IN THE DISTRICT COURT
AT AUCKLAND

CIV-2009-004-001116

BETWEEN	MAURICE ARTHUR AUSTIN Appellant
AND	REGISTRAR OF IMMIGRATION ADVISERS Respondent

Appearances: P Butler for the Appellant
R Denmead and J Hopkins for the Respondent

Judgment: 15 February 2010

ORAL JUDGMENT OF JUDGE M-E SHARP

Introduction

[1] The appellant appeals the decision of the Registrar of Immigration Advisers, pursuant to s 81 of the Immigration Advisers Licencing Act 2007, declining to grant him an immigration adviser's licence.

[2] The appeal was filed out of time but the respondent has consented to an extension of time for its filing and thereby the appeal was heard in full today.

Background

[3] On 5 January 2009 the appellant made an application for a full immigration adviser's licence to the respondent. On 15 April 2009 it was refused. That decision was communicated to the appellant on 15 April 2009. On 12 May 2009 a notice of appeal was filed.

[4] The only evidence filed in respect of this appeal comes from the respondent and was filed rather late in the day but ultimately received the leave of the Court.

The Act

[5] The Immigration Advisers Licensing Act 2007 received royal assent on 4 May 2007. At s 3 its purpose and scheme is said to be to promote and protect the interests of consumers receiving immigration advice and to enhance the reputation of New Zealand as a migration destination by providing for the regulation of persons who give immigration advice.

[6] From 5 May 2009 nobody may provide immigration advice unless licensed or exempt under that Act. Immigration advice is defined at s 7 and the licensing process is to be found at ss 18 to 26 of the Act although assisted by ss 6 to 17. In order to be licensed a would-be immigration adviser is required to make an application to the respondent who is the registrar.

[7] Section 19 provides the circumstances in which the respondent must grant a licence to an applicant and specifically says subs 1:

> "The registrar must grant a licence to an applicant if satisfied that:
>
> (a) the applicant is not prohibited from registration under s 12, 6 or 15, and
>
> (b) having regard to the matters specified in GST 16 and 17 the person is fit to be licensed as an immigration adviser, and
>
> (c) the person meets minimum standards of competence set under s 36, and
>
> (d) the application complies with s 18 and is properly completed, and
>
> (e) the applicant has paid the required amount of immigration advisers levy (if any)."

This appeal

[8] This appeal has been brought against the registrar's refusal to grant a licence on the grounds of fitness. As can be seen from s 19(1)(b) the registrar must assess an applicant's fitness to be licensed having regard to the matters in ss 16 and 17

which at s 16 provide restrictions on certain persons being licensed as immigration advisers and s 17 contains other matters that are relevant to fitness for licensing.

The major appeal issue

[9] The registrar determined that the appellant was not a fit and appropriate person to hold an immigration adviser's licence. He did so, it would appear, almost solely on the grounds that the appellant had previously been struck off as a barrister and solicitor on findings by the Disciplinary Tribunal of misconduct and conduct unbecoming.

[10] Section 17(b) of the Act, in setting out other matters which are relevant to fitness for licensing, expressly refers to any disciplinary proceedings taken or being taken against the person.

[11] It is the appellant's case that in declining to consider him a fit person to have an immigration adviser's licence the respondent should have gone beyond merely taking account of the Disciplinary Tribunal's decision with respect to the appellant and should have looked at other relevant matters; and had he done so, he would not have reached the same conclusion.

Specific grounds for appeal

[12] The appellant said that the respondent failed to consider the appellant's competence to give immigration advice, that his decision to refuse the appellant a licence was substantively unfair/unreasonable and that the respondent erred in concluding that the appellant was not fit to be licensed.

Procedure

[13] Section 81 of the Act provides the right of appeal. Because it is not specified otherwise in the Act this appeal, being under part 9 of the District Court Rules, is to proceed by way of rehearing. Rehearing does not mean that the evidence is to be reheard in its entirety but rather, as discussed in *Pratt v Wanganui Education Board and Ors* [1977] 1 NZLR 476, means that the Court is to consider for itself the issues

which had to be determined at the original hearing and the effect of the evidence then heard as it appears in the record of the proceedings but applying the law as it was when the appeal is heard. A rehearing is different from a de novo hearing.

[14] The record of proceedings must be the appellant's application and supporting information including further correspondence by him and the respondent's decision.

[15] I have seen all of this information.

[16] As I have the discretion to hear and receive further evidence on questions of fact I have exercised that discretion by permitting both parties to file any further evidence that they wish provided that it is credible and cogent.

[17] Only one party, being the respondent, chose to do so. I allowed it in despite being a little late because firstly it was credible and cogent and is explanatory and helpful to the Court. Secondly I was assured by counsel for the respondent that whilst he objected to its introduction he could not in fact point to any prejudice to his client that would be occasioned by its receipt.

[18] In determining this appeal I may confirm, vary or reverse the respondent's decision (s 84). I may also remit the whole or any part of the matter back to the respondent for further consideration and determination pursuant to District Court Rule 561(2).

Matters not in contest

[19] Neither ss 15 nor 16 applied then or now to the appellant. As I have already said however s 17 did, and does, because of the disciplinary proceeding which was taken against the appellant as a result of which he was struck off the role of barristers and solicitors in New Zealand.

[20] As I see it, the only issue for me to determine therefore is whether the respondent was correct in determining, without more, that the appellant was not a fit and appropriate person to hold an immigration adviser's licence on account of the Disciplinary Tribunal's findings and decision in his case.

[21] It is clear that the respondent did not, in his decision, take into account whether the Appellant had met the competency standards set under s 36 of the Act. He explained in his affidavit why he did not feel the need to do so.

Meaning of fit and appropriate

[22] Because this statute is so new there is no authoritative decision on the meaning of that phrase or indeed, as I understand it, any other phrase of importance. The standard "fit and appropriate" has been the subject of much discussion in other decisions under different statutes which is not necessarily appropriate or relevant in this context.

[23] I have reached the conclusion that the term "fit and appropriate" should be given its normal Oxford English Dictionary definition because that appears to accord with the purpose and scheme of the Act which is to promote and protect the interests of consumers receiving immigration advice and to enhance the reputation of New Zealand as a migration destination by providing for the regulation of persons who give immigration advice.

[24] I therefore conclude that that term means "right, proper, suitable, befitting the circumstances, of an adequate standard, sufficiently good, qualified, competent or worthy." Any one of those words or phrases appears to me to adequately define the term as it should be interpreted and was intended by the legislature.

Was the respondent correct to determine that the appellant was not a fit and appropriate only on the basis of the Disciplinary Tribunal's decision finding him to have misconducted himself and striking him off?

[25] In the respondent's decision he gave as his reason that the appellant is not fit to be licensed "because of the nature of the conduct that led to the disciplinary proceeding and the severity of the sanction imposed by the Tribunal."

[26] He expanded upon that and then indicated its relevance to the provision of immigration advice by saying this :

> "Licensed immigration advisers are required to act in the best interests of their clients and to observe high standards of ethical conduct. The competency standards for licensed immigration advisers are similar in many ways to the standards of professional competent expected of solicitors. Mr Austin's conduct would be unacceptable conduct if it were the conduct of a licensed immigration adviser."

[27] There is nothing in the manner in which the respondent reached his decision which I can criticise. I concur with him that there are some analogies between the standards required of licensed immigration advisers and barristers and solicitors and I concur with him in viewing with unease the prospect of somebody advising the often reasonably vulnerable when they themselves have been recently found guilty of misconducting themselves in respect to not too dissimilar situations with regards to vulnerable people.

[28] The respondent said in his decision that he took into account that whilst the misconduct occurred nearly five years earlier, the appellant was only struck off nearly three months before submitting his application for an immigration adviser's licence. Clearly, he considered that that is a matter which must have been within the purview of the Disciplinary Tribunal at the time but nevertheless did not affect its decision to strike off.

[29] I have read the Tribunal's decision. Clearly it found that the appellant's conduct was sufficiently egregious, notwithstanding the lapse of time, to warrant a strike off order.

[30] He did not take into account that the appellant was appealing the Tribunal's decision to the High Court. Whether he should or should not have is irrelevant now because that appeal was dismissed. He expressly ignored, it would appear, submissions on the appellant's ill health, etc, because he said that the same submissions had been placed before the Disciplinary Tribunal yet the Tribunal still found that the appellant had misconducted himself and struck him off nevertheless.

[31] If the Disciplinary Tribunal took this step, notwithstanding submissions or evidence about the appellant's mental state, then in my view it is good enough for the registrar to reach the determination that he did without being affected by the same considerations.

Is there any additional information which was before the respondent which could or should have altered the decision that he reached?

[32] I have read the application, all its enclosures and the correspondence that flowed therefrom and I have reached the same conclusion as the respondent.

[33] Had the application been made by the appellant some years after he had been struck off then the appellant would have been in a safer position to bring this appeal because I would have expected, as with any Law Society hearing an application to be reinstated to the Roll, the respondent to have considered an application in the light of the years that had elapsed since the egregious and offending conduct rather than purely on the basis of it and it alone.

[34] That is not to say of course that all such conduct can be excused by time but there has been many a solicitor who has been reinstated to the role after a suitable period of time has elapsed and they have proven themselves to be fit and proper to again be licensed as barristers and solicitors.

[35] The same would and should, in my view, apply to a person applying to be an immigration adviser. However that is not the case here because whilst the misconduct which caused the respondent to find the appellant not to be a fit and appropriate person occurred some five years earlier than the application, the decision of the Disciplinary Tribunal striking him off was only very recent.

[36] Every application must rest on the facts which pertain to it at the time and if with the passing of time the appellant or any other would be immigration adviser is able to present an improved picture to the respondent and one in which it appears that he or she has been rehabilitated and could no longer be said to be an unfit and inappropriate person then any such application being considered on its merits, all things being equal, could be granted.

[37] The appellant attempts to argue that the respondent's obligation was to go beyond looking merely at the Disciplinary Tribunal's decision but to also look at whether he met the competency standards set under s 36. I disagree. Section 10 of

the Act expresses subs (a), (b), (c) and (d) to be conjunctive. All of them must be met before one may be licensed as an immigration adviser. It follows, ergo, that if an applicant fails on any one of those heads they may not be licensed as an immigration adviser.

[38] Whilst on the face of it one might assume that the respondent would have approached his obligations under the Act in the same order that they are listed in s 10, and in this case in fact did not do so, I fail to see that that is an impediment to the appropriateness of his decision because, as counsel for the respondent said, there is a great amount of work for the respondent to satisfy himself that the applicant meets the competency standards set under s 36 whereas if the respondent looks first at s 10(c), (whether the applicant is a fit and appropriate person to hold a licence), and determines that he is not, he is not required to then satisfy himself that the applicant meets the competency standards. Whichever way the respondent approaches his task under s 10 is satisfactory as far as I can see and the Act is not prescriptive as to order.

[39] It was a further ground of the appellant that the Registrar could have determined his fitness to be licensed for one of the different grades of licence and not just a full licence.

[40] To that I answer: if the respondent determines that the applicant is not a fit and appropriate person to hold a licence then that is the end of the matter. If, on the other hand, he is satisfied that the applicant is a fit and appropriate person to hold such licence then and only then (the other requirements of s 10 having been fulfilled) can the respondent then consider what type of licence, ie, full, limited or provisional. I am satisfied that the words "fit and appropriate" must be determined in that way, that is as to a licence and not any specific class.

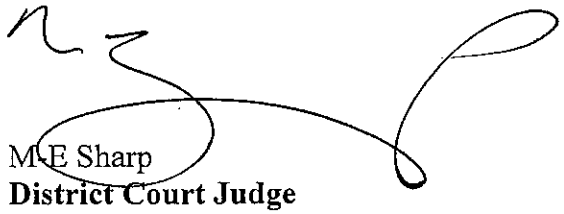
[41] In discussing the order in which the respondent should approach his task under s 10 I find it of assistance to look at s 19 of the Act which sets out the relevant matters in a different order.

Summary

[42] Whilst the respondent did not consider all of the matters that are required for the ultimate issue of an immigration adviser's licence under the Immigration Advisers Licensing Act 2007 (that is because having approached his task first by considering whether the Appellant was a fit and appropriate person to hold such a licence he found it unnecessary to continue), I concur with the manner in which he approached his obligations. I see no reason for criticism at all. I confirm the decision that he made because I, too, consider that somebody who misconducted himself in the manner that the Disciplinary Tribunal found and determined, notwithstanding the lapse of time, to strike him off, was also at the time that he applied for an immigration adviser's licence not a fit and appropriate person to hold such a licence.

[43] That may not always be the case however and I repeat that in the future, once he has behaved in a way which could be considered to show rehabilitation, that he may be capable of being reconsidered for admission to such a licence, all things being equal.

[44] The appeal is dismissed.



M E Sharp
District Court Judge