Act provides that the Secretary may approve a person to provide legal aid services if "satisfied that the person meets the criteria prescribed in regulations". The Legal Services (Quality Assurance) Regulations 2011 provide, in pt 1, the criteria and process for approval.[7] As relevant here:

(a) Regulation 6(1) sets out the general requirement that the lawyer "must be experienced and competent in each area of law in which he or she intends to provide legal aid services".

(b) Regulation 6(2) prescribes the decision-making steps to be followed by the Secretary:

> (2) In deciding whether the applicant meets the criteria in subclause (1), the Secretary must—
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> (a) apply the relevant experience and competence requirements set out in the Schedule; and
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> (b) take into account the applicant's experience as a lawyer; and
>
> (c) be satisfied that the applicant has the appropriate level of knowledge and skill to provide legal aid services or specified legal services in each area of law to which the application relates.

[7] In setting out the relevant experience and competence requirements the schedule first defines the particular "area of law" involved, and then those requirements. As relevant here:

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6 *McGuire v Secretary for Justice*, above n 5.

7 We refer to the regulations as they appeared when Mr McGuire made his application in 2015.

(a) Clause 1(1) provides:

> **approval level 1 criminal proceedings** means—
>
> (a) any proceeding—
>
> (i) for which the procedure for trial is the Judge-alone trial procedure; and
>
> (ii) that is not a Crown prosecution; and
>
> (b) any proceeding in a Youth Court

(b) Clause 2 describes the relevant experience and competence requirements as follows:

> **2 Approval level 1 criminal proceedings**
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> For approval level 1 criminal proceedings, the applicant must—
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> (a) have at least 12 months' recent experience in criminal law practice; and
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> (b) have appeared as counsel with substantial and active involvement in at least 3 trials in criminal proceedings.

(c) The phrase "recent experience" is defined in reg 3(1) to mean "experience gained in the 5 years immediately before the date of the application".

[8] Mr Melvin, for the Secretary, advises that she applies the criteria found in the schedule on the basis that that five year period applies to the requirement both for 12 months' experience in criminal law practice and for appearance as counsel in at least three trials in criminal proceedings. That is, the work experience relied on by the practitioner for both criteria must have been had in the five years immediately before the date of the application.

[9] The Secretary determined that Mr McGuire was unable to meet the 12 months' recent experience criterion. In particular, the three trials he referred to involved defended police prosecutions in the three-year period from 2008 to the cancellation of his approval in 2010. His more recent criminal court appearances were for sentencing after guilty pleas. Accordingly, whilst he had had substantial and active involvement in the period up to July 2010, he had not thereafter.

[10] Pursuant to reg 6(5), a person in that position may nevertheless qualify if the Secretary, having taken into account the applicant's experience as a lawyer, is satisfied that they meet the relevant experience and competence requirements in all other respects and have the appropriate level of knowledge and skill to provide legal aid services in the relevant area. In his 2015 application, under the heading "Summary of experience outside the last five years", Mr McGuire wrote:

> I had 60 criminal files in 2009. I started practising as a duty solicitor and criminal lawyer in my first few weeks of practice in the Lower Hutt District Court in 2005. I have helped train other duty solicitors (for example Jock Turnbull in Porirua some years' ago). I have written on criminal law. I have conducted defended summary jurisdiction criminal hearings. I have conducted at least one criminal appeal in the Court of Appeal and have represented clients on appeal in the High Court (usually bail appeals). The law of criminal procedure has changed a bit lately but I still appear on agency instructions even though I no longer have the regular appearances I had. I feel confident in my abilities.

[11] The Secretary referred Mr McGuire's application to a selection committee established under s 78 of the 2011 Act to assess applications and advise as to the suitability of applicants. That committee advised the Secretary to decline Mr McGuire's application. The Committee was concerned Mr McGuire had not been significantly involved in criminal law since 2010 and that, since then, he had been the subject of one substantiated complaint and three further complaints that were yet to be finally determined. The Secretary then wrote to Mr McGuire, advising him of the Committee's advice.

[12] Mr McGuire responded, noting that he had not been significantly involved in criminal law because he had lost his contract to provide legal aid services in 2010. He had, however, prior to that practised criminal law since 1995 and had not lost his skill and competency since 2010. He referred to a recently published article in the New Zealand Law Journal on discharges without conviction,[8] and his completion of litigation skills and other relevant courses. He acknowledged the changes to the criminal law that occurred with the passage of the Criminal Procedure Act 2011 and his consequent lack of experience under that regime. But, he stated, nobody had experience before the Act was enacted, so it was difficult to see how that was relevant. Once he had appeared in court a few times he would be just the same as everybody

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8 Jeremy McGuire "Discharge without conviction" [2014] NZLJ 411.

else. As for the substantiated and open complaints, Mr McGuire noted most remained subject to challenge. Until those matters were resolved, it would not be appropriate for the Secretary to take them into account.

[13] In her decision, and with respect to the decision-making steps found in reg 6(2), the Secretary first acknowledged Mr McGuire's experience in criminal law. Turning to the questions of "knowledge and skill" the Secretary formulated her decision in the following terms:

> - Mr McGuire argues that he has not had the opportunity to gain recent experience in criminal law as he has not held an approval to provide legal aid services since 2010.
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> - Legal aid is not a training ground for lawyers and the Regulations set out experience and competence requirements that must be met by all applicants. These give the Secretary for Justice and the wider public the assurance that legal aid lawyers are providing quality services. There are a number of ways to gain experience including working in private practice, as a junior or as a supervised provider.
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> - The Selection Committee were unable to provide advice on Mr McGuire's knowledge and skill in criminal proceedings as he was unable to provide examples of criminal cases where he has demonstrated his knowledge and skill, especially since the implementation of the Criminal Procedure Act 2011. I acknowledge that Mr McGuire has written on the subject of discharge without conviction recently, but this does not make up for the lack of recent criminal law experience on his feet in the courtroom acting for clients.
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> - On balance, I am not satisfied that Mr McGuire has the appropriate level of knowledge and skill to provide legal aid services as a lead provider at Criminal PAL 1. The application for approval as a lead provider at Criminal PAL 1 is declined.

[14] As to the complaints, the Secretary accepted Mr McGuire's submission and put them to one side, reaching no finding as to whether or not Mr McGuire was a fit and proper person:

> Mr McGuire is currently exploring the possibilities for review for three of the complaints and has various dates set down for the filing of memoranda and hearings. It would be premature for me to consider how those complaints, individually or together, affect Mr McGuire's status as a fit and proper person to provide legal aid services.

High Court judgment

[15] In the High Court, and in response to Mr McGuire's arguments to the contrary, Clark J reached the clear view that the Secretary made no reviewable error in declining Mr McGuire's application. In doing so, she endorsed the Secretary's assessment of the significance of the fact Mr McGuire had not practised criminal law in a substantive way since losing his approval as a legal services provider.[9] Moreover, over that period significant reforms introduced by the Criminal Procedure Act had come into force. That Act had, the Judge noted, been referred to by the authors of *Adams on Criminal Law* as leaving "few aspects of criminal procedure untouched".[10] The Judge summarised the examples given in that text as follows:[11]

> (a) The statutory reforms overhauled offence categories and jurisdiction.
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> (b) The Criminal Procedure Act includes only high-level requirements. Matters of detailed court procedure are provided in court rules. "Judicial officers, counsel and unrepresented defendants, need to be familiar with and apply both the Act and relevant rules and regulations."
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> (c) The Criminal Procedure Act overtook many of the provisions of the Summary Proceedings Act and Crimes Act.
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> (d) The reforms [touched] on the law relating to who may conduct proceedings; how a proceeding is commenced; pre-trial procedure; the approach to election of trial by jury; case management; proceeding in the absence of the defendant; name suppression; and appeals.

[16] The Judge concluded:

> [63] Against the backdrop of such substantial change, it is difficult to conceive of an applicant for approval in the criminal law area being able to satisfy the statutory criteria for competence if lacking substantive court experience under the reformed system. Mr McGuire did not meet the requirement for "recent experience" in Criminal PAL 1 and did not satisfy the Secretary that she should waive that requirement. I find no error of law or fact in the Secretary's assessment [or] her decision to decline Mr McGuire's application.

[17] Nor had the Secretary erred on the question whether Mr McGuire was a fit and proper person. Given the Secretary had already concluded Mr McGuire lacked the

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9 Judgment under appeal, above n 4, at [59]–[63].

10 At [61], quoting Simon France (ed) *Adams on Criminal Law* (online ed, Thomson Reuters) at [CPAIntro.01].

11 At [61].

requisite skill and experience, there had been no legal requirement for her to make a decision on the "fit and proper" criterion and she had not done so.[12]

The appeal

Submissions

[18] In this appeal, Mr McGuire repeated his challenge to the Secretary's decision as one primarily based on the grounds of unreasonableness, a failure to consider relevant considerations and alleged errors of fact and law. These grounds overlapped to a very large extent, however, reflecting Mr McGuire's generic pleaded position that the Secretary's decision was wrong in fact and law and resulted from her failing to properly discharge her statutory and regulatory duties. Mr McGuire instead arranged his submissions around the requirements of (i) experience and competence and (ii) the fit and proper person test, and we therefore address the issues in that order.

[19] On the question of his experience and competence, Mr McGuire disputed the Secretary's conclusion, upheld by the Judge, that he lacked recent experience. He pointed to the fact his application recorded that he held 31 criminal files in 2010, two in 2011 and two in 2015, and referred to his current work for private clients and as a prosecutor for Fish & Game New Zealand. In essence, Mr McGuire argued that his experience up until the time at which he lost his approval to provide legal aid services established that he had the appropriate level of knowledge and skill required. Such relevant work as he had done since then, and the professional writing and training he had referred to, had helped maintain that competence. As to the Criminal Procedure Act, and as he had said in response to the Selection Committee's recommendation, a return to practice would soon see him familiarise himself with the new regime. It was also to be remembered that his application was for approval as a provider of legal aid services in level 1 proceedings. Such proceedings were essentially what had previously been called summary proceedings, where the trial before a Judge alone essentially focused on the Crown and, if any, defence evidence, with little requirement for advocacy or legal analysis.

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[12] At [79]–[80].

[20] Mr McGuire suggested the Secretary's decision erroneously overlooked these factors, was unreasonable and wrong in fact and law. He also claimed the Secretary failed to take into account two decisions of the Review Authority which were relevant,[13] and wrongly failed to consider whether to exercise her power under reg 6(5) to waive the strict experience requirements.

[21] On the question of whether he was fit and proper, Mr McGuire submitted the Secretary had failed to determine whether he satisfied this criterion. He suggested this constituted an error of law, because s 77(4) of the 2011 Act required the Secretary to "provide reasons for his or her decision to give or decline approval". Confusingly, however, he simultaneously refuted the Judge's suggestion that "the Secretary did not decide the application on the basis of … the fit and proper person [criterion]",[14] and submitted that his application "was declined both for not having recent experience *and also* for not being a fit and proper person as at the time of the application".[15]

[22] For the Secretary, Mr Melvin submitted that Mr McGuire's application, and his own correspondence with the Ministry of Justice, made clear he fell short of the ordinary requirements for recent experience. The suggestion that the Secretary had failed to consider whether to exercise her discretionary power under reg 6(5) was incorrect, as the decision expressly recorded such a consideration. As for the "fit and proper person" criterion, the Secretary's decision was clear on its face that no decision had been reached and nor was one required. There was therefore no reviewable error on this ground and the Judge was correct to dismiss the application for judicial review.

Analysis

[23] As to the Secretary's assessment that Mr McGuire failed to demonstrate he had the requisite recent experience, we reject the submission that the Secretary overlooked relevant considerations. Several of the factors Mr McGuire pointed to — such as his subsequent prosecution work and private clients — were not before the Secretary in 2015 and are not relevant to her decision. The two Review Authority decisions he relied upon before us do not advance matters either. Both concerned practitioners in

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13 *AO v Secretary for Justice* 2012 NZRA 27; and *AQ v Secretary for Justice* 2013 NZRA 1.
14 Judgment under appeal, above n 4, at [80].
15 Emphasis in original.

very different positions to Mr McGuire: the first applicant left her field for only two years, meaning she could point to significant experience within the five years before her application;[16] and the second applicant had extensive overseas experience and had previously been appointed as an acting Judge in a foreign jurisdiction.[17] To the extent Mr McGuire sought to draw unobjectionable points of law from these decisions — for instance, that the Secretary's discretion must be exercised fairly and the Regulations must be interpreted purposively — we consider that the Secretary's decision does not depart from them.

[24] As to Mr McGuire's suggestion that the Secretary failed to consider whether to exercise her power under reg 6(5), this submission was simply wrong. The Secretary expressly canvassed this option and gave reasons as to why she did not consider it was appropriate to exercise her discretion in this case. She recorded in her decision:

> - Regulations 6(5) to (7) outline that if an applicant does not satisfy the requirement that his or her experience is recent experience, I may still consider granting an approval.
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> …
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> - For a number of reasons, I am not confident that Mr McGuire has the appropriate level of knowledge and skill to provide legal aid services at Criminal PAL 1. I will note my concerns under regulation 6(2)(c) below.
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> …

[25] We turn then to Mr McGuire's broader suggestion the decision was unreasonable, the underlying theme of his other challenges to the Secretary's decision. As Mr McGuire acknowledged, the claim of unreasonableness is not an easy one to make successfully. The ambit of this review ground was explained in many ways over the years. Richardson P said in *Wellington City Council v Woolworths New Zealand Ltd (No 2)*:[18]

> For the ultimate decisions to be invalidated as "unreasonable", to repeat expressions used in the cases, they must be so "perverse", "absurd" or

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16 *AO v Secretary for Justice*, above n 13.
17 *AQ v Secretary for Justice*, above n 13.
18 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 552.

> "outrageous in [their] defiance of logic" that Parliament could not have contemplated such decisions being made by an elected council.

More recently the Court has acknowledged that the standard of review may be more or less intense depending on the particular context of the decision in question.[19] In this case, however, we are satisfied that whatever degree of scrutiny is brought to bear on the Secretary's decision, Mr McGuire's appeal cannot succeed.

[26] By 2015, when he made his application, Mr McGuire had not substantively practised criminal law for almost five years. The three case examples Mr McGuire attached to his application all related to cases that were more than five years old, and the evidence before the Secretary was that since then, Mr McGuire had only made a handful of appearances in Court for clients who had already pleaded guilty.[20] As we understood from him, with the exception of a limited number of private clients and prosecution work for Forest and Bird, that remains the case today. Whilst Mr McGuire was applying for a relatively low level of service approval it is fair to say — as the Secretary observed — that legal aid is not a training ground for lawyers.

[27] One of the outcomes of the review which preceded the enactment of the 2011 Act was a recognition of a need to ensure legal aid lawyers possessed the necessary knowledge and skill. Furthermore, the Criminal Procedure Act substantially changed many aspects of criminal procedure in New Zealand. In those circumstances, it cannot be said the Secretary acted unreasonably either by having regard to those legal issues or in her conclusion declining Mr McGuire's application.

[28] Turning briefly to the assessment whether Mr McGuire was a fit and proper person, we agree with the Judge that the Secretary declined to make a decision on this point and that did not constitute an error of law. Mr McGuire is correct that s 77(4) requires the Secretary to give reasons for her decision to decline approval, but she complied with that requirement by explaining why she considered that Mr McGuire failed to satisfy the recent experience criterion. As the Judge found, given that

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19 *Quake Outcasts v Minister of Canterbury Earthquake Recovery* [2017] NZCA 332, [2017] 3 NZLR 486 at [73], referring to *Wolf v Minister of Immigration* (2004) 7 HRNZ 469 (HC) at [47].

20 After the hearing, Mr McGuire sought to file (without leave) a memorandum drawing attention to the fact that some of the examples of work samples in reg 9A(3) are relevant only to jury trials. Given the regulation is inclusive and merely gives examples, nothing turns on this point.

conclusion, no assessment was called for as to whether Mr McGuire was a fit and proper person. Nor, as Mr McGuire appears to argue, can it be said that her decision to do so reflected adversely on any assessment of him as a fit and proper person.

[29] We therefore dismiss Mr McGuire's appeal.

[30] In saying that we observe that Mr McGuire has not been without a limited measure of success in the various proceedings he has commenced following the LSA's 2010 decision. His efforts over the last 10 years show he is not without tenacity. Perhaps now is the time for Mr McGuire to invest those skills and talents, and his time and energy, in supplementing his criminal law experience as he has done to an extent following the Secretary's decision,[21] so as to provide the "recent experience" to support a new application. But that will be over to Mr McGuire.

Costs

[31] At the end of the hearing of the appeal, there was an indication to us that there may have been discussions between Mr McGuire and the Secretary that would be relevant to any decision on costs. We therefore reserve that issue. If agreement can be reached, we invite a joint memorandum. If that is not the case, submissions should be filed, by the Secretary within three weeks of this decision, and by Mr McGuire within one week thereafter. No more than three pages will be considered.

Solicitors:
Crown Law Office, Wellington for Respondent

[21] As noted above at [19], Mr McGuire has, following the Secretary's decision, worked as a prosecutor for Fish & Game and defended clients in private practice.