

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

NO. 001/2010

BETWEEN: CHIEF REGISTRAR

Applicant

A N D: HAROON ALI SHAH

Respondent

**Applicant: Ms V. Lidise & Mr A. Chand
Respondent: Ms N Khan**

**Date of Hearing: 12 August 2010
Date of Ruling: 14 September 2010**

RULING

1. When this matter came before the Commission by way of first call the Respondent raised a preliminary issue for determination.
2. It was submitted on behalf of the Respondent that by operation of the Rehabilitation of Offenders (Irrelevant Convictions) Act 1997 the complaint was ill-founded and should be dismissed. The Respondent relied on s.10 of the Act which provides:

"Notwithstanding a provision in an enactment, law or rule to the contrary, authorising or requiring a conviction to be taken into account, an authority or body empowered under an enactment or rules of that authority or body to exercise disciplinary powers on persons carrying on a profession, trade or calling, shall not exercise the disciplinary powers on a person by reason of an irrelevant conviction of the person."

3. The particulars of the complaint against the Respondent are:-

"Haroon Ali Shah a legal practitioner, on the 6th of June 2005 was convicted for the criminal offences of assault occasioning actual bodily harm and damaging property at the Laufoka Magistrates Court in the proceedings State V Haroon Ali Shah Criminal Case No. 227 of 2005, which conduct involved a substantial failure to reach a reasonable standard of competence and diligence."

4. It is not disputed that the Respondent was convicted of a criminal offence on the 6th of June 2005, however the Respondent submits that the conviction is an "irrelevant

conviction" and therefore the Commission is precluded from exercising its disciplinary powers on the Respondent.

5. Section 3 of the Act defines "irrelevant conviction" in the following terms:-

"3. For the purposes of this Act, a conviction is irrelevant:-

(a) Where there is no direct relationship between that conviction and the particular matter in respect of which it is sought to take that conviction into account; or

(b) If the rehabilitation period has expired."

6. Section 4 then defines "direct relationship"

"4.-(1) For the purposes of section 3, there is a direct relationship between a conviction and any matter in respect of which it is sought to take that conviction into account if the fact of that conviction means that there is a real likelihood that the person against whom that conviction was entered will, in relation to that matter:-

(a) be unreliable, untrustworthy, or otherwise unsatisfactory; or

(b) commit a further offence.

(2) In determining, whether there is a real likelihood that any of the matters specified in paragraph (a) or paragraph (b) of subsection (1) will occur, the following matters shall be taken into consideration:-

(a) In relation to the offence for which the conviction in issue was entered,-

(i) The type and seriousness of that offence;

(ii) The overall circumstance of that offence; and

(iii) The period that has elapsed since that offence was committed; and

(b) In relation to the person convicted, his or her present personal attitudes and personal circumstances."

7. The Respondent submits that it is an irrelevant conviction as there is no "direct relationship" between the conviction and the proceedings before the Commission.

8. The Act commenced on 1st July 1998.

9. The proceedings before the Commission are brought pursuant to the Legal Practitioners Decree 2009 and in particular Section 83 (1)(d)(i).

- "83 (1) without limiting sections 81 and 82, the following conduct is capable of being 'unsatisfactory professional conduct' or 'professional misconduct' for the purposes of this Decree:
... (d) conduct in respect of which there is a finding of guilt or conviction for:
(i) A criminal offence (excluding traffic offences);..."

10. It would seem that the following issues arise for determination, namely:-

- is there a "direct relationship" between the conviction of the Respondent for a criminal offence and the proceedings before the Commission pursuant to s.83(1)(d)(i) of the Legal Practitioners Decree; and if not
- does the Legal Practitioners Decree 2009, being the later law, prevail over the inconsistent earlier law.

Direct Relationship

11. There are two general approaches to the interpretation of legislation; the literal approach and the purposive approach.

12. The literal approach was defined and explained by Higgins J. In **Amalgamated Society of Engineers v The Adelaide Steamship Co. Ltd [1920] 28 CLR 129 at 161-2** as follows;

"The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or improbable."

13. In **Grey v Pearson [1857] 6 HLC 61 at 106** Lord Wensleydale placed a limitation on the literal approach. He said:

"I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the word is to be adhered to, unless that would lead to some absurdity, or some repugnant or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the word may be modified, so as to avoid that absurdity and inconsistency, but no farther."

14. The purposive approach has its origins in the "mischief rule" set out in **Heydon's case [1584] 3 Co. Rep 7a at 7b**. The purposive approach was applied by determining the purpose of the Act, or the particular provision in question ("mischief" with which it was intended to deal), and by adopting an interpretation of the words that was consistent

with that purpose. It was generally accepted that the purposive approach applied only when an attempt to apply the literal approach produced an ambiguity or inconsistency.

13. S. 4 of the Act (direct relationship) relevantly states:

*if the fact of that conviction means that there is a real likelihood that the person against whom that conviction was entered will, in relation to that matter-
be..... unsatisfactory*

14. "Matter" is, not surprisingly, not defined in the Act and must be read in the context in which it is used in the various sections. When s.4 is read with s.10 the "matter" is the allegation of Professional Misconduct.

15. S.4 (2)(a) and (b) of the Act require a consideration of further factors to determine whether or not there is a "real likelihood" that the Respondent will be found to be unsatisfactory. These factors are :

- the type and seriousness of the offence
- the overall circumstances of the offence
- the period of time that has elapsed since the offence was committed .

16. The conviction of the Respondent was for assault occasioning actual bodily harm and damaging property. The victim was his opponent's client and the offence was committed in the precinct of the High Court Lautoka about 5 years ago. It is submitted that the Respondent was provoked and that the injury and the damage to property were not serious. Taking account of this submission there is still in my opinion a real likelihood that the Respondent will be found to be unsatisfactory.

17. The complaint against the Respondent relies on the conviction and alleges Professional Misconduct, which is defined in s. 82(1)(b) of the Legal Practitioners Decree as conduct, if established, that would justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

18. The conviction by virtue of s. 83(1)(d)(i) of the Decree is capable of constituting Professional Misconduct.

19. I am of the opinion that there is a direct relationship between the conviction and the proceedings alleging professional misconduct. There is a "real likelihood" that the Respondent will be "unsatisfactory" in the proceedings before this Commission in that it is capable of a finding that he is not a fit and proper person. The "grammatical and ordinary sense" of the definition of "direct relationship" as set out in s.4(1) of the Act leads to the conclusion that the proceedings commenced by the Applicant pursuant to the Legal Practitioners Decree alleging professional misconduct consequent upon the conviction for a criminal offence on 6th of June 2005 are directly related to that conviction . The proceedings are wholly dependent upon that conviction and the fact of the conviction is capable of justifying a finding that the Respondent is "otherwise

unsatisfactory" or, in other words, not a "fit and proper person" to engage in legal practice.

Implied Repeal

20. There are numerous authorities where a court has been pressed with the argument that a later statute has repealed an earlier statute not by express words but by implication or perhaps more relevantly where an inconsistency arises in the application of the statutes to particular cases where of necessity the operation of the earlier statute is impliedly repealed to the level of the inconsistency.

21. The High Court of Australia in **Goodwin v Phillips [1908] 7 CLR 1 at 7 per Griffith CJ** said:-

"..... where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."

22. In **Saraswati v R [1991] 172 CLR 1** the High Court of Australia [Gaudron J] said at paragraph 4:-

"It is basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other. Nor will an intention to affect the earlier provisions be implied if the later is otherwise capable of sensible operation. The position was stated by Lord Selborne in *Seward v The "Vera Cruz"* (1884) 10 App Cas 59, at p 68 as follows:

"where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so".

23. If the maintenance of an earlier Act would defeat the purpose of the later, the earlier must give way. If inconvenience or incongruity would result from both Acts continuing in force, the later must prevail.

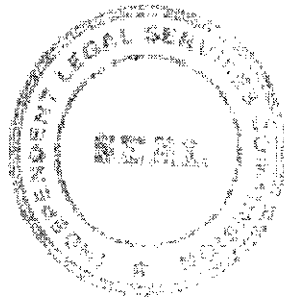
Conclusion

24. I am of the opinion that the proper interpretation of the provisions of the Rehabilitation of Offenders (Irrelevant Convictions) Act does not preclude the use of the conviction of the Respondent of a criminal offence to found an application pursuant to s. 83(1)(d) of the Legal Practitioners Decree. The conviction is not an "irrelevant conviction" and accordingly the Act does not apply in the circumstances of these proceedings before the Commission.
25. If, however, I am not correct in the interpretation of the Act then I am of the opinion that there can be no "sensible operation" of s.83 (1)(d)(i) of the Legal Practitioners Decree without the implied repeal of s.10 of the Rehabilitation of Offenders (Irrelevant Convictions) Act, as it applies to the operation s.83(1)(d)(i) of the Decree. Such an implied repeal is necessary as the maintenance of the earlier Act would defeat the purpose of s. 83(1)(d)(i) of the Decree.
26. The Respondent's application must therefore fail.

ORDERS

1. Respondent's application is dismissed.
2. The hearing of this matter is to commence on the 15th September 2010 together with the hearing of application 008/2009.


JOHN CONNORS
COMMISSIONER



14 SEPTEMBER 2010