IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2017-404-000161
CRI-2017-404-000162
[2017] NZHC 1673

BETWEEN	ALISON YANG Appellant
AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Hearing: 17 July 2017

Counsel: P Dacre QC for Appellant
NB Porter for Respondent

Judgment: 19 July 2017

JUDGMENT OF DOWNS J

This judgment was delivered by me on Wednesday, 19 July 2017 at 4.30 pm.

~~Registrar~~/Deputy Registrar

Matthew Howe
Deputy Registrar
High Court Auckland

Solicitors/Counsel:
P Dacre QC, Auckland.
Meredith Connell, Auckland.

The issues

[1] The appellant was convicted of holding herself out as a person who provided immigration advice contrary to s 64(1) of the Immigration Advisers Licensing Act 2007, and providing immigration advice when she was neither licensed to provide nor exempt from holding a license, knowing she was required to be licensed or exempt contrary to s 63(1)(a) of the same Act. The appellant contends Judge Aitken was wrong not to discharge her without conviction as the alleged consequences of conviction are out of all proportion to the gravity of her offending.[1] Permanent name suppression is also pursued, albeit tentatively.

The facts

[2] The appellant was the director and shareholder of a company that provided immigration advice. But as the charges imply, the appellant was neither a licensed immigration advisor nor exempt from holding a license. In 2011 the appellant participated on at least four occasions in a radio programme conducted in Mandarin. The programme was concerned with immigration, and divided in two sections. In the first, the appellant gave generic immigration advice. In the second, callers asked specific questions of the appellant in relation to immigration matters, which she answered. The appellant's son was present but said little. More about this aspect shortly.

[3] The appellant had previously made similar broadcasts. On 26 February 2009 the Immigration Advisers Authority (IAA) sent her a letter saying anyone giving immigration advice must be licensed by 4 May 2009. On 6 May 2009, two IAA members met with the appellant to discuss the broadcasts, followed by email questions from her to them. The IAA conveyed its position the appellant had been providing immigration advice to callers during the programme and she required a licence to do so. The IAA conveyed this position again in 2010 (in a letter to the appellant following a meeting with her). The appellant said she understood.

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[1] Because of the age of the underlying criminal proceedings, the appeals remain governed by the Summary Proceedings Act 1957 rather than the Criminal Procedure Act 2011.

[4] The radio broadcasts resumed in 2011; see [2]. However, her son was present. And, he was a licensed immigration adviser. Judge Aitken concluded the prosecution had not proved beyond reasonable doubt the appellant knew she was breaching the Act given her son's presence and related advice from the manager of the radio station that meant her conduct was lawful.

Procedural background

[5] The procedural background is relevant.

[6] The appellant defended the charges. She was found guilty by Judge Aitken on 5 March 2014.[2] And sentenced on 16 July 2014.[3] Judge Aitken fined the appellant $10,000 ($5,000 on each charge). Her Honour dismissed an application for discharge without conviction and an application for permanent name suppression. The appellant appealed conviction, sentence and (absence of) name suppression. On 10 June 2015 Courtney J dismissed the conviction appeal but upheld the sentence appeal.[4] Her Honour concluded the evidence had not clearly established as an aggravating fact an absence of belief on the part of the appellant she was acting within the law.[5] The Judge made an order suppressing the appellant's name "until final disposition of the matter", that is, an interim order.

[7] Judge Aitken conducted a disputed facts hearing on 12 December 2016. The Judge found the prosecution had not proved beyond reasonable doubt the appellant deliberately flouted the law; rather it was reasonably possible she was "genuinely mistaken as to her obligations under the Immigration Act at the time she committed [the] offences".[6]

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2 *Immigration Advisers Authority v Yang* DC Auckland CRI-2013-004-002413, 5 March 2014.
3 *Police v Yang* DC Auckland CRI-2013-004-002413, 16 July 2014.
4 *Yang v Ministry of Business, Innovation and Employment* [2015] NZHC 1307.
5 At [45]–[46].
6 *Ministry of Business, Innovation and Employment v Yang* [2017] NZDC 24 at [11].

[8] The Judge sentenced the appellant again on 26 April 2017.[7] The Judge dismissed renewed applications for discharge and permanent name suppression. The appeals lie against these determinations.[8]

The respective cases

[9] For the appellant, Mr Dacre QC contends the Judge's factual conclusion the appellant might have been "genuinely mistaken as to her [legal] obligations" is incompatible with the balance of the Judge's approach to the discharge application. He submits if the Judge had approached her task consistently with this conclusion, the appellant should have been discharged without conviction.

[10] The respondent submits the Judge's factual determination does not vitiate any of the reasoning in connection with the discharge application and in any event, the consequences of conviction are not out of all proportion to the gravity of the offending.

Analysis

[11] The Judge's factual conclusion in relation to the appellant's state of mind is of obvious importance. So too the Judge's associated remarks at the disputed facts hearing. Her Honour observed:[9]

> The fact that there was no difference in the style or type of advice given by the defendant reflected either wilful defiance or a genuine mistake. Given the efforts that the defendant has gone to in establishing here company, the fact that her son was working there, the fact that the Authority had already recorded previous programmes and called her to task on them, to proceed in the face of all of that would suggest the wilful defiance as the prosecution submits. However, the defendant did not, as a matter of fact, proceed in the same manner as before: her son was present at the express request of the radio station manager.
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> Having had the opportunity to see and hear Mr Cheung give evidence, I am satisfied that, at the time, he honestly believed that his mother was complying with the legal requirements when she expressed the view she did

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7 *Immigration Advisers Authority v Yang* [2017] NZDC 8557.

8 In *E H Cochrane Ltd v MOT* [1987] 1 NZLR 146 (CA) at 153-154, Cooke P and Somers J observed s 131 of the Summary Proceedings Act 1957, which governs this case, carried an associated right of appeal after proceedings had been remitted to the District Court following the original appeal.

9 *Ministry of Business, Innovation and Employment v Yang*, above n 6, [9]–[11].

> on the programme. Because of that, her son's presence, the tacit approval by the radio station of her proceeding in this way, I am left with a reasonable doubt as to what the defendant honestly believed at the time she conducted these radio programmes.
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> It follows that I must conclude that the defendant did not deliberately flout the law – rather that she was genuinely mistaken as to her obligations under the Immigration Act at the time she committed these offences. She falls to be sentenced on that factual basis.

[12] As will be apparent, the Judge concluded the appellant was genuinely mistaken as to her obligations under the Act, or at least, there was a reasonable possibility the appellant was so mistaken.

[13] At the subsequent sentencing hearing, the Judge reminded herself of this conclusion. But having done so, the Judge observed it would not have been difficult for the appellant to have easily identified the correct legal position. So, for example, a "single telephone call to [the IAA] would have elicited the same response as earlier—that her son's interpretation was in … error".[10] The Judge said each radio broadcast was "littered with instances" in which advice had been given,[11] and while the appellant's son was present, it was obvious the appellant (rather than son) was the "star of the show".[12] The Judge concluded the appellant's conduct was "very negligent" in light of advice from the IAA her conduct was unlawful.[13] And the Judge again observed a "single telephone call to the IAA … was all that was needed" to clarify the legal position.[14]

[14] I accept Mr Dacre's submission that having concluded it was at least reasonably possible the appellant was genuinely mistaken as to her legal obligations; the Judge then approached the discharge application as if this was not the position. The dissonance in the Judge's approach can be illustrated with this rhetorical question: *why* would the appellant seek to clarify the legal position when there was at least a reasonable possibility she believed her conduct was lawful? Approached another way, *how* could the absence of steps to clarify the legal position aggravate

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10 *Immigration Advisers Authority v Yang*, above n 7, at [18].
11 At [23](a).
12 At [23](b).
13 At [27].
14 At [27].

the offending when, given the appellant's state of mind her conduct was lawful, there was no reason for her to take those steps?

[15] Contrary to Mr Porter's submission, this error vitiates the balance of Her Honour's reasoning. To refer to the broadcasts as being "littered" with advice is to imply the appellant knew her actions were unlawful. And to refer to the appellant as the "star of the show" implies the son's presence was little more than a stratagem to avoid breaching the Act.

[16] In summary, having earlier concluded the appellant's conduct might have reflected "a genuine mistake" as against "wilful defiance" of legal responsibilities, the Judge could not her approach her task as if the latter informed the application. I must consider it afresh.[15]

Gravity of the offending

[17] The offending occurred on at least four occasions and involved the provision of immigration advice contrary to the Act. The backdrop was commercial; the appellant was promoting her immigration business. Obviously, immigrants can be vulnerable. So, duration of offending, commercial context and target audience aggravate seriousness.

[18] However, there is no evidence any of the appellant's advice was incorrect, or any listener or caller suffered harm in consequence of her advice. And as will now be clear, the prosecution could not exclude the reasonable possibility the appellant believed her conduct was lawful. The appellant has no convictions beyond one for careless driving 21 years ago.[16] She is of otherwise good character, and well regarded in the Chinese community.

[19] The combination, overall, means the gravity of the offending is low to moderate.

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15 Sentencing Act 2002, ss 106–107.
16 See [21].

Consequences of conviction

[20] Mr Dacre invites attention to five alleged adverse consequences of conviction:

(a) The appellant will not be able to travel using an APEC business travel card.

(b) The appellant intends to purchase a business in Australia. The contract is conditional on consent from a body corporate. A police check is required before the body corporate will consent.

(c) The appellant intends to return to China to retire. She holds a New Zealand passport and is therefore required to apply for permanent residence in China. For this she must certify she does not have a criminal record in New Zealand.

(d) The appellant will lose face in the Chinese community.

(e) Conviction may aggravate the appellant's depression.

[21] The appellant filed and served a brief "updating" affidavit (with annexures) in support of some of these points. Doubt attaches to its admissibility, for, it is not clear any of its content was not reasonably available when the case was last before Judge Aitken (on 26 April 2017).[17] But this is also true of "fresh" evidence advanced by the respondent, which is to the effect the appellant has a 1996 conviction for careless driving in another (Chinese) name. Neither party advanced any real objection to appellate receipt of the other's evidence. Given that, and in light of the protracted procedural history, I received all of the evidence in the interests of justice. For reasons that will become apparent, little if anything turns on this decision.

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[17] *R v Bain* [2004] 1 NZLR 368 (CA) at [22]–[27].

The APEC business travel card

[22] It appears to have been common ground in the Court below, and was common ground before me; a conviction will render the appellant ineligible to use an Apec business travel card. The card permits easy access to China and other countries. It is issued to facilitate business arrangements. The primary benefit is that a holder may enter China without needing to apply for a visa. However, there remains no evidence the appellant would be ineligible for a visa into China should she apply for one. In other words, there is no reason to believe the appellant's ineligibility for an Apec business travel card would or may impede her travel to and from China.

The police check

[23] The material advanced by the appellant in relation to the business purchase—a single brief email from an Australian law firm—does not say or imply the body corporate would or may decline consent in the event the appellant has a criminal record. Furthermore, the regulatory nature of the convictions and associated absence of any dishonesty ingredient may be thought to tell against them posing a significant hurdle in relation to the appellant's Australian business plans.

Retirement in China

[24] In *Edwards v R* the Court of Appeal held in relation to travel-related impediments of conviction:[18]

> ... a court will ordinarily expect to be satisfied that under the law and practice of the jurisdiction concerned:
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> (1) the conviction must be disclosed but, assuming a discharge is given, the fact that the offence was committed need not be; and
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> (2) in consequence of the conviction, the applicant is prima facie inadmissible, and for how long; and
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> (3) there is no alternative entry process available or that, if there is, such process is unreasonably difficult and uncertain in all the circumstances.

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[18] *Edwards v R* [2015] NZCA 583 at [26].

[25] As with the evidence in relation to the police check, that advanced by the appellant on this issue is perfunctory. The appellant has annexed a copy of extracts from the Measures for the Administration of Examination and Approval of Foreigners' Permanent Residence in China. Article 9 of these appears to support the appellant's evidence she must not have a criminal record. However, contrary to *Edwards v R*, there is no evidence before me as to whether:

(a) The rule is qualified by an exception or exceptions.

(b) Insisted upon in practice.

(c) A discharge without conviction is treated as analogous to a conviction.

[26] Moreover, as a former Chinese national, an alternative path may be open to the appellant to obtain permanent residence in China. Given the state of the evidence, I am not satisfied of a real and appreciable risk the appellant's retirement plans will be thwarted through conviction.

Loss of face

[27] I accept some loss of face may arise from the fact of conviction, but context is likely to dilute this consequence. The Chinese community in which the appellant mixes will likely know or soon learn the appellant believed she was acting lawfully and the Judge accepted as much. The regulatory nature of the offending also diminishes this aspect.

Depression

[28] There is no evidence to support the proposition the fact of conviction may aggravate the appellant's depression. A brief letter from the appellant's general medical practitioner (annexed to the appellant's affidavit) refers to the appellant "becoming depressed and contemplating suicide". However, the letter is silent on what effect, if any, the entry of a conviction would or may have. Moreover, the appellant does not say in her affidavit conviction may make her feel worse or otherwise aggravate her condition.

[29] The high point for the appellant in this respect appears in an affidavit sworn in the District Court in which the appellant says: "I did not know how I could face people now I am a criminal". That comment could refer to the entry of conviction, the fact the charges were proved, or some combination of both. But again, there is no evidence to sustain the alleged consequence.

Overall effect of the consequences of conviction

[30] Overall, the direct and indirect consequences of conviction appear to be low to moderate, and little if any beyond the ordinary.

Evaluation

[31] As will be apparent, the direct and indirect consequences of conviction are not out of all proportion to the gravity of the offending. Indeed, they align. There is no jurisdictional basis for an order to discharge the appellant without conviction.

Name suppression

[32] The appellant also appeals, at least formally, refusal to grant permanent name suppression. Judge Aitken's decision records a responsible concession by Mr Dacre in the District Court the jurisdictional basis for an order—extreme hardship to the appellant by virtue of publication of name[19]—was not met.[20]

[33] Nothing material has changed since then.

Conclusion

[34] Judge Aitken erred when considering the appellant's application for discharge without conviction. But having undertaken that exercise too, I reach the same conclusion as the Judge; the consequences of conviction are not out of all proportion to the gravity of the offending. As observed earlier, they align.

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19 Criminal Procedure Act 2011, s 200(2)(a).

20 *Immigration Advisers Authority v Yang*, above n 9, at [54].

[35] That appeal is dismissed. So too the appeal in relation to permanent name suppression.

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Downs J