SUPREME COURT OF QUEENSLAND

CITATION:	*Alroe v Medical Board of Queensland* [2010] QCA 44
PARTIES:	**MEDICAL BOARD OF QUEENSLAND** (respondent/applicant/appellant) **v** **CHRISTOPHER JOHN ALROE** (appellant/respondent)
FILE NO/S:	Appeal No 13241 of 2009 DC No 75 of 2009 DC No 201 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	5 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2010
JUDGE:	McMurdo P and Muir JA and Daubney J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal be granted;** **2. The appeal be allowed;** **3. The orders of the District Court made on 30 October 2009 be set aside;** **4. The appeal to the District Court be dismissed; and** **5. The respondent pay the applicant's costs of the appeal to the District Court and of this appeal.**
CATCHWORDS:	HEALTH AND GUARDIANSHIP – REGULATION OF HEALTH CARE PROFESSIONALS – REGISTRATION REQUIREMENTS AND PROCEDURE – REGISTRATION CATEGORIES AND QUALIFICATIONS – MEDICAL PRACTITIONERS – QUEENSLAND – where respondent psychiatrist de-registered due to unsatisfactory professional conduct – where applicant granted respondent general registration – where applicant refused respondent specialist registration because respondent was not a Fellow of the Royal Australian and New Zealand College of Psychiatrists – where respondent argued that Fellowship was not a "qualification" required by s 111(1)(b) *Medical Practitioners Registration Act* 2001 (Qld) – whether a general registrant who is not a Fellow can be registered as a specialist

District Court of Queensland Act 1967 (Qld), s 118(3)
Medical Practitioners Registration Act 2001 (Qld), s 84, s 85, s 111(1)(b)(i), s 111(1)(b)(ii), s 111(2)(b), s 111(3), s 124(1)(a)

R v Refshauge; Ex parte Thomson (1976) 11 ALR 471, cited

COUNSEL: J H Dalton SC for the applicant/appellant
D A Skennar for the respondent

SOLICITORS: DLA Phillips Fox for the applicant/appellant
O'Sullivan Solicitors for the respondent

[1] **McMURDO P:** The application for leave to appeal should be granted and the appeal allowed for the reasons given by Muir JA. I agree with the orders proposed by Muir JA.

[2] **MUIR JA: Introduction**
The respondent psychiatrist was found guilty of unsatisfactory professional conduct by the Health Practitioners Tribunal on 17 December 2003. On 6 May 2005, the Tribunal ordered that the respondent's registration be cancelled for four years from 21 January 2004. During that four year period the respondent was again found guilty by the Tribunal of unsatisfactory professional conduct and it was ordered that he not be re-registered by the applicant before 21 January 2009. In its order of 19 September 2007, the Tribunal imposed a number of conditions with which the respondent was obliged to comply "upon re-registration by the" applicant.

[3] The respondent applied for general and specialist registration and the applicant granted the application for general registration on 12 May 2008. However, the applicant refused the respondent's application for specialist registration on 16 February 2008 and again on 28 July 2009. The respondent appealed against the latter decision to the District Court, which upheld the appeal on 30 October 2009. The applicant applies pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld), for leave to appeal against that decision.

Other relevant facts

[4] Before considering the merits of the grounds of appeal, it is desirable to say a little more about the facts.

[5] After the Tribunal's decision in 2003, the Royal Australian and New Zealand College of Psychiatrists terminated the respondent's fellowship of the College. Under cover of a letter to the respondent of 31 July 2009, the applicant gave the following reasons for its determination that the respondent was not eligible for specialist registration in accordance with s 111(1)(b)(ii) of the *Medical Practitioners Registration Act* 2001 (Qld) ("the Act").

> "
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> - Section 11l(l)(b)(ii) provides that an applicant, who is a general registrant, is eligible for specialist registration if the applicant has a qualification, in the specialty, the Board considers is substantially equivalent to, or based on similar competencies to that required for, a current qualification in the specialty;

- The current qualification in the specialty of psychiatry is Fellowship with the Royal Australian and New Zealand College of Psychiatrists (the College);
- The College provided advice that the award of Fellowship is the required standard for the award of a qualification and practice as a specialist in the field of psychiatry and that, having regard to your violation of the College's Ethical Guidelines No 8 'Sexual Relationships', you do not meet the College requirements for an award of fellowship;
- The Australian Medical Council (AMC) provided advice that you were not an AMC candidate through any pathway and noted that it could provide no further advice in relation to your qualifications and competencies;
- The Board considered your skills and abilities in relation to your practice in psychiatry between 1985 and 2004 and your lack of recent practice since January 2004;
- Upon the information before it and having regard to the advice received from the College, the Board is not satisfied that your skills and experience in the field of Psychiatry are substantially equivalent to, or based on similar competencies to that required for, a current qualification in the specialty as 'required by' section 111(1)(b)(ii) of the Act."

The primary judge's reasons

[6] The primary judge held that s 111 of the Act did not apply to persons seeking registration after de-registration from a medical specialty. His Honour appeared also to have concluded that the effect of the Tribunal's order of 19 September 2007 was to give rise to an entitlement on the part of the respondent to registration after 21 January 2009.

The respondent's submissions

[7] Counsel for the respondent did not seek to support the primary judge's conclusion that s 111 of the Act did not apply to applications for re-registration. Nor was it contended that the Tribunal's order of 19 September 2007 gave rise to an entitlement to re-registration. Those implicit concessions were well founded. The Tribunal cancelled the respondent's registration on 6 May 2005. In order to become registered again the respondent had to apply to the applicant and satisfy the requirement for registration. Paragraph 2 of the 2007 Order prohibited re-registration before 21 January 2009 and paragraph 3 of that Order implicitly recognised that the respondent had to make application for re-registration if he wished to obtain registration as a psychiatrist.

[8] The substance of the argument advanced on behalf of the respondent was as follows. The applicant applied the wrong test in determining the respondent's application by treating as decisive the fact that the applicant was not a Fellow of the Royal Australian and New Zealand College of Psychiatrists. That requirement is applicable to s 111(1)(b)(i) but not to s 111(1)(b)(ii). The purpose of s 111(1)(b)(ii) cannot be that a general registrant who is not also a Fellow of the College can never be registered as a specialist. Nor can it be that the "qualification" needed is some other formal qualification from another organisation.

[9] The applicant accepted that there is no other process for obtaining a qualification by ascertaining that the Australian Medical Council pathway is not available. "Qualification" in s 111 has the broader meaning attributed to the word in the reasons of the Court in *R v Refshauge; Ex parte Thomson*,[1] in which it was said that the assessment of "qualifications" of an applicant for registration requires, "… consideration not only of his skill and competence but also of his experience, because experience may in itself constitute a qualification in the wider sense of the word. Indeed, a consideration of the qualifications of a medical practitioner might be thought to involve also consideration of his standing in the medical profession and the nature of his practice".

[10] The qualifications of the respondent are more than adequate. The only difference between the respondent's qualifications and those required by s 111(1)(b)(i) is that the respondent is not actually a current Fellow of the College: he previously passed the membership examinations and has had more than 20 years practical experience.

The proper construction of s 111(1)(b)(ii) of the Act

[11] The qualification relevantly prescribed in respect of s 111(1)(b)(i) is Fellowship of the Royal Australian and New Zealand College of Psychiatrists.

[12] Section 111 of the Act relevantly provides:

> "**111 Eligibility**
>
> (1) An applicant for specialist registration in a specialty is eligible for specialist registration in the specialty if—
>
> (a) the applicant is a general registrant; and
>
> (b) the applicant has—
>
> (i) an Australian or New Zealand qualification, in the specialty, that is prescribed, for the specialty, under a regulation; or
>
> (ii) a qualification, in the specialty, the board considers is substantially equivalent to, or based on similar competencies to that required for, a current qualification in the specialty.
>
> (2) Also, an applicant for specialist registration who is not qualified for general registration under section 44 is eligible for specialist registration in a specialty if—
>
> (a) the applicant is fit to practise the specialty; and
>
> (b) has a qualification in, and experience in the practice of, the specialty the board considers are sufficient as a basis for specialist registration in the specialty.
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> (3) Without limiting subsections (1) and (2), the board may be satisfied the applicant is eligible for specialist registration in the specialty by imposing conditions on the registration under section 121(1).
>
> (4) For deciding under subsection (2)(a) whether the applicant is fit to practise the specialty, section 45 applies as if—
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> (a) an applicant for general registration were an applicant for specialist registration; and
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> (b) the profession were the specialty.

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[1] (1976) 11 ALR 471 at 475.

(5) In making its decision under subsection (1)(b)(ii) or (2)(b), the board must have regard to the advice and recommendations of—
(a) any relevant Australian specialist college or institution for the specialty; and
(b) the Australian Medical Council.

(6) In this section—
current qualification, in a specialty, means a qualification in the specialty mentioned in a regulation made under subsection (1)(b)(i), that may be conferred or awarded as a result of the successful completion of a course offered, at the date of the applicant's application for specialist registration, by the educational institution mentioned in relation to the qualification."

[13] Section 111(1)(b)(ii) requires an applicant for specialist registration to have either:

(a) "a qualification, in the specialty, [which] the board considers is substantially equivalent to … a current qualification in the specialty", namely, either the prescribed Australian or New Zealand qualification; or

(b) "a qualification, in the specialty, [which] the board considers is … based on similar competencies to that required for, a current qualification in the specialty", namely either the prescribed Australian or New Zealand qualification.

[14] I accept the submissions of counsel for the applicant that the use in sub-paragraph (b)(ii) of the expression "a qualification", particularly in the light of the reference to "an Australian or New Zealand qualification" in sub-paragraph (b)(i), suggests that the expression is not intended to equate to "qualifications" in the broad sense of that word discussed in *R v Refshauge*. Rather, it is used in its "narrower, but natural, sense of … qualifications in the nature of a degree, diploma, fellowship or membership granted by some recognized body".[2] On the face of it, the comparison required by the first limb of the sub-paragraph is that of one type of formal qualification with another. The concept of substantial equivalence calls for a comparison of like with like. Thus, a qualification in the subject specialty considered by the board to be substantially equivalent to a qualification referred to in sub-paragraph (b)(i), must be, on the face of it, a reference to a formal qualification granted by an appropriate professional body, or, perhaps, a governmental authority. I note that in s 111(2)(b) the expression "a qualification" is used in a sense which plainly means something other than "experience in the practice of the specialty".

[15] The expression "a qualification" cannot have the capacity to change when the second limb of the sub-paragraph is not being considered. Moreover, the language of the second limb is not helpful to the respondent's construction either. The natural meaning of "a qualification, in the specialty, the board considers is … based on similar competencies" to that required for, a current qualification in the specialty, is, as with the first limb, a formal qualification. If the Legislature had intended that practical experience and training would suffice for eligibility, sub-paragraph (1)(b) would have been worded differently, for example:

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[2] *R v Refshauge (Supra)* at 475, 476 per Gibbs J and see also the observations of Stephen J at 478.

"the applicant has –

…

(ii) qualifications consisting of competencies similar to those required for a current qualification in the specialty."

[16] But, such a construction is unlikely. On that construction, the applicant, in applying the second limb of s 111(1)(b)(ii), would not be entitled to have regard to matters such as formal qualifications, professional standing and recognition. It is unlikely that this was intended.

[17] This construction, as counsel for the respondent complained, meant that, subject possibly to s 111(3), a person who lacks a current prescribed qualification in a specialty is eligible for registration in the specialty only if he or she has another current formal qualification in the specialty which meets the requirements of s 111(1)(b)(ii). It follows from this construction also that where an applicant for registration as a psychiatric specialist has no formal qualification which could satisfy s 111(1)(b)(ii), his or her eligibility for registration depends on whether the Royal Australian and New Zealand College of Psychiatrists will admit or re-admit him or her as a fellow.

[18] The College has a policy of "not allow[ing] reinstatement of any Fellow … whose Fellowship has been terminated … as a consequence of committing sexual boundary violations in breach of the College's policy". That policy, in circumstances such as those now under consideration, subject to the possible exception referred to above, effectively decides the fate of an application for re-registration. That, however, is a necessary consequence of the wording of s 111(1)(b). Whether this is a desirable state of affairs is not a matter for this Court's consideration and I do not express a view one way or the other.

[19] It follows from the above discussion that the primary judge erred: in construing s 111(1)(b); in construing the Tribunal's Order of 19 September 2007 and in his determination of the effect of paragraphs 2 and 3 of the Order.

The respondent's contention that the granting of leave to appeal would be futile

[20] On 9 November 2009 the solicitors for the applicant sought the respondent's agreement to a stay of the orders made in the District Court. The respondent did not agree and no stay application was made. In early December 2009, the applicant registered the respondent as a psychiatrist with effect from 30 November 2009. The respondent contends that the applicant may cancel the respondent's specialist registration only pursuant to s 84 and that, under that section, no grounds for cancellation exist.

[21] The respondent's argument overlooks s 84(b) introduced into s 84 on 3 November 2009 by the *Health and Other Legislation Amendment Act* 2009 (Qld). The section, as amended, relevantly provides:

"A general registration may be cancelled, under this division, on any of the following grounds –

…

(b) the registrant ceases to have, or does not have, the qualifications necessary for registration; …"

That provision applies to specialist registrations by virtue of s 124(1)(a) of the Act. As the above reasons demonstrate, it would be open to the applicant to call on the

respondent to show cause[3] why his specialist registration should not be cancelled on the grounds that he does not have "the qualifications necessary for registration" as a psychiatrist.

[22] It is not appropriate to express any views on the likely outcome of such a proceeding. It may never eventuate. If it does, the meaning of s 111(3) may be relevant. Although that meaning was the subject of some discussion on the hearing of the appeal, the discussion resulted from questioning from the Bench and there were thus no considered submissions on the construction of the provision. Accordingly, I do not consider it necessary or desirable to express a view on the provision's meaning.

Conclusion

[23] Leave to appeal should be granted. Section 111(1)(b) has a significance which extends far beyond these proceedings and the error at first instance should not be left uncorrected.

[24] For the above reasons, I would grant leave to appeal and order that:

(a) The appeal be allowed;
(b) The orders of the District Court made on 30 October 2009 be set aside;
(c) The appeal to the District Court be dismissed; and
(d) The respondent pay the applicant's costs of the appeal to the District Court and of this appeal.

[25] **DAUBNEY J:** I also agree with the reasons of Muir JA and with the orders proposed.

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3 *Medical Practitioners Registration Act* 2001 (Qld), s 85.