IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 4/2021
[2021] NZSC 27

BETWEEN		JEREMY JAMES MCGUIRE Applicant
AND		SECRETARY FOR JUSTICE Respondent

Court: William Young, Glazebrook and Williams JJ

Counsel: Applicant in person
G L Melvin and C C Barnett for Respondent

Judgment: 18 March 2021

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2,500.

REASONS

[1] Mr McGuire applies for leave to appeal against the Court of Appeal's decision upholding the decision of the Secretary for Justice not to approve his application to be a legal aid provider in low-level criminal proceedings.

Background

[2] Mr McGuire is a lawyer and was an approved legal aid provider under the previous Legal Services Act 2000. His approvals were cancelled in 2010 after he faced professional disciplinary charges of unsatisfactory conduct. His challenge in the Review Authority against the cancellation decision was unsuccessful.

[3] Mr McGuire made a fresh application for approval in 2013, but that was declined. His challenge to that decision ended when this Court dismissed his appeal in 2018.[1]

[4] During that process, Mr McGuire made another application for approval in August 2015. Specifically, he applied to be a lead provider for approval level 1 criminal proceedings (criminal PAL 1 proceedings). The Secretary for Justice also declined that application, and Mr McGuire's challenge in the Review Authority was unsuccessful. Mr McGuire then applied to the High Court to judicially review the Secretary's decision. That application was dismissed,[2] as was Mr McGuire's appeal to the Court of Appeal.[3]

[5] Mr McGuire now applies for leave to appeal to this Court against the decision of the Court of Appeal.

The regulations

[6] The requirements for acceptance as a lead provider are set out in reg 6 of the Legal Services (Quality Assurance) Regulations 2011. Regulation 6(1) provides that the applicant must "be experienced and competent" in the relevant area of law. In deciding whether the applicant meets this criterion, the Secretary must (among other things) apply the requirements in the Schedule to the Regulations. For criminal PAL 1 proceedings, cl 2(a) of the Schedule provides that the applicant must "have at least 12 months' recent experience in criminal law practice". "Recent experience" means "experience gained in the 5 years immediately before the date of application".[4]

[7] Before these provisions were repealed, reg 6(4)–(7) provided for the circumstances in which the Secretary may make an exception for those whose experience was not "recent".[5] They were the operative provisions at the time of the challenged decision. Regulation 6(5) provided that an applicant may still meet the

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1 *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335.
2 *McGuire v Secretary for Justice* [2019] NZHC 42 (Clark J).
3 *McGuire v Secretary for Justice* [2020] NZCA 612 (Cooper, Clifford and Collins JJ) [CA judgment].
4 Legal Services (Quality Assurance) Regulations 2011, reg 3 definition of "recent experience".
5 The exception is now provided for in reg 6A.

reg 6(1) criteria if the Secretary is satisfied the applicant meets the relevant experience and competence requirements "in all other respects", and has the appropriate level of knowledge and skill to provide legal aid services in the relevant area.

[8] Further, all applicants must satisfy the Secretary that they are a "fit and proper person to provide legal aid services or specified legal services".[6]

Secretary for Justice decision

[9] The Secretary declined Mr McGuire's application. She found that Mr McGuire did not demonstrate the requisite experience and competence for criminal PAL 1 proceedings.

[10] It was common ground that Mr McGuire did not meet the requirement of 12 months' criminal law experience in the last five years, as he had not practised criminal law to any real extent since 2010. However, he submitted that he made brief court appearances in 2015 as an agent for people being sentenced after pleading guilty. He also provided three examples of involvement in police prosecutions between 2008 to 2010.

[11] The Secretary was not prepared to waive the recent experience requirement, as she did not consider Mr McGuire had the appropriate level of knowledge and skill to provide legal aid services in criminal PAL 1 proceedings. She noted that legal aid "is not a training ground for lawyers" and that Mr McGuire could have gained the necessary experience by working in private practice, as a junior, or as a supervised provider. She also noted that Mr McGuire had not demonstrated knowledge and skill in relation to the Criminal Procedure Act 2011, which was not operative when he last practised criminal law.

High Court and Court of Appeal decisions

[12] Both the High Court and Court of Appeal upheld the Secretary's decision.

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6 Regulation 9C(1).

[13] The Court of Appeal held that the Secretary did not overlook any relevant considerations. In particular, the Court distinguished *AQ v Secretary for Justice*, a case where the Review Authority waived the recent experience requirement for a foreign practitioner who did not have sufficient New Zealand legal experience.[7] The Court noted that the applicant in that case had "extensive overseas experience and had previously been appointed as an acting Judge in a foreign jurisdiction". Mr McGuire, the Court considered, was in a very different position.[8]

[14] The Court also rejected arguments that the Secretary failed to consider whether to exercise her power under reg 6(5) to make an exception to the recent experience requirement, and that her decision was unreasonable.[9] As the Court rehearsed, Mr McGuire had not practised criminal law for almost five years, except for a limited number of private clients and prosecution work for the Royal Forest and Bird Protection Society of New Zealand Inc.[10] Further, the Criminal Procedure Act, which post-dated the effective cessation of Mr McGuire's criminal practice, substantially changed many aspects of criminal procedure in New Zealand.[11]

Applicant's submissions

[15] Mr McGuire does not suggest his application raises any issue of general or public importance.[12]

[16] Rather, he submits that the Secretary erred when she did not consider the effect of *AQ*. He submits that there is no substantive difference between his case and *AQ*, and so the Secretary's decision is unreasonable because it fails to treat like cases alike.[13] He submits that this amounts to an error of such substantial character that it meets the miscarriage threshold for civil cases.[14]

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7 *AQ v Secretary for Justice* [2013] NZRA 1.
8 CA judgment, above n 3, at [23].
9 At [24]–[27].
10 At [26].
11 At [27].
12 Senior Courts Act 2016, s 74(2)(a).
13 Citing *Wellington City Council v Minotaur Custodians Ltd* [2017] NZCA 302, [2017] 3 NZLR 464.
14 Senior Courts Act, s 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

[17] In comparing his case to that of *AQ*, Mr McGuire points out that he had been practising low-level criminal law in New Zealand for more than 20 years prior to 2010, including 15 years as a lead provider for criminal PAL 1 proceedings. The applicant in *AQ* had only two years' experience practising in New Zealand, and there was no indication he had any experience with the Criminal Procedure Act.

Our assessment

[18] As is common ground, Mr McGuire's application does not involve a question of general or public importance.[15] Rather, he argues that leave should be granted on the miscarriage ground.[16]

[19] We are satisfied that there is no real risk that a substantial miscarriage of justice may occur if leave is not granted. In particular, Mr McGuire's key argument that the circumstances of his case and those of the applicant in *AQ* are materially similar does not have sufficient prospects of success. The threshold for miscarriage in civil cases is therefore not met in this case.[17]

[20] The application for leave to appeal is dismissed.

[21] The applicant must pay the respondent costs of $2,500.

Solicitors:
Crown Law Office, Wellington for Respondent

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15 Section 74(2)(a).
16 Section 74(2)(b).
17 *Junior Farms*, above n 14.