IN THE DISTRICT COURT
AT AUCKLAND

CIV-2009-004-001496

IN THE MATTER OF	the Immigration Advisers Licensing Act 2007
AND IN THE MATTER OF	of an appeal from a decision of the Registrar of Immigration Advisers
BETWEEN	MANJ NAGRA Appellant
AND	REGISTRAR OF IMMIGRATION ADVISERS Respondent

Hearing: 26 January 2010

Appearances: Mr P F Gorringe counsel for the Appellant
Ms T Thomson and Ms K England counsel for the Respondent

Judgment: 11 May 2010

RESERVED JUDGMENT OF JUDGE M E PERKINS

INTRODUCTION

[1] In April 2009 the appellant, Manj Nagra, applied unsuccessfully pursuant to s 18 of the Immigration Advisers Licensing Act 2007 (the Act) to be licensed as an Immigration Adviser. In a reasoned decision dated 21 May 2009, the Registrar of Immigration Advisers (the Registrar) declined Mr Nagra's application.

[2] Mr Nagra has appealed against the decision, pursuant to s 81 of the Act. I am informed by counsel that this is the first such appeal to be heard since the Act's inception.

[3] At the end of the hearing, on 26 January 2010, I adjourned the matter to enable counsel to consider the reservation of a point arising from the documents, which are relied upon in the appeal. Counsel have now filed a joint memorandum resolving that issue, such memorandum being received by the Court on 16 February 2010. I shall deal with that later in this decision.

APPROACH TO APPEAL

[4] This is a general appeal to the District Court. The procedure for dealing with this particular appeal, in view of the fact that it was lodged in June 2009, is covered by Rules 544 and 563 of the now revoked District Courts Rules 1992. By virtue of Rule 560 of those rules, the appeal shall be by way of rehearing. In dealing with the appeal, the Court has full discretionary power to hear and receive further evidence on questions of fact, either by oral evidence or by affidavit. The Court shall also have regard to any report lodged by the person making the decision appealed from.

[5] There was some criticism in Ms Thomson's submissions of behalf of the respondent, as to the affidavits filed by the appellant and supporting witnesses and the weight to be attached to them. She does not oppose the reading of those affidavits but submits that they have limited weight.

[6] Following the filing of the notice of appeal, the respondent filed two affidavits in support of the opposition to the appeal, one of which was from the

Registrar himself. In the circumstances, I do not consider that it is unreasonable for the appellant to have subsequently filed an affidavit in support of the appeal and affidavits from three supporters. In any event the Registrar then filed a further affidavit in reply.

[7] In this appeal there is no oral evidence on record presented to the Registrar because he exercised his discretion on the basis of documents supplied by the appellant, Mr Nagra. The record upon which the appeal by way of rehearing is to be conducted, therefore, consists of those documents plus the decision itself. In the circumstances I do not consider it unreasonable for the parties to have filed affidavits for the assistance of the Court. It is appropriate that I read those affidavits and give them the weight necessary to be able to deal appropriately with the appeal in a just manner.

[8] The Registrar has sworn and filed an affidavit containing matters, which might be said to go marginally beyond the face of his decision. However, I shall treat the affidavit as the Registrar's report. In addition to that there is the affidavit of Ms England, who is team leader, licensing assessment, at the Immigration Advisors Authority and a barrister and solicitor. Her affidavit is primarily directed towards the procedures adopted within the Authority when an application for registration is received.

[9] Mr Gorringe did not raise any objection to those affidavits. I am bound to say that the affidavits provide useful information in determination of the primary issue, the subject of this appeal.

LEGISLATIVE PROVISIONS APPLYING

[10] Section 3 of the Act provides that its purpose 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.

[11] No immigration advice may be given by any person unless registered under the Act or exempted by its provisions. "Immigration advice" is defined in s 7 of the Act and:

> (a) Means using, or purporting to use knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward; but
>
> (b) does not include –
>
> (i) providing information that is publicly available, or that is prepared or made available by the Department; or
>
> (ii) directing a person to the Minister or the Department, or to an immigration officer, a visa officer, or a refugee status officer (within the meaning of the Immigration Act 1987), or to a list of licensed immigration advisers; or
>
> (iii)carrying out clerical work, translation or interpreting services, or settlement services.

[12] In addition s 9 provides that there shall be no acceptance of immigration applications or requests from unlicensed immigration advisers.

[13] The crux of this appeal concerns the relationship between and application of ss 10, 15, 16 and 17 of the Act. These are set out as follows:

> **10 Who may be licensed as immigration adviser**
>
> A person may be licensed as an immigration adviser only if—
>
> (a) the person is a natural person who applies for a licence under section 18; and
>
> (b) the Registrar is satisfied that the person meets the competency standards set under section 36; and
>
> (c) the person is not prohibited from holding a licence under section 15, and, in the case of a person to whom section 16 or 17 applies, is determined by the Registrar to be a fit and appropriate person to hold a licence; and
>
> (d) the person is not a category 2 exemptee or a lawyer.

15 Persons prohibited from licensing

(1) A person is prohibited from being licensed if he or she—

(a) is an undischarged bankrupt; or

(b) is prohibited or disqualified under any of the provisions of sections 382, 383, or 385 of the Companies Act 1993 (or any corresponding provision of the Companies Act 1955) from managing a company; or

(c) has been convicted of an offence against the Immigration Act 1987 or the Immigration Act 1964; or

(d) has been removed or deported from New Zealand under the Immigration Act 1987 or the Immigration Act 1964; or

(e) is unlawfully in New Zealand.

(2) Persons who hold or have held any of the following offices or employment are prohibited from being licensed while holding the office or employment or at any time within 12 months after leaving the office or employment:

(a) Ministers of Immigration and Associate Ministers of Immigration in the New Zealand Government:

(b) any immigration officer, visa officer, or refugee status officer (as defined in the Immigration Act 1987).

16 Persons subject to restriction on being licensed

The following persons must not be licensed unless the Registrar is satisfied that the nature of the relevant offence or matter is unlikely to adversely affect the person's fitness to provide immigration advice:

(a) a person who has been convicted, whether in New Zealand or in another country, of a crime involving dishonesty, an offence resulting in a term of imprisonment, or an offence against the Fair Trading Act 1986 (or any equivalent law of another country):

(b) a person who, under the law of another country,—
(i) is an undischarged bankrupt: or
(ii) has been prohibited or disqualified from managing a company; or
(iii) has been convicted of an immigration offence: or
(iv) has been removed or deported from the country; or

(c) a person to whom section 15(1)(a) or (b) has applied in the past.

17 Other matters relevant to fitness for licensing

In determining a person's fitness to be licensed, the Registrar may take into account—

(a) any conviction, whether in New Zealand or in another country, for an offence of a kind other than those referred to in sections 15 and 16:

(b) any disciplinary proceedings, whether in New Zealand or in another country, and whether in relation to the provision of immigration advice or in relation to the conduct of any other occupation or profession, taken or being taken against the person (including any past cancellation or suspension of a licence under this Act, or any non-compliance with any other sanction imposed under this Act):

(c) whether or not the person is related by employment or association to a person to whom a licence would be refused under this section or section 15 or 16.

[14] While I have set out the provisions of s 17 I perceive that it really had no relevance to the Registrar's direction in this case. The Registrar nevertheless referred to it in his decision as having relevance to any decision under S 19 to grant a licence should he have done so. In any event none of the circumstances specified in s 17 exist in this case.

FACTUAL HISTORY - CONVICTIONS

[15] Mr Nagra was convicted in the Hamilton High Court following guilty verdicts by a jury in respect of three charges of dishonesty offending. The offences were theft of a motor vehicle, theft by failing to account and theft by a person in a special relationship. Two of the offences were committed in 2001 and the third in 2003. Mr Nagra was at that time employed as an immigration officer by the New Zealand Immigration Service division of the Department of Labour. He then went under the name Manjit Singh. On 30 September 2005, following the verdicts, he was sentenced by Justice Venning, the trial judge, to 300 hours of community work on each charge to be served concurrently.

[16] Justice Venning, in the High Court, upon sentencing Mr Nagra, set out the factual position relating to the offending as follows:

> "[2] At the time of your offending you were employed as an immigration officer. Your offending arose out of that employment. Your duties as an immigration officer included the location and removal of people who were illegally in New Zealand. You had authority under the Immigration Act 1987 to seize money and property from such people for the purposes of recovering the costs associated with their deportation.
>
> [3] In July 2001 you located and had the police take into custody an Arisa Lerdchanchi. She owned a motor vehicle valued at $500. The Crown evidence against you that the jury accept was that you sold the vehicle to Mr Changratlanachaichok for $500. You made no record of that transaction and you did not account for the $500 you received. You were found guilty on one count of theft of the vehicle and also the count of failing to account in relation to that transaction.
>
> [4] Approximately two years later, in October 2003, you located four people in Gisborne who were illegally in New Zealand. One of them owned a motor vehicle. You allowed or directed a friend of the overstayers to sell that motor vehicle. She sold the car and gave you the net proceeds as you required. The net proceeds were $1900. Again you failed to account for that $1900. In total then you received $2,400 that you were obliged to account to your employer, the Immigration Service, for and you failed to account.
>
> [5] Your offending has affected the Immigration Service as has been referred to in submissions. In a letter to the Court the Deputy Secretary of Workforce of the Department of Labour records that and notes particularly that your conduct and the prosecution and publicity associated with it have impacted on employees throughout the Department. It has called into question other employees' integrity, particularly those who exercise the same powers as you did, Compliance Officers.

[17] Justice Venning in his sentencing went on to say:

> "For my part I do not accept that your offending is analogous in nature to a solicitor's breach of trust but rather I see your offending, while clearly a breach of trust, as more in the nature of an employee failing to account to an employer for the funds. While you were convicted of one charge of theft in relation to a third party's car, in my view given that you were authorised to sell the cars, the principal offending in your case was your failure to account for the proceeds of sale to the Immigration Service as you should have. You failed to account to your employer with the consequences that you are now well aware of. Following conviction you have accepted your conviction, you have accepted the verdict of the jury and you have now provided full and complete reparation. In fact it seems you have overpaid by $300."

[18] At the hearing of this appeal, the respondent raised an issue as to whether, indeed, Mr Nagra even had authority under the Immigration Act to seize money and property for the purposes of recovering the costs associated with the deportation.

That is the point I reserved for further submissions. In the memorandum now received from counsel, the respondent is satisfied, on the basis of the evidence received at the trial that the appellant legitimately believed he had authority to uplift and sell the motor vehicles of those who had been detained pending deportation. Although it was the appellant's case that he did not sell the vehicle, he was entitled to do so. Accordingly, the respondent no longer wishes to pursue the issue of whether the appellant did have statutory authority to retain the vehicle, the subject of the charges. It has been agreed between counsel that the appeal can be finalised on the basis of Justice Venning's sentencing remarks, including his observation that Mr Nagra (Singh) had authority to seize money and property for the purposes of recovering deportation costs.

THE REGISTRAR'S DECISION

[19] Having referred to the relevant provisions of the Act and his perception of their input and meaning, the Registrar indicated that:

> "I am <u>not satisfied</u> that the applicant is <u>fit</u> to be licensed as an Immigration Adviser, having regard to the matter specified in s 16 of the Immigration Advisers Licensing Act 2007."

The inquiry, the subject of this appeal, relates solely to the Registrar's application of s 16 of the Act in declining a licence. It does not relate to any issue of competency.

[20] At two places in the decision the Registrar indicates that s 16 of the Act establishes a presumption against licensing for the categories of persons identified. Mr Gorringe, in his submissions, argued that that was not a correct statement of the legal position. Ms Thomson, on the other hand, on behalf of the respondent submitted that the form of the wording in the section meant that there was a presumption. Mr Gorringe's submission was that if there was a presumption then there could be inferred a correlative burden on the applicant to displace it when no such burden exists under the wording. While I agree there is no burden or onus upon an applicant, I am of the view that the use of the words "must not be licensed unless" used in s 16 does infer a presumption against registration where the person applying has a conviction of the kind specified in s 16(a). Similar wording to this, for instance, is adopted in s 128(B) of the Crimes Act 1961 which reads:

128B Sexual violation

(1) Every one who commits sexual violation is liable to imprisonment for a term not exceeding 20 years.

(2) A person convicted of sexual violation must be sentenced to imprisonment unless, having regard to the matters stated in subsection (3), the court thinks that the person should not be sentenced to imprisonment.

(3) The matters are—
  (a) the particular circumstances of the person convicted; and
  (b) the particular circumstances of the offence, including the nature of the conduct constituting it.

[21] This section recently came to be considered in *R v AM* [2010] NZCA 114 at [77]. The Court of Appeal inferred, by virtue of the wording of the section, there was a presumption of imprisonment. Nevertheless, even if no presumption is created by s 16 of the Act, having regard to the purpose of the legislation, s 16 provides a strong direction to the Registrar as to the limited nature and breadth of the discretion he is to exercise.

[22] Having set out his decision, the Registrar then went on to consider the circumstances relating to Mr Nagra's offending and convictions in 2001 and 2003 and his sentencing by Venning J in 2005. Under the heading *Relevance of convictions for fitness to provide immigration advice* he stated:

> "I have considered whether or not Mr Nagra's convictions would adversely affect his fitness to provide immigration advice. Licensed Immigration Advisers are required to act in the best interests of their clients and to observe high standards of professional and ethical behaviour. Venning J states in his decision that Mr Nagra's actions were a clear breach of trust, a breach of duty he owed his employer to account for the money and that he was a public servant at the time working for the Immigration Service."

While it is true that Justice Venning did accept Mr Nagra's offending as clearly a breach of trust, he went on to say that it was more in the nature of failing to account.

[23] The Registrar took into account the age of the convictions at the time of the application and letters of support and references provided. He does comment that

none of the references and letters of support addressed whether Mr Nagra was fit to be licensed. Finally, in this decision he states:

> "Section 16 establishes a presumption against licensing. Given the breach of trust characterising Mr Nagra's offences and the fact that his most recent offending occurred six years ago, I am not satisfied that the nature of Mr Nagra's offending is unlikely to adversely affect the persons fitness to provide immigration. [sic]"

[24] Ms Thomson for the Registrar, conceded in oral submissions that in exercising his discretion, the Registrar had not provided in the decision an appropriate linkage between the facts to be considered and his conclusion as to fitness. In other words, the Registrar having considered the nature of the offending, has not stated exactly why he is not satisfied the convictions and the nature of them is unlikely to adversely affect Mr Nagra's fitness to provide immigration advice.

FINDINGS

[25] I agree with Ms Thomson's submission that s 16 of the Act sets the bar on licensing reasonably high. The use of the words "is unlikely to adversely affect the person's fitness to provide immigration advice" means that when the Registrar is considering them within the context of the nature of the relevant offence and its effect, the standard he is to apply is a high one. That is because the discretion is being exercised on the basis of mere likelihood.

[26] Having regard to the purposes of the Act, strongly consumer oriented, the effect of s 16 is to provide a very limited exception to prohibition when specified crimes, offences or restrictions have been previously committed or imposed. When s 16 is read in the context of the surrounding provisions, concentration must be directed to the exact nature of the relevant offence and not post offending mitigating behaviour, as Mr Gorringe has submitted. Clearly, the "nature" of the relevant offence must include the circumstances of it otherwise there would be no need for the Registrar to take into account degrees of seriousness of offending in each case and his discretion would be rendered somewhat nugatory. However, that does not mean that the Registrar is required to extend his enquiries into post offending conduct. In that regard, I accept Ms Thomson's submission that s 16 requires an

assessment of and concentration on the nature of the offence when committed and not the offender's wider personal circumstances or behaviour.

[27] When one reads the parliamentary debates surrounding the passage of the bill subsequently enacted, it is clear that the legislation is directed at the unscrupulous way in which some advisers were dealing with consumers seeking immigration status when they were in a particularly vulnerable state. In introducing the bill to the House, Hon. David Cunliffe (then Minister of Immigration) explained that:

> … there are currently insufficient regulatory constraints or market incentives to prevent some Advisers in providing unethical or incompetent services.
>
> … By raising the standard of immigration advice, this bill will promote and protect the interests of migrants and potential migrants who receive immigration advice, and enhance the reputation of New Zealand as a migration destination.

[28] Darien Fenton (Labour MP) expressed a similar sentiment during the second reading debate as follows:

> The fact is that it has just been too easy for people to set themselves up as immigration experts, to take money from unsuspecting people, to give them inappropriate advice, and in some cases to abscond with people's money, leaving ruined lives behind them. In other cases, inexperience or incompetence from well-meaning people has led to cases being mishandled and it has caused an overload of a system that actually works very well.

[29] Other members of the House expressed similar sentiments although in some cases in more colourful language. Clearly issues of integrity and honesty are important where licensed Advisers may be holding reasonably large sums of money on behalf of migrants or potential migrants and in particular retainers against fees to be incurred for the future provision of advice and services.

[30] As indicated, the Registrar has failed to provide a connection between the nature of the offending and his decision that Mr Nagra is not fit to provide immigration advice. He has mainly concentrated in the decision on the issue of whether Mr Nagra's offending resulted from a breach of trust. I am not satisfied that, in the context of the purposes of this Act, that is necessarily the primary consideration. Justice Venning's consideration that there was a failure to account has more direct relevance to the consumer protection directions of the Act.

Obviously, not every crime of dishonesty is going to result, by its inherent nature, in prohibition from licensing. There will be degrees of offending to be taken into account as well as degrees of criminality and culpability involving the same crime. For instance, one or two crimes of petty shoplifting of an historic nature would not entitle the Registrar to solely make a connection of that with matters in his discretion and then to prohibit licensing unless it was accompanied by other matters affecting fitness (s17) or competence (ss 20 and 36). Consistent periodic and recidivist offending of that nature would, however, so seriously call into question the applicant's basic integrity that such a connection could then be made. Persistent offending with dishonest use of documents could for similar reasons provide a proper basis for refusal to licence so long as the decision was reasoned. Obviously, each application must be considered on its own facts. Theft by failure to account, it seems to me, by its very nature is closely linked to the purposes of the Act. That is so, when one considers exactly what mischief the Act is designed to protect against. As the parliamentary debates disclose, this Act has been promulgated against history within this industry of significant sums of money being procured from prospective immigrants by unscrupulous advisers who failed to provide any reasonable service in return or simply misappropriated the funds to their own use without any attempt to provide a service.

[31] The Registrar's decision therefore needs to be considered against that background. The present appeal involves an applicant for registration who has offended as an Immigration Compliance Officer in the very industry in which his registration would operate. The offending was serious, mainly because it involved grave dishonesty when acting on behalf of the State against persons who were vulnerable and defenceless. The appellant, having obtained property and money from such persons, then retained the benefit of that to himself and failed to account. That would not auger well in the mind of the Registrar who has to decide on whether such offending was unlikely to affect the fitness of a person to act as an immigration adviser.

[32] Mr Gorringe, in his concluding submissions, was correct in stating that the Registrar has not accurately recorded his decision nor properly addressed the real issues set out in s 16 and accordingly, there was an error of law. Similarly, he

submitted that the Registrar placed too much weight on the breach of trust element of the offending, particularly when contrasted with the trial sentencing judge's view. However, in respect of that particular submission, if the Registrar had placed weight on that aspect of the sentencing, which covered failure to account and related that to the purposes of the Act, then he would certainly have been on strong ground. Mr Gorringe's submissions relating to Mr Nagra's behaviour before and after the offences have introduced matters that do not fit within the discretion. Section 16 requires the Registrar to concentrate on the nature of the relevant offence and how that would impact on the fitness of the applicant against the stated purposes of the legislation and having regard to the mischief, which the legislation is designed to prevent. To allow the Registrar to consider the matters which Mr Gorringe has submitted should be taken into account, would be to widen s 16 and lower the threshold too far beyond its context within the surrounding provisions and stated objects of the Act. A crime involving dishonesty and its effect on fitness also needs to be considered in its context in s 16 with the other offences specified in subsection (a) and also the offences and restrictions on status specified in subsection (b) and s 15. Even an offence against the Fair Trading Act 1986 leads to prohibition if the Registrar exercises the discretion accordingly. The inclusion of offending and restrictions on status of that kind specifically sets the context as one of stringent consumer protection.

[33] In conclusion, therefore, s 16 is to be narrowly construed. Concentration is to be centred by the Registrar in the exercise of the discretion on the exact nature of the offending and should not take account of what might be regarded as ancillary mitigatory circumstances such as post offending conduct. Where a person who has offended by way of failure to account on two separate occasions and been convicted on three separate crimes in respect of that offending and the offending has occurred by an officer of the State dealing with potential immigrants, the Registrar is entitled to find that such offending is relevant to that person's fitness to provide immigration advice. The Registrar, in such circumstances obviously has to have regard to the purposes of the legislation, the context in which it has been enacted and the mischief it seeks to eliminate. It may well be that Mr Nagra has mended his ways since 2003 but one of the consequences of his offending, which he now has to accept, is that

because of the way that his offending is categorised in the Act, he is unable to return to the industry as an immigration adviser.

[34] Section 84 provides that in determining an appeal of this kind, the Court may confirm, vary or reverse the decision of the Registrar. These would appear to be similar powers to the powers prescribed under rule 561 of the now repealed District Court Rules 1992. In this case, while there may be some deficiency in the reasons provided by the Registrar his decision was, in the circumstances, nevertheless correct. For that reason the appeal is dismissed.

[35] Counsel did not address me at the hearing on the issue of costs. If costs are to be sought by the respondent, written submissions are to be filed within 21 days. Mr Gorringe, on behalf of the appellant, may then have a further 14 days to file any answer. Any reply can then be filed within a further seven days after that.

Dated at …………..this…………..day of…………2010 at……….am/pm

M E Perkins
District Court Judge