# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *In the matter of an application for admission as a legal practitioner by MCF* [2015] QCA 154 |
| PARTIES: | **IN THE MATTER OF THE LEGAL PROFESSION ACT 2007 AND THE SUPREME COURT (ADMISSION) RULES 2004**<br>**and**<br>**IN THE MATTER OF AN APPLICATION BY MCF** |
| FILE NO/S: | SC No XYZ of 2015 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Admission |
| ORIGINATING COURT: | Legal Practitioners Admissions Board |
| DELIVERED ON: | Order delivered ex tempore on 1 June 2015<br>Reasons delivered on 21 August 2015 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 1 June 2015 |
| JUDGES: | Margaret McMurdo P and Morrison JA and Burns J<br>Judgment of the Court |
| ORDER: | **Delivered ex tempore on 1 June 2015:**<br>**Application for admission as a legal practitioner granted.** |
| CATCHWORDS: | PROFESSIONS AND TRADES – LAWYERS – QUALIFICATIONS AND ADMISSION – FIT AND PROPER PERSONS – where the applicant applies for admission as a legal practitioner – where the applicant has met the academic and practical training requirements for admission – where the applicant has convictions for using a carriage service to transmit child exploitation material, using a carriage service to access child exploitation material, using a carriage service to make child exploitation material available and possession of child exploitation material – where the applicant's name and other identifying particulars were entered on the child protection register maintained pursuant to the *Child Protection (Offender Reporting) Act* 2004 – where the applicant has ongoing reporting obligations under the *Child Protection (Offender Reporting) Act* 2004 until 7 October 2016 – where the Legal Practitioners Admissions Board opposed the applicant's admission – whether the applicant is a fit and proper person to be admitted to the legal profession in Queensland |

*Child Protection (Offender Reporting) Act* 2004 (Qld), s 35, s 36
*Legal Profession Act* 2007 (Qld) s 9, s 31, s 35

*A Solicitor v Council of Law Society (NSW)* (2004) 216 CLR 253; [2004] HCA 1, cited
*Legal Services Board v McGrath (No 2)* (2010) 29 VR 325; [2010] VSC 332, considered
*Legal Services Commissioner v CBD* [2012] QCA 69, considered
*Ziems v Prothonotary of Supreme Court (NSW)* (1957) 97 CLR 279; [1957] HCA 46, considered

COUNSEL: P Davis QC for the applicant
M Timmins (*sol*) for the respondent

SOLICITORS: Mulcahy Ryan Lawyers for the applicant
Legal Practitioners Admission Board for the respondent

[1] **THE COURT:** On 1 June 2015, the Court ordered that the applicant be admitted as a legal practitioner and indicated that it would publish its reasons in due course. What follows are those reasons.

**The application**

[2] By the *Legal Profession Act* 2007 (Qld), the Court may make an order admitting an applicant as a lawyer if satisfied that the applicant for admission is, first, eligible for admission under the Act and, second, a fit and proper person to be admitted to the legal profession.[1] Here, the applicant had completed all of the academic and practical legal training requirements for admission under the Act as well as the *Supreme Court (Admission) Rules* 2004 (Qld) and, as such, was eligible for admission as a legal practitioner. Indeed, he obtained a Bachelor of Laws with Honours. However, in the material filed in support of his application, the applicant disclosed that he had in the past been convicted of a number of criminal offences. It therefore became necessary for the Court to consider whether the applicant was a fit and proper person to be admitted in light of those convictions.

[3] As to the convictions, on 7 October 2011 the applicant appeared before O'Brien DCJ[2] in the District Court at Brisbane to be sentenced with respect to one count of using a carriage service to transmit child pornography material,[3] two counts of using a carriage service to access child pornography,[4] one count of using a carriage service to make child pornography available[5] and one count of possessing child exploitation material.[6] For the Commonwealth offences, the applicant was released on a recognizance in the sum of $5,000 conditioned that he be of good behaviour for a period of 18 months.[7] For the State offence, he was placed on probation for 12 months on the

---

1 *Legal Profession Act* 2007 (Qld), s 35(1)(a). And see, *Cohen v Legal Practitioners Admissions Board (No 2)* [2012] QCA 106, [11] per Margaret McMurdo P.
2 As his Honour the Chief Judge then was.
3 Pursuant to s 474.19(1)(a)(iii) & (b) of the *Criminal Code* (Cth).
4 Pursuant to s 474.19(1)(a)(i) & (b) of the *Criminal Code* (Cth).
5 Pursuant to s 474.19(1)(a)(iv) & (b) of the *Criminal Code* (Cth).
6 Pursuant to s 228D of the *Criminal Code* (Qld).
7 Under s 20(1)(A) of the *Crimes Act* 1914 (Cth).

usual conditions, as well as a special condition to the effect that he submit to "such counselling or treatment in relation to sexual or related matters" as required.[8] Convictions were recorded for each offence.

[4] One consequence of the applicant's conviction for the State offence was that he became a "reportable offender" under the *Child Protection (Offender Reporting) Act* 2004 (Qld).[9] That fixed the applicant with a number of ongoing reporting obligations,[10] and his name and other identifying particulars were entered on the child protection register maintained pursuant to s 68 of that Act. That will remain the position until the reporting period comes to an end on 7 October 2016.[11]

[5] The Legal Practitioners Admissions Board opposed the application although, when it resolved to do so, not all of the affidavit material filed in support of the application was to hand and nor were the written submissions which were later filed on behalf of the applicant. Be that as it may, on the material it did consider, the Board appears to have accepted that the convictions were not of themselves disentitling. Rather, the application was opposed because the Board considered that admitting the applicant while his name remains on the child protection register "could adversely affect the public's perception of the legal profession". For that reason, the Board recommended that the applicant not be admitted until his name is removed from the register. The Board also submitted that, if the applicant is required to wait until October 2016 before re-listing his application, the Court will then have the advantage of seeing whether the applicant has complied with his various obligations under the *Child Protection (Offender Reporting) Act* 2004 (Qld) for the balance of the reporting period.

**The relevance of convictions**

[6] In deciding whether an applicant is a fit and proper person to be admitted, the Court is required to consider each of the "suitability matters" set forth in s 9(1) of the *Legal Profession Act* 2007 (Qld) to the extent any such matter is appropriate to the applicant, along with any other matters the Court considers relevant.[12] Importantly, the Court may consider a person to be a fit and proper person to be admitted despite the existence of a suitability matter "because of the circumstances relating to the matter".[13]

[7] Of the suitability matters specified in s 9(1), two were presently relevant, that is, whether the applicant was "currently of good fame and character"[14] and whether he had been convicted of an offence.[15] In the case of an applicant who has been convicted of an offence, s 9(1)(c) then requires the Court to consider the nature of the offence, how long ago it was committed and the person's age at that time.[16]

[8] By requiring the Court to consider the nature of the offence and its temporal relationship with the application, s 9(1)(c) substantially reflects the common law. In that regard, it has long been accepted as necessary in most cases to look behind the conviction for an offence in order to consider what Fullagar J described in *Ziems v The*

---

8 Under s 93(1) of the *Penalties and Sentences Act* 1992 (Qld).
9 *Child Protection (Offender Reporting) Act* 2004 (Qld), s 5 and s 9 and Sch 1(4) & (6).
10 *Child Protection (Offender Reporting) Act* 2004 (Qld), Part 4.
11 *Child Protection (Offender Reporting) Act* 2004 (Qld), s 35(1)(b)(i) and s 36(1)(a).
12 *Legal Profession Act* 2007 (Qld), s 31(2).
13 *Legal Profession Act* 2007 (Qld), s 31(3).
14 *Legal Profession Act* 2007 (Qld), s 9(1)(a).
15 *Legal Profession Act* 2007 (Qld), s 9(1)(c).
16 Ibid.

*Prothonotary of the Supreme Court of New South Wales*[17] as the "real facts of the case".[18] It is only when that exercise is undertaken that the Court may properly assess the conduct underlying a conviction and then decide how, if at all, such conduct bears on an overall assessment of the applicant's fitness to be admitted.[19] Of course, a conviction for some kinds of offences may bespeak unfitness because it is, by proof or admission of the essential ingredients for that offence, revealing of a defect of character that is incompatible with satisfaction of the statutory test.[20] In such a case, it may not be necessary for the Court to look any further. But in all other cases, the statutory requirement to consider the nature of the offence is unlikely to be satisfied merely by reference to the ingredients of the offence – the "real facts" underlying the conviction need to be considered.

[9] Such is the approach to be taken in the case of the convictions with which this application is concerned. Indeed, that very point was made by Warren CJ in *Legal Services Board v McGrath (No 2)*[21] in the course of dealing with an application to have a practitioner who had been convicted of several child pornography offences struck from the roll:

> "Convictions for, or arising out of, child pornography offences are not prima facie evidence that a person is not a fit and proper person to remain on the roll kept by this court. The nature of the material involved, the extent and circumstances of the offending in question, its relationship to the offender's professional life, and the behaviour of the offender before, during and after the legal processes which result from that offending will all be relevant to deciding any application to strike that offender from the roll. As the High Court's decision in *A Solicitor v Council of the Law Society of New South Wales* indicates, even an individual convicted for the sexual abuse of minors can, albeit in a very small number of conceivable circumstances, remain a fit and proper person to practise law in this country."[22]

[10] These considerations provide the context for the assessment which must be made by the Court in a case such as this. What must be determined is whether the conduct underlying a conviction, together with any explanation for it, tells against an applicant's ability to practise as a lawyer.[23] Furthermore, it must be determined whether the existence of such a conviction, considered in its proper context, means that an applicant is not "currently of good fame and character".[24] The fact that someone has been convicted of an offence may, depending on the offence, carry with it a degree of opprobrium but, for the reasons given, that is certainly not the end of the inquiry. As Warren CJ observed, in addition to the circumstances of the offending, the behaviour of the offender before, during and after any criminal proceedings taken with respect to the offending will all be relevant to consider. So, too, will be the steps the offender has taken to rehabilitate himself or herself including

---

17 *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279. ***(Ziems)***

18 *Ziems* at 288.

19 *Ziems* supra at 288 per Fullagar J, 298 per Kitto J and 302-303 per Taylor J.

20 See *Ziems* supra at 298 per Kitto J. And see *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253, 267-268 per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

21 *Legal Services Board v McGrath (No 2*) (2010) 29 VR 325. ***(McGrath (No 2))***

22 *McGrath (No 2)* at [12], footnote omitted.

23 See *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253, 268.

24 Within the meaning of s 9(1)(a) of the *Legal Profession Act* 2007 (Qld).

any treatment he or she has obtained with respect to any medical condition that may have contributed to the offending.

**The conduct underlying the convictions**

[11] The applicant is a 24-year-old man and the offences for which he was convicted were committed between August 2007 and September 2009. The first in time of those offences occurred only 10 days after the applicant turned 17 years of age and, thereby, became an adult in the eyes of the criminal law. The offending came to light following a police investigation that targeted users of internet file sharing websites. A search was subsequently carried out at the applicant's home, during which he made full admissions with respect to each offence.

[12] The offences overall were concerned with a relatively small number of images and movie files compared to the number usually encountered in offending of this nature. None were in the worst category on the Oliver scale.[25] A large proportion of the images and movies were located on one or other of the applicant's computers as temporary internet files, indicating that these files had been accessed but not saved by the applicant. The Statement of Facts which was agreed for the purposes of the applicant's sentence reveals that the applicant initially accessed this material for approximately one month in August 2007 but then made no attempt to do so again until April 2009. Thereafter he accessed, but did not save, a number of images and files until his apprehension in September 2009.

[13] The matters proceeded by way of a full hand-up committal hearing, at the conclusion of which the applicant pleaded guilty to each of the offences. He cooperated with the authorities in both the investigation and the subsequent prosecution. When sentencing the applicant, O'Brien DCJ observed that the offending appeared to have arisen from a combination of the applicant's "very moralistic upbringing and some confusion as to (his) own sexual identity" and, based on the material before this Court, that certainly seems to have been the case.

**The applicant's rehabilitation**

[14] After the applicant was charged with each of the offences in September 2009 and released on bail, he wasted no time in seeking professional help. He was referred by his general practitioner to a consultant psychiatrist for treatment and this took the form of psychotherapy. As at the date of his sentence, the applicant had on no fewer than 35 occasions attended on the psychiatrist for such treatment. After being sentenced, the applicant continued to receive psychotherapy until approximately October 2012 when his period of treatment – over the preceding three years – came to an end. His initial diagnosis included an adjustment disorder of a depressive type which had completely resolved by the end of his treatment.

[15] The applicant's psychiatrist provided a report for the purposes of this application after reviewing the applicant in May of this year for that purpose. In it, he described the treatment outcome as "extremely favourable" and expressed the opinion that the applicant "remains very well and stable", that he "does not require any further psychiatric intervention" and that it is extremely unlikely that he will reoffend. Overall, the psychiatrist regarded the applicant's prognosis as "excellent".

---

25 See *R v Oliver & Ors* [2002] All ER (D) 320 (Nov); *R v MBM* (2011) 210 A Crim R 317, 320 per White JA (with whom Fraser JA and Chesterman JA agreed).

[16] In addition, it is to be recorded that the applicant satisfactorily completed his period of probation, and attended each appointment with his assigned probation officer. Similarly, his good behaviour bond expired without breach. Apart from a minor traffic offence that occurred before he was sentenced and two instances when the applicant fell into technical breach of his reporting obligations under the *Child Protection (Offender Reporting) Act* 2004 (Qld), the applicant has not otherwise come to the adverse attention of the authorities.

[17] Lastly, we note that in April 2014 the applicant commenced employment with a firm of solicitors, as a graduate lawyer. He has fully disclosed his convictions to his employers and, indeed, provided them with a copy of the affidavit in which such disclosure was made to this Court.

**Conclusion**

[18] The conduct underlying the convictions was at the lower end of the scale of seriousness for offending of this type and is, in any event, explained by reference to the unchallenged psychiatric opinion that was placed before the Court. Save for a minor traffic offence, the applicant had never before, and has not since, come to the adverse attention of the authorities. As to the submission made on behalf of the Board that the applicant should wait until October 2016 before reapplying, it is now almost six years since the last in time of the series of offences was committed and over three-and-a-half years since he was sentenced. In the intervening period, the applicant has been fully treated and his rehabilitation is as complete as one could possibly expect. It is difficult to imagine that requiring the applicant to wait for a further period of time will achieve anything.

[19] On the other hand, the proposition that admitting the applicant whilst his particulars remain on the child protection register might adversely affect public perception of the legal profession is an understandable position for the Board to take. However, for the reasons we will come to, members of the public do not have access to the register. It is, in any event, not a sufficient basis to refuse admission to say, in effect, that the applicant remains subject to a corrective supervisory regime consequent on his convictions.

[20] For example, in *Legal Services Commissioner v CBD*,[26] the respondent solicitor had pleaded guilty to possession of child exploitation material and was sentenced to 12 months' imprisonment wholly suspended for an operational period of two years. The Commissioner made application under s 452 of the *Legal Profession Act* 2007 (Qld) to the Queensland Civil and Administrative Tribunal to seek the making of disciplinary orders. The Commissioner argued that the respondent's conduct meant that he was not a fit and proper person to practise law. The Tribunal disagreed, and refused to impose any sanction on the respondent other than an order that the respondent pay the Commissioner's costs. Before this Court, it was argued that the Tribunal failed to consider that, at the time of hearing before the Tribunal, the operational period of the respondent's suspended sentence had not expired. In particular, it was submitted on behalf of the Commissioner that it was, "inconceivable that a court would … find that an applicant who was still serving a suspended sentence of imprisonment was of 'current good fame and character'".[27] However, during the course of argument, counsel for the Commissioner rightly abandoned that submission. In this respect, Muir JA later observed that:

---

26 *Legal Services Commissioner v CBD* [2012] QCA 69. ***(CBD)***

27 *CBD* at [17] per Muir JA, with whom Margaret Wilson AJA and Applegarth J agreed.

> "there could be no inflexible principle that a person serving a suspended sentence was necessarily, by that fact alone, not of 'good fame and character' and thus not a fit and proper person to engage in legal practice."[28]

[21] Similar logic applies here. The features that the applicant has continuing obligations under the *Child Protection (Offender Reporting) Act* 2004 (Qld) and that his name and other particulars will remain on the child protection register until October 2016 cannot, without more, determine this application against him. Indeed, just as the Court is required to look behind the convictions that have been recorded against the applicant's name, the Court must also look behind the statutory consequences of those convictions as part of an overall assessment as to whether the applicant is a fit and proper person to be admitted as a legal practitioner.

[22] When proper regard is had to the conduct underlying the convictions, the applicant's behaviour before, during and after the criminal proceedings and his impressive rehabilitation, it cannot be concluded that the convictions tell against his ability to practise as a lawyer. Nor do they mean that the applicant is not currently of good fame and character. We were therefore satisfied on the hearing of this application that the applicant is a fit and proper person to be admitted as a legal practitioner, and that he should be so admitted.

**Publication**

[23] Mr Davis QC, who appeared for the applicant, asked that the applicant not be identified in these reasons. He submitted that, to do so, would have the consequence that the applicant would be "forever blighted". So much may be accepted, although that consideration alone would not be sufficient to withhold publication and particularly not in circumstances where the sentencing proceedings against the applicant took place in open court.

[24] However, identification of the applicant in these reasons would subvert the evident purpose of the provisions of the *Child Protection (Offender Reporting) Act* 2004 (Qld) which govern the use to which information contained on the child protection register can be put. By those provisions, access to the information contained on the child protection register is strictly controlled and restricted, and the general public do not have access to that information. Instead, such information may only be used for child protection and community safety and policing purposes, if authorised to do so by the Commissioner of Police.[29] Such a legislative approach is consistent with the purpose of the Act, that is, to require "reportable offenders" to keep police informed of their whereabouts and other personal details for a period of time after their release into the community so as to reduce the likelihood that they will reoffend and to facilitate the investigation and prosecution of any future offences that they may commit.[30] It would therefore follow that, if the applicant is identified in these reasons, the confidentiality which the legislature so clearly intended to attach to that information would be destroyed. For that reason, the applicant should not be identified in these reasons.[31]

**Summary**

[25] The following were matters of particular significance in the granting of this application:

---

28 *CBD* at [23].

29 *Child Protection (Offender Reporting) Act* 2004 (Qld), s 68, s 69 and s 70.

30 *Child Protection (Offender Reporting) Act* 2004 (Qld), s 3(1).

31 A similar approach was taken in *CBD* at [37].

(1) the offences were in respect of material which, in terms of quantity and content, were rightly identified as being at the lower scale of seriousness compared to those normally encountered in offending of this kind;

(2) the offences occurred about six to eight years ago;

(3) upon the offences being discovered the applicant cooperated with the authorities, making admissions at the time of his arrest, and fully cooperating at a very early stage in bringing the proceedings to sentence;

(4) the applicant sought immediate psychiatric assistance, and has diligently undertaken the consequent psychotherapy for a period of about three years;

(5) the treating psychiatrist's report provides powerful evidence, not challenged by the respondent, that the treatment has been successful with the result that the applicant's prognosis is excellent and he is extremely unlikely to ever reoffend;

(6) he disclosed these matters to the Board and his employers for whom he has worked as a graduate lawyer since April 2014.

[26] That being the case, the fact that the applicant will remain on the child protection register for a further 16 months from the date of the hearing, and for that period will be subject to reporting obligations, cannot be properly regarded as preventing the applicant's admission as a legal practitioner.

[27] For the reasons given, we order that the applicant not be identified in these reasons.