

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-004045

UNDER the Immigration Advisers Licensing Act
2007

IN THE MATTER OF an appeal from a determination of the
District Court at Auckland

BETWEEN MANJ NAGRA
Appellant

AND REGISTRAR OF IMMIGRATION
ADVISERS
Respondent

Hearing: 12 October 2010

Counsel: P F Gorringe for the Applicant
A R Longdill for the Respondent

Judgment: 11 March 2011

JUDGMENT OF PETERS J

*This judgment was delivered by
The Hon. Justice Peters
on
11 March 2011 at 2:30pm
pursuant to Rule 11.5 of the High Court Rules*

David Slight
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Registrar/Deputy Registrar

D J SLIGHT
DEPUTY REGISTRAR

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[1] This decision concerns the meaning of s 16 of the Immigration Advisers Licensing Act 2007 (“Act”).

[2] The issue arises on a case stated by a District Court Judge on 23 June 2010. The question in the case stated is:

The question for the opinion of the Court is whether my decision was erroneous in point of law in the following respects:

- i) That s 16 [of the Act] imposes a presumption against licensing where the specified convictions or restrictions have been imposed.
- ii) That s 16 [of the Act] is to be narrowly construed so that an application is assessed by concentrating on the nature of the relevant offence and not the applicant’s wider personal circumstances or behaviour.

[3] With all due respect to the learned Judge, I consider that the answer to the question is “Yes”. In reaching that view, I have considered the statute as a whole and its purpose. I have had particular regard to the text of the provisions which govern to whom and in what circumstances the Registrar of Immigration Advisers (“Registrar”) may or must grant a licence to operate as an immigration adviser (“licence”). Such a licence entitles the licensee to provide immigration advice as defined in s 7 of the Act (“immigration advice”).

[4] The Act received Royal Assent on 4 May 2007. In his decision, the Judge referred to parliamentary debates during the passage of the Bill. Those debates made it clear that the legislation was a response to the unscrupulous manner in which some advisers had dealt with consumers, often in a vulnerable position, requiring immigration advice.

[5] The Act implemented a régime for the licensing of those who proposed to provide immigration advice and who were not otherwise exempt from the requirement to hold a licence. It is now an offence to provide such advice in the absence of a licence or an exemption.

[6] The Act includes provision:

- (a) For a licensing régime for those who propose to offer immigration advice and who are not exempt from the requirement that they hold a licence to do so. This part of the Act includes s 16 which is the critical provision in this case. The Act also contains provisions dealing with the cancellation and suspension of a licence which has been issued, if particular circumstances arise.
- (b) For the appointment of a Registrar, and the creation of an Immigration Advisers Authority and an Immigration Advisers Complaints and Disciplinary Tribunal. The Act sets out the functions of the Authority and the Tribunal.
- (c) Requiring the Registrar to develop and publish competency standards which licensed immigration advisers must meet and to develop, maintain and publish a code of conduct which licensed immigration advisers are to observe (see ss 36-38 of the Act). The code of conduct must address standards of professional and ethical conduct for those advisers, both in terms of their obligations to a client, and to the Minister of Immigration and the relevant government department. A breach of the code is a ground on which a person may complain to the Registrar.
- (d) For a complaints and disciplinary process. The Tribunal determines complaints. It has power to suspend or cancel a licence and, amongst other things, may order a person to refrain from re-applying for a licence for at least two years or pending compliance with specified conditions.
- (e) For the Registrar or authorised people to exercise powers of inspection and information gathering.
- (f) A series of acts which constitute an offence.

- (g) An appeal from a decision of the Registrar or Tribunal to the District Court, and from the District Court to the High Court on matters of law only.

[7] The Applicant in this case, Mr Nagra, applied to the Registrar for a licence. The Registrar refused to grant him a licence and the Applicant appealed the Registrar's refusal to the District Court pursuant to s 81 of the Act. The learned Judge dismissed the appeal but set out the question referred to above by way of case stated pursuant to s 85(1) of the Act.

Background

[8] Following a jury trial in 2005, the Applicant was convicted of three crimes involving dishonesty. The events leading to two of the convictions took place in 2001, and in 2005 as to the other.

[9] In each case, whilst employed by the Department of Immigration as an Immigration Compliance Officer, the Applicant had sold property belonging to people who were in New Zealand illegally. The Applicant was required to account to the Department for the proceeds of those sales but failed to do so. On 30 September 2005 Venning J sentenced the Applicant to 300 hours community service on each charge, to be served concurrently. By the time of sentencing, the Applicant had made reparation in full to the Department. The Applicant completed the sentence imposed upon him.

[10] By application dated 23 April 2009 the Applicant applied for an immigration adviser licence.

[11] The Applicant disclosed in his application that he had been convicted of a crime involving dishonesty. This disclosure brought the Applicant within s 16 of the Act. The Applicant was required to provide full details of the offending. The copy of the application which I have does not include that information but there is no suggestion that the Applicant's disclosure was inadequate.

Registrar's decision

[12] By decision dated 21 May 2009, the Registrar decided as follows:

"I am not satisfied that the applicant is fit to be licensed as an immigration adviser having regard to the matters specified in section 16 of the Immigration Advisers Licensing Act 2007."

[13] Section 16 of the Act reads as follows:

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.

[14] As can be seen, and as counsel for the Applicant submitted, ss 16(a)-(c) encompass a wide variety of offending, penalty and circumstance.

[15] Having considered the Applicant's convictions and Venning J's sentencing notes, the Registrar stated that advisers must act in their client's best interests and observe high standards of professional and ethical behaviour. The Registrar also said that Venning J had referred to the Applicant's actions as a clear breach of trust. I do not have the sentencing notes but understand from the Judge's decision that Venning J characterised the offending as more of a failure to account than as a breach of trust. Regardless, I do not consider that any error the Registrar may have made in that respect was significant in his final decision.

[16] The Registrar then referred to the historic nature of the Applicant's offending and to references which the Applicant had submitted to the Registrar. Several of these pre-dated the Applicant's sentencing and referred to his general good character. A further four were written after the sentencing, but none referred to the Applicant's criminal convictions or addressed whether he was fit to be licensed as an immigration adviser. In addition, the Applicant provided a letter dated 27 April 2009 from his local Member of Parliament. The letter referred to the Applicant's convictions but attested to his general good character.

[17] The Registrar then said:

Section 16 establishes a presumption against licensing. Given the breach of trust characterizing 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 person's fitness to provide immigration [advice].

Judge's decision

[18] The first issue before the Judge was whether the Registrar was correct in stating that s 16 establishes "a presumption against licensing" for any applicant falling within the classes defined in s 16(a), (b) or (c). Counsel for the Registrar submitted to the Judge, and to me, that s 16 does establish such a presumption. Counsel for the Applicant submitted that the effect of s 16 was simply to trigger an enquiry into the applicant's fitness to provide immigration advice.

[19] The second issue before the Judge concerned the information the Registrar is to consider in deciding under s 16 whether he is satisfied that the nature of the offence or matter is unlikely to adversely affect the person's fitness to provide immigration advice.

[20] Counsel for the Registrar submitted to the Judge, and she also submitted before me, that the enquiry is a narrow one and goes only as to the circumstances of the offending. In the present case, that would mean the references the Applicant submitted were irrelevant and, in summary, that the Registrar cannot go beyond consideration of when, where and how the offending occurred, the sentencing remarks and the sentence. Counsel for the Applicant, however, submitted that the

Registrar may and indeed is required to consider information that is broader than the nature of the offence or matter and may consider material such as references, and efforts to redeem reputation and generally to rehabilitate.

[21] The Judge's determinations, as they appear in his judgment, are summarised in the case stated and are as follows:

(i) Section 16 does establish a presumption against licensing and sets a high standard to be applied by the Registrar, because the discretion is exercised on the basis of mere likelihood.

(ii) The effect of s 16 is to provide a very limited exception to a prohibition when specified crimes have been previously committed. The inquiry under s 16 is directed to the exact nature of the relevant offence and not to the applicant's wider personal circumstances or behaviour after the offending.

(iii) In applying s 16, the Registrar is required 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 the mischief it is designed to prevent.

(iv) Section 16 is to be narrowly construed. A consequence of the appellant's offending is that he is unable to return to the industry as an Immigration Adviser, because of the way his offending is categorised in the Act.

(v) The appeal would be dismissed because, although there may have been some deficiency in the respondent's reasoning, his decision was correct.

[22] I turn now to consider the relevant provisions of the Act and to set out my conclusions.

Relevant provisions of the Act

[23] The purpose of the Act is set out in s 3 and reads as follows:

3 Purpose and scheme of Act

The purpose of this Act 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] Sections 6 and 7 of the Act set out respectively the prohibition on providing immigration advice in the absence of a licence or exemption and the definition of immigration advice. They read as follows:

6 Prohibition on providing immigration advice unless licensed or exempt

No person may provide immigration advice unless that person—

- (a) is licensed under this Act to provide that advice; or
- (b) is exempt under section 11 from the requirement to be licensed.

7 What constitutes immigration advice

(1) In this Act, **immigration advice**—

(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 or a refugee and protection officer (within the meaning of the Immigration Act 2009), or to a list of licensed immigration advisers; or]
- (iii) carrying out clerical work, translation or interpreting services, or settlement services.

(2) To avoid doubt, a person is not considered to be providing immigration advice within the meaning of this Act if the person provides the advice in the course of acting under or pursuant to—

- (a) the Ombudsmen Act 1975; or
- (b) any other enactment by which functions are conferred on Ombudsmen holding office under that Act.

[25] Section 10 of the Act sets out the class of person who may be licensed as an immigration adviser. The wording of s 10(c) in particular is relevant to determining the present issue.

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.

[26] Section 18 sets out how an application for a licence must be made.

[27] Section 19(1) sets out the circumstances in which the Registrar must grant a licence to an applicant. In the Applicant's case, the only issue which arose concerned s 19(1)(b).

19 Granting of licence

- (1) The Registrar must grant a licence to an applicant if satisfied that—
 - (a) the applicant is not prohibited from registration under section 12(6) or 15; and
 - (b) having regard to the matters specified in sections 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 section 36; and
 - (d) the application complies with section 18 and is properly completed; and
 - (e) the applicant has paid the required amount of immigration adviser's levy (if any).

[28] Having determined to grant a licence, the Registrar must determine whether the applicant is to be granted a full, limited or provisional licence (see s 19(2) of the Act). The Registrar may grant a full licence if satisfied that the applicant has overall competence in all areas of immigration advice. The Registrar may grant a limited licence authorising the applicant to provide immigration advice only in relation to specified matters, if the Registrar is satisfied that the applicant is competent only in relation to those matters. The Registrar may grant a provisional licence requiring the applicant to work under the supervision of a fully licensed immigration adviser for at most 12 months if the applicant is a new entrant to the industry or if the Registrar is

satisfied that for any other reason supervision is required or appropriate (see s 19(3) to (5) of the Act).

[29] Section 19(1)(a) refers to ss 12(6) and 15. Section 12(6) deals with exemptions and is not relevant. Section 15 prohibits outright certain persons from being licensed and it reads as follows:

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 2009, the Immigration Act 1987, or the Immigration Act 1964; or
 - (d) has been removed or deported from New Zealand under the Immigration Act 2009, 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).
 - (c) any immigration officer or refugee and protection officer (as defined in the Immigration Act 2009).

[30] A person within the categories referred to in ss 15(1)(a) and (b) will at some future point cease to be so because they will be discharged from bankruptcy or the period of prohibition or disqualification referred to will end. At that point such a person will fall within s 16(c), that is, will move from the “prohibited” category to the “prohibited unless” category.

[31] Section 19(1)(b) refers to “the matters specified in sections 16 and 17”. I have already referred to s 16. Section 17 reads:

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.

[32] If the Registrar determines not to grant a licence, s 21 is relevant and it reads as follows:

21 Refusal to grant licence

- (1) If the Registrar determines not to grant a licence, he or she must notify the applicant in writing of the decision and the reasons for it within 10 working days after the decision is made.
- (2) An applicant has the right to appeal, under section 81, the Registrar's decision to refuse to grant a licence.

Decision

[33] Section 19(1) provides that the Registrar must grant a licence to an applicant if satisfied as to the matters specified in s 19(1) (a) to (e).

[34] The first question I have considered is whether the Registrar is required in every case to be satisfied of an applicant's fitness to be licensed or whether the Registrar is only required to be so satisfied if the particular applicant falls within the classes of person defined in s 16(a) to (c) and in s 17(a) to (c).

[35] I consider the Registrar is only required to be satisfied as to an applicant's fitness to be licensed if such applicant falls within the classes defined in ss 16 or 17. I take that from the opening words in s 19(1)(b), namely:

“having regard to the matters specified in sections 16 and 17”

and from the words in s 10(c), namely:

“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”.

[36] That said, the opening words of s 17 might suggest that the Registrar is required in every case to be satisfied as to an applicant’s fitness to be licensed. That is an alternative view but I do not consider it correct, given the words to which I have referred in s 10(c) of the Act.

[37] Secondly, it is necessary to consider what s 19(1)(b) requires of the Registrar. The Registrar is required to be satisfied having regard to “the matters specified” in ss 16 and 17.

[38] The matter or matters specified in s 16 to which the Registrar is to have regard could be either the need to be satisfied that the nature of the relevant offence or matter is unlikely to adversely affect the person’s fitness to provide immigration advice or it could be the categories set out in s 16(a) to (c). The latter would make little sense. I think the reference in s 19(1)(b) to “the matters specified in section 16” requires the Registrar to have regard to the nature of the relevant offence or matter and whether it is unlikely to adversely affect the person’s fitness to provide immigration advice.

[39] The next issue is whether s 16 creates a presumption of the type described by the Registrar.

[40] I do not consider it necessary or helpful to refer to s 16 as creating a presumption. The opening words of s 16 create a prohibition against licensing unless that prohibition is displaced as a result of the Registrar being satisfied as to the other matters set out in s 16.

[41] The word *satisfied* is also used in other provisions of the Act, including ss 10 and 19. The meaning of “satisfied” in the context of s 94(2) Resource Management Act 1981 was discussed by members of the Supreme Court in *Discount Brands Ltd v*

*Westfield (New Zealand) Ltd.*¹ At [23] and [24], Elias CJ referred to the word as requiring more than a finely balanced judgment, and that the use of the word, at least in that context, indicated a need for caution and for a degree of conviction. Keith J referred in [53] to the word as requiring assurance. He also referred to its definition in the *Oxford English Dictionary* as being “To furnish with sufficient proof or information; to assure or set free from doubt or uncertainty, to convince.”

[42] Given the purpose of the Act, I consider the use of the word “satisfied” indicates that the Registrar is to have the same degree of assurance when determining the matters required by ss 19(1)(b) and 16 as their Honours discussed in the *Westfield* case.

[43] The next question concerns how the enquiry which s 16 anticipates is activated. I consider that enquiry is activated if an applicant who falls within s 16 submits to the Registrar information which that applicant contends is sufficient to displace the prohibition which would otherwise exist. There is no burden or obligation on the Registrar to seek to obtain information. It is for the applicant who seeks a licence to provide that information. The Registrar is to give the information the weight which is appropriate in the circumstances which present themselves.

[44] The next point concerns the information which is relevant to the determination the Registrar is required to make under s 16. On that matter, I consider the Registrar and Judge have taken too restrictive a view of the information which is relevant.

[45] Each of ss 10(c), 16 and 19(1)(b) refer to “the” person. The determination is as to the fitness of the particular applicant whose application is being considered.

[46] In addition, the determination is as to the applicant’s fitness at the time of the application. Section 19(1)(b) requires the Registrar to be satisfied the person *is* fit to be licensed. Section 10(c) requires that the applicant be determined by the Registrar *to be* a fit and appropriate person to hold a licence.

¹ *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597.

[47] Once the enquiry is activated as I have said, s 16 requires the Registrar to consider the effect of the nature of the offending or matter on the person's fitness, that is, the effect of a previous event on present fitness. I do not consider the Registrar could make the determination required unless he or she formed a view as to the person's fitness at the time of the application. To do so, the Registrar is required to have regard to information other than the circumstances of the offending or matter.

[48] There is some support for this view to be taken from the point I made in paragraph [30] above, namely that a person who has previously been within s 5(1)(a) or (b) will move out of those classes and into s 16(c) simply by passage of time. That the legislation provides for this indicates that those who had previously been prohibited outright from holding a licence should have an opportunity to satisfy the Registrar that, whatever the position may have been, they are now fit to hold a licence.

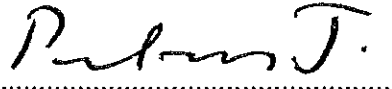
[49] Information concerning an applicant's character prior to the offending or matter may satisfy the Registrar that the transgression was out of character. Information as to an applicant's conduct after the offending or matter occurred may satisfy the Registrar that the offending or matter can be treated as an historic and isolated event and that the applicant has mended their ways. I mentioned above that it is for the Registrar to give such weight to the information as is appropriate in the circumstances which present themselves. I would have thought it likely for instance that the Registrar would give greater weight to a reference from a referee to whom the applicant has made full and frank disclosure, than to one from a referee who may be in ignorance of the offence or matter in the applicant's past.

[50] To summarise, I do not consider s 16 requires the Registrar to concentrate exclusively on the nature of the offence or matter. The Registrar is required to consider the applicant's present fitness to provide immigration advice. The Registrar is to do so by reference to the nature of the offence or matter and by reference to information that the applicant contends is relevant to his or her fitness to provide immigration advice at the time the application is made.

Result

[51] For those reasons, my view is that the answer to the case stated is "Yes". I remit the matter to the District Court with my opinion, for re-hearing.

[52] There will be no order as to costs.

A handwritten signature in cursive script, appearing to read "Peter J. Peters". The signature is written in black ink and is positioned above a horizontal dotted line.

PETERS J