

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2016-485-761
[2019] NZHC 42**

UNDER the Judicature Amendment Act 1972
AND Part 30 of the High Court Rules
BETWEEN JEREMY JAMES MCGUIRE
Plaintiff
AND SECRETARY FOR JUSTICE
First Defendant
AND NEW ZEALAND LAW SOCIETY
Second Defendant

Hearing: 15 August 2018

Appearances: Appellant in person
G L Melvin and M J McKillop for First Defendant
P N Collins for Second Defendant

Judgment: 31 January 2019

JUDGMENT OF CLARK J

*I direct the delivery time of this judgment at
11:00 am on 31 January 2019*

Table of Contents

Introduction	[1]
Background to this proceeding	[3]
Legislative framework	[14]
Mr McGuire’s application for approval: the lead-up and determinations	[19]
The Secretary’s 2015 decision	[29]
Challenges to the Secretary’s decision	[43]
<i>Ground (a): did the Secretary wrongly decide Mr McGuire lacked “recent experience”?</i>	[45]
<i>Ground (b): did the Secretary wrongly decide Mr McGuire did not meet the fit and proper person requirement?</i>	[69]
<i>Ground (c): Was the Selection Committee improperly constituted?</i>	[82]
<i>Ground (d): Was the Selection Committee’s recommendation in error?</i>	[92]
Claim against the second defendant	[99]
Result	[115]

Introduction

[1] In this application for judicial review Mr McGuire challenges the decision of the first defendant, the Secretary of Justice who, on 27 October 2015, declined Mr McGuire’s application for approval to provide legal aid services as a lead provider in the area of law termed Criminal PAL 1 (the 2015 decision).¹ Mr McGuire seeks an order setting aside both the Secretary’s decision and the recommendation which the Selection Committee made to the Secretary following its consideration of Mr McGuire’s application. Mr McGuire also challenges the certificate of standing issued on 6 May 2015 by the second defendant, the New Zealand Law Society (Law Society). Mr McGuire says the certificate was invalid and he seeks an order to that effect.

[2] The primary questions for determination are:

(a) as against the first defendant —

¹ In the legal services arena “Criminal PAL 1” is used as short form for “Criminal Provider Approval Level 1”. There are different experience and competence requirements for each of the four approval levels for criminal matters. The meaning of each approval level – approval level 1 to approval level 4 – is set out in cl 1 of the schedule to the Legal Services (Quality Assurance) Regulations 2011.

- (i) whether she wrongly decided the plaintiff lacked “recent experience” as a level 1 criminal lawyer;
 - (ii) whether she wrongly decided Mr McGuire was not a “fit and proper person” to provide legal aid services;
 - (iii) whether the Selection Committee was constituted in breach of reg 11(2)(a) of the Legal Services (Quality Assurance) Regulations 2011 (the Legal Services Regulations);
 - (iv) whether the Selection Committee’s recommendation was wrong in fact and law; and
- (b) as against the second defendant —
- (i) whether the certificate of standing issued on 6 May 2015 (the 2015 certificate) was invalid.

Background to this proceeding

[3] At the hearing Mr McGuire drew my attention to the fact that, approximately a fortnight earlier, the Supreme Court heard an appeal of potential relevance to this proceeding. The appeal related to a decision by the Secretary declining an earlier application by Mr McGuire for approval to provide legal aid services as a lead provider in family law. The Secretary’s decision was given on 7 November 2013 (the 2013 decision).² The Supreme Court heard Mr McGuire’s appeal on 1 August 2018. Judgment was delivered on 27 November 2018.³ The two primary legal issues for the Supreme Court’s determination concerned:

² In the various interlocutory judgments, including the judgment of the Supreme Court, the Secretary’s decision given on 7 November 2013 has been termed “the 2013 decision”. For consistency, in this judgment I adopt the same description. Similarly, I refer to the decision which is the subject of the present application for judicial review that is, the Secretary’s decision given on 27 October 2015, as the “2015 decision”.

³ *McGuire v Secretary for Justice* [2018] NZSC 116 [*McGuire* (SC)].

- (a) the privative effect of s 83 of the Legal Services Act 2011; and
- (b) whether a successful litigant in person who was also a lawyer could recover costs.

[4] While neither issue is raised in this proceeding the judgment is helpful for its description of the genesis to the present application for judicial review. Largely, the narrative that follows at [5] to [10] is from the Supreme Court’s judgment.⁴

[5] Following Mr McGuire’s admission as a barrister and solicitor in 1992 he practised in Wellington and later moved to Palmerston North.

[6] A number of professional complaints have been made against Mr McGuire. Some have resulted in adverse findings by various standards committees of the Law Society. The Supreme Court described most of the complaints as being of “only limited significance”.⁵ Since the 2013 decision, Mr McGuire has also achieved a measure of success in judicial review proceedings challenging the standards committees’ findings.⁶

[7] One of the complaints against Mr McGuire was, however, of some moment. The complaint resulted in disciplinary charges before the Lawyers and Conveyancers Disciplinary Tribunal and was of critical significance to the 2013 decision. Mr McGuire had entered into a contingency fee arrangement with a legally aided client in 2008. The client complained to the Legal Services Agency (operating under the now repealed Legal Services Act 2000) because Mr McGuire sought payment of a fee additional to the grant of legal aid. On the basis that contingency fee arrangements were precluded by the Legal Services Act, the Agency cancelled Mr McGuire’s legal aid approvals and terminated his legal services contract in September 2010.

⁴ At [13]–[18].

⁵ At [14].

⁶ Mr McGuire made an application for approval as a lead provider of family law services on 13 May 2013. His application was declined in July 2013. That decision was unsuccessfully challenged by Mr McGuire, the Supreme Court holding that his application to judicially review the 2013 decision was properly struck out by the Court of Appeal: *McGuire* (SC), above 3 at [51].

[8] Mr McGuire initiated a review of the decision with the Review Authority. His review was unsuccessful, as were the judicial review proceedings he subsequently commenced.⁷ Mr McGuire filed an appeal but the appeal was deemed abandoned as he did not meet the time limits. His subsequent application for an extension of time to bring a second appeal was dismissed.⁸

[9] Mr McGuire was prosecuted before the Lawyers and Conveyancers Disciplinary Tribunal in respect of the contingency fee arrangement. He pleaded guilty in October 2011 to a charge of unsatisfactory conduct. With a view to the imposition of a rehabilitative sanction, the proceedings were adjourned to allow mentoring and supervision arrangements to be put in place. Eventually, on October 2013, the Tribunal censured Mr McGuire and ordered him to pay \$14,700 in costs.⁹

[10] The Supreme Court's judgment discusses the process leading to the Secretary's 2013 decision declining Mr McGuire's 2013 application, the Secretary's reasons and the nature of the Selection Committee's recommendations. Beyond the following description of the present litigation it is unnecessary for me to say more about the 2013 application, or the 2013 decision.

[11] When Mr McGuire first filed the present proceeding he challenged only the 2013 decision and the Selection Committee's recommendation. Mr McGuire subsequently amended his claim to seek review of both the 2013 and 2015 decisions. In the Court of Appeal Mr McGuire's challenge to the 2013 decision was struck out. The Court of Appeal held the High Court erred in declining to strike out that part of the claim.¹⁰ Mr McGuire's challenge to the 2013 decision could not proceed in the face of s 83 of the Legal Services Act.¹¹ Mr McGuire appealed to the Supreme Court. His appeal was dismissed. The Supreme Court held that, on any conceivable approach to the question whether s 83 is capable of any meaning other than that applied to it by the Court of Appeal, the application for review was "misconceived".¹²

⁷ At [16].

⁸ At [16].

⁹ At [18].

¹⁰ *McGuire v Secretary for Justice* [2018] NZCA 37 [*McGuire* (CA)] at [59].

¹¹ Section 83 provides that a person may not apply for judicial review of a decision made by the Secretary under subpt 2 of pt 1 of the Act without first obtaining a review by the Review Authority.

¹² *McGuire* (SC), above n 3, at [45].

[12] Mr McGuire’s third amended statement of claim, accordingly, continues only his challenge to the 2015 decision.

[13] Before turning to Mr McGuire’s various criticisms of the 2015 decision, and the Selection Committee’s recommendation, I first set out the key statutory and regulatory provisions governing applications for approval to provide legal aid services.

Legislative framework

[14] Subpart 2 of pt 3 of the Legal Services Act 2011 (“the Act”) is directed towards a quality assurance system for providers of legal services. To this end no person may provide a legal aid service (or a specified legal service) unless the person is approved by the Secretary to provide that service and the person complies with any conditions of approval.¹³

[15] Applications for approval to provide legal aid services must be made to the Secretary in the prescribed manner.¹⁴ The Secretary may approve a person to provide one or more legal aid services (or specified legal services) only if satisfied the person meets the criteria prescribed in regulations.¹⁵ The Secretary must provide reasons for his or her decision to give or decline approval.¹⁶

[16] Section 78 empowers the Secretary to establish selection committees to assess applications for approval to provide legal aid services and to advise the Secretary of the suitability of those applicants.

[17] A person may apply to the Review Authority for a review of a decision of the Secretary declining the person’s application for approval, or imposing conditions, restrictions or sanctions.¹⁷ The Review Authority must give reasons for its decision

¹³ Legal Services Act 2011, s 75.

¹⁴ Section 76.

¹⁵ Section 77(1).

¹⁶ Section 77(4).

¹⁷ Section 82.

and its decision is binding on the Secretary and the person to whom the decision applies.¹⁸

[18] The criteria which an applicant must meet are prescribed in the Legal Services Regulations. Specifically, Mr McGuire had to satisfy the Secretary that he met:

- (a) the professional entry requirements set out in reg 5, by providing a certificate of standing from the Law Society;¹⁹
- (b) the experience and competence requirements set out in reg 6, by establishing:
 - (i) either that he had 12 months' experience in criminal law practice within the last five years, and had appeared as counsel with substantial and active involvement in at least three criminal trials,²⁰ and had sufficient experience, knowledge and skill as a lawyer;²¹ or
 - (ii) that in light of his experience, knowledge and skill, the Secretary could waive the recent experience requirement;²²
- (c) the service delivery systems requirements set out in reg 9;
- (d) the work samples requirements set out in reg 9A, by providing samples as proof of his recent experience in criminal proceedings;
- (e) the references requirements set out in reg 9B, by providing two written references attesting to the referee's direct experience and knowledge of

¹⁸ Section 86(3).

¹⁹ This requirement can be waived for existing providers who have been notified by the Secretary that they need not comply with it: Legal Services (Quality Assurance) Regulations 2011, reg 5(1A).

²⁰ Legal Services (Quality Assurance) Regulations 2011, Schedule cl 2.

²¹ Legal Services (Quality Assurance) Regulations 2011, reg 6(2).

²² Legal Services (Quality Assurance) Regulations 2011, reg 6(5)–(7) (in force as at 27 October 2015, the date of the Secretary's decision).

the applicant's skill in the area of law in which approval was sought;
and

- (f) the fit and proper person requirements set out in reg 9C.²³

Mr McGuire's application for approval: the lead-up and determinations

[19] Mr McGuire first contacted the Ministry of Justice about making an application for approval as a legal aid provider on 12 March 2015. He was given guidance and copies of the relevant application forms. An affidavit, containing a full narrative and evidentiary record of Mr McGuire's 2015 application, was filed on behalf of the Secretary. The affidavit evidence includes:

- (a) correspondence between the Ministry and Mr McGuire prior to his application being considered;
- (b) the full application considered by the Selection Committee and Secretary;
- (c) the Selection Committee's recommendation;
- (d) the Secretary's decision; and
- (e) the Review Authority's decision confirming the Secretary's decision.

[20] The deponent, Amy Victoria Davis, is a senior advisor within the Ministry and was involved in processing Mr McGuire's 2015 application.

[21] The evidence shows that, on 10 August 2015, Mr McGuire's application for Criminal Provider Approval Level 1 (PAL 1), Family, and Duty Lawyer was formally lodged with the Ministry. Mr McGuire was advised by email that his application for Criminal PAL 1 was complete but that further information relating to his application for approval as duty lawyer and family lawyer was required, in order to complete those aspects of his application.

²³ Regulation 9C is set out in full at [71].

[22] Between 10 August and 15 September 2015 Ms Davis communicated on multiple occasions with Mr McGuire with a view to assisting him to complete his application, and to provide the documentation and evidence that best supported his application.

[23] In May 2015 Mr McGuire raised a concern about the composition of the Taranaki-Whanganui-Manawatū Selection Committee, the regional selection committee which, ordinarily, would have assessed an application for a lawyer practising in Palmerston North. Earlier, Mr McGuire had asked one of the members of the Selection Committee to be a referee for his application. Mr McGuire advised the Ministry that this person had refused on the basis she did not know Mr McGuire well enough. Mr McGuire took issue with that assessment of her acquaintance with him. There were other issues as well, from Mr McGuire's perspective. The short point is that, to avoid any potential conflict of interest, Ms Davis advised Mr McGuire that she would ask for his 2015 application to be assessed by a selection committee in a neutral region. Accordingly, Mr McGuire's completed application was provided to the Southern Selection Committee for its consideration.

[24] On 2 October 2015, the Southern Selection Committee recommended that Mr McGuire's application for approval as a lead provider, Criminal PAL 1, be declined. While Mr McGuire met the professional entry requirements, had service delivery systems to support the provision of legal aid services and had provided references supporting his experience and knowledge in the area of law to which his application related, Mr McGuire had not demonstrated experience and competence in Criminal PAL 1. The Selection Committee noted Mr McGuire was last significantly involved in criminal law in 2010. In his application Mr McGuire referred to his involvement in two Criminal PAL 1 cases in 2015 but that involvement (on Mr McGuire's own description) was limited to representing clients at sentencing after guilty pleas had been entered.

[25] Ms Davis emailed the Selection Committee's recommendation to Mr McGuire on 13 October 2015 and invited him to respond before the Secretary for Justice made a decision on the application. Mr McGuire responded by letter dated 15 October 2015.

[26] On 22 October 2015 Ms Davis submitted Mr McGuire’s application, the Selection Committee’s recommendation and Mr McGuire’s 15 October 2015 response to the recommendation for the Secretary’s consideration and decision.²⁴

[27] On 27 October 2015 the Secretary declined Mr McGuire’s application for approval to provide Criminal PAL 1 legal aid services.

[28] Mr McGuire applied for a review of the Secretary’s decision. On 22 December 2015 the Review Authority confirmed the Secretary’s decision.²⁵

The Secretary’s 2015 decision

[29] Annually, the Secretary receives approximately 600 applications for legal aid provider approval or for re-approval. On this occasion the decision was made by the General Manager of Legal Aid Services, Ms McCreadie acting pursuant to a delegated authority.

[30] The Secretary’s decision declining Mr McGuire’s application is contained in a five-page document. On the first page, within a few lines, the applicant’s details are summarised: the application number, the name of the applicant and the type of provider and areas of law in which the application is made. On the fifth line the outcome is stated in the following way: “**Decision Decline** – Criminal PAL 1”.

[31] Immediately following is a statement of the reasons for the decision:

Does not met the criteria for approval under the Legal Services Act 2011 and Legal Services (Quality Assurance) Regulations 2011 as a Lead Provider in Criminal PAL 1.

- Applicant **meets** the Professional Entry Requirements.
- Applicant **has** Service Delivery Systems that support the applicant to provide and account for legal aid services or specified legal aid services in an effective, efficient and ethical manner.

²⁴ The documents were submitted to the General Manager, Legal Aid Services, Ms McCreadie who was acting pursuant to a delegation from the Secretary under s 41 of the State Sector Act 1988.

²⁵ *McGuire v Secretary for Justice*, NZRA 003/2015, 23 December 2015.

- Applicant **has** provided references that support the applicant's experience and knowledge in the area of law to which the application relates.
- Applicant **has not** demonstrated experience and competence in Criminal PAL 1 proceedings.
- Applicant **has not** satisfied the Secretary that he is a fit and proper person to provide legal aid services.

[32] Under a heading "Background", the Secretary referred to the cancellation in 2010 of Mr McGuire's legal services approvals.²⁶ The only other information under this heading is the 24 June 2015 date on which Mr McGuire made his application to provide legal aid services as a lead provider in Criminal PAL 1.

[33] The Southern Selection Committee's recommendation and Mr McGuire's response to the recommendation were summarised. The following two to three pages of the decision contain the considerations said by the Secretary to be relevant to her decision. The considerations are set out under three headings: "Regulation 6(2)(a)", "Regulation 6(2)(b)", and "Regulation 6(2)(c)". I set out this part of the document in rather more detail.

[34] Under the heading "Regulation 6(2)(a)" the Secretary stated:

Regulation 6(2)(a) requires me to apply the relevant experience and competence requirements set out in the Schedule to the Regulations. For Criminal PAL 1 the relevant clause is clause 2.

- **Clause 2(a) of the Schedule requires the applicant to have at least 12 months' recent experience in criminal law practice.**
- For the purposes of Mr McGuire's application, recent experience is defined in the interpretation of the Regulations as experience he has gained working on approval legal 1 proceedings in the five years immediately before he made his application in July 2015

[35] The Secretary recorded Mr McGuire's concession in this regard:

- Mr McGuire acknowledged that he does not meet this aspect of the criteria, as he has not practiced in criminal law since 2010, because he did not hold a contract to provide legal aid services. Mr McGuire states that he has made brief appearances in court this year as an agent for people who were being sentenced after pleading guilty.

²⁶ See [7] above.

[36] After acknowledging Mr McGuire's provision of three examples of his work from 2008 to 2010, although no examples since May 2010, the Secretary observed an applicant may still be granted approval even if the applicant has not had 12 months recent experience in criminal law practice.²⁷ Regulation 6(5)–(7) enables the Secretary to decide an applicant meets the relevant experience and competence requirements set out in the schedule if, having taken into account the applicant's experience as a lawyer, the Secretary is satisfied:

- (a) the applicant meets the relevant experience and competence requirements in all other respects; and
- (b) the applicant has the appropriate level of knowledge and skill to provide legal aid services in each area of law to which the application relates.

[37] The Secretary was not satisfied Mr McGuire met the grounds for waiving the requirement to demonstrate recent experience:

- For a number of reasons, I am not confident that Mr McGuire has the appropriate level of knowledge and skill to provide legal aid services at Criminal PAL 1. I will note my concerns under regulation 6(2)(c) below.
- I am not prepared to waive the requirement that Mr McGuire must demonstrate 12 months' recent experience working in criminal law practice.

[38] After noting cl 2(b) of the Schedule was satisfied, the Secretary turned to reg 6(2)(b):²⁸

Regulation 6(2)(b) requires me to take into account the applicant's experience as a lawyer.

- Mr McGuire was admitted to practice in 1992 and was a criminal legal aid provider at Criminal PC 1 for most of the time between 2003 and 2010. I acknowledge Mr McGuire's experience in the criminal area of law.

²⁷ As required by cl 2(a) of the schedule to the Legal Services Regulations.

²⁸ Clause 2(b) of the Schedule requires the applicant to have appeared as counsel with substantial and active involvement in at least three trials in criminal proceedings.

[39] The Secretary then turned to the third criterion in reg 6(2):

Regulation 6(2)(c) requires me to be satisfied that the applicant has the appropriate level of knowledge and skill to provide legal aid services or specified legal services in each area of law to which the application relates.

[40] Mr McGuire had argued that, not being approved to provide legal aid services since 2010, he had not had the opportunity to gain recent experience in criminal law. The Secretary responded:

- Legal aid is not a training ground for lawyers and the Regulations set out experience and competence requirements that must be met by all applicants. These give the Secretary for Justice and the wider public the assurance that legal aid lawyers are providing quality services. There are a number of ways to gain experience including working in private practice, as a junior, or as a supervised provider.

[41] Mr McGuire had been unable to provide examples of criminal cases demonstrating his knowledge and skill, especially since the implementation of the Criminal Procedure Act 2011. Although he had recently written on the subject of discharge without conviction:²⁹

- ... [it] did not make up for the lack of recent criminal law experience on his feet in the courtroom acting for clients.
- On balance, I am not satisfied that Mr McGuire had the appropriate level of knowledge and skill to provide legal aid services as a lead provider at Criminal PAL 1. The application for approval as a lead provider at Criminal PAL 1 is declined.

[42] By this stage, the Secretary had made her decision to decline the application for the reasons she set out. Nevertheless, under a heading “[f]urther considerations – fit and proper person” the Secretary proceeded to address reg 9C which requires every applicant to satisfy the Secretary he or she is a fit and proper person to provide legal aid services. To that end an applicant must provide details of any convictions or complaints upheld under the Legal Services Act 2011 or the former Act.³⁰ Referring to four upheld complaints disclosed in Mr McGuire’s application the Secretary observed:

²⁹ The Secretary was referring to an article which Mr McGuire authored, *Discharge without conviction*, published in the December 2014 New Zealand Law Journal.

³⁰ Section 4 (the interpretation section) of the Legal Services Act 2011 provides that “former Act means the Legal Services Act 2000”.

- The Selection Committee made no comment on whether or not they considered Mr McGuire met the requirements under regulation 9C(3)(c) as at least three of those complaints had yet to be finally determined.
- Mr McGuire is currently exploring the possibility of review for three of the complaints and has various dates set down for filing of memoranda and hearings. It would be premature for me to consider how those complaints, individually or together, affect Mr McGuire's status as a fit and proper person to provide legal aid services.
- Mr McGuire may wish to apply for approval at Criminal PAL 1 when he meets the 12 month minimum requirement and when all of the outstanding complaints are determined.

Challenges to the Secretary's decision

[43] Mr McGuire's application for judicial review challenges the lawfulness of the Secretary's decision on the following grounds:

- (a) the Secretary wrongly decided Mr McGuire lacked "recent experience" as a level one criminal lawyer and duty solicitor;
- (b) the Secretary wrongly decided Mr McGuire had not satisfied her he was a fit and proper person to provide legal aid services;
- (c) the Selection Committee was constituted in breach of regulation 11(2)(a); and
- (d) the Selection Committee's recommendation was wrong in fact and law.

[44] Each ground is assessed in turn.

Ground (a): did the Secretary wrongly decide Mr McGuire lacked "recent experience"?

Mr McGuire's position

[45] Mr McGuire's essential point is that he is an experienced litigator with almost 16 years' experience as a legal aid lawyer. In view of his experience Mr McGuire says it is "hard to see" why the Secretary could not be confident he was a fit and proper

person. Mr McGuire firmly believes the Secretary's assessment is based on the certificate of standing enclosed with his 2015 application. The certificate recited the complaints which Mr McGuire faced at that time. Mr McGuire's grievance is that some of those complaints were subsequently determined in his favour yet the decision declining him approval to provide legal aid services was influenced by the content of the certificate of standing.

First defendant's position

[46] Mr McKillop, counsel for the first defendant, submitted there was no error in the Secretary's decision nor in the subsequent decision of the Review Authority, that being the operative decision. As Mr McGuire was unable to meet the requirements for recent experience in Criminal PAL 1 proceedings, and did not convince the Secretary (or Review Authority) to waive that requirement, it was open to the Secretary to declare herself as having insufficient confidence in Mr McGuire's knowledge and skill and to decline to waive the recent experience requirements.

Assessment

[47] For approval level 1 criminal proceedings Mr McGuire had to show at least 12 months' recent experience in criminal law practice and to have appeared as counsel with substantial and active involvement in at least 3 criminal trials.³¹

[48] "Recent experience" means experience gained in the five years immediately before the date of application.³²

[49] Mr McGuire's application was dated 24 July 2015. Mr McGuire was required, therefore, to have gained the requisite 12 months' experience in the five-year period between 24 July 2010 and 24 July 2015. It needs to be borne in mind that Mr McGuire's approval as a legal aid provider was cancelled on 13 September 2010. It was suggested on behalf of the Secretary that the cancellation of Mr McGuire's contract in September 2010 meant any experience Mr McGuire gained in 2010 was

³¹ Legal Services (Quality Assurance) Regulations 2011, sch 1, cl 2.

³² Legal Services (Quality Assurance) Regulations 2011, reg 3(1) definition "recent experience".

not “recent experience” for the purpose of his application unless it occurred between 24 July and 13 September 2010.

[50] I do not read the definition of “recent experience” in that way. The recent experience required by the Legal Services Regulations is experience, in the area of law in which the applicant applies to provide legal aid services, gained in the five years preceding the date of the application. The recent experience is not confined to experience as a legal aid provider. Therefore, it was open to Mr McGuire to point to recent experience (as defined) whether in his capacity as a legal aid provider or otherwise.

[51] The case examples which Mr McGuire provided of three trials in criminal proceedings did not demonstrate recent experience as counsel with substantial and active involvement. They related to trials in December 2009, 20 May 2010 and 8 December 2008. None came within the five-year period.

[52] Nor did the work samples which Mr McGuire submitted demonstrate “recent experience”. The documents were dated 6 April 2009 and 2 June 2009 and related to the sentencing phase of Mr McGuire’s 2008 case example. This deficiency was pointed out to Mr McGuire by Ms Davis who advised he should rely on his most recent Criminal PAL cases but Mr McGuire noted he did not have any recent defended hearings. He had only appeared at sentencing after the clients pleaded guilty.

[53] The application and accompanying documentation put before the Secretary included email communications between Mr McGuire and Ms Davis. Ms Davis had encouraged Mr McGuire and assisted him in putting forward the information that best supported his application. In one of the emails, Mr McGuire observed he had no recent defended hearings as he had not represented a private criminal law client since the middle of 2009. The Secretary was accurate, therefore, in her observation that Mr McGuire acknowledged he did “not meet this aspect of the criteria, as he had not practiced in criminal law since 2010, because he did not have a contact to provide legal aid services”.

[54] But Mr McGuire’s lack of recent experience is not to the fore. Where the Secretary is satisfied an applicant meets the relevant experience and competence requirements, the Secretary may waive the requirement for “recent experience”. In the present case, the main question for the Secretary therefore becomes one concerning the sufficiency of Mr McGuire’s experience and competence in the criminal law area, notwithstanding his lack of “recent experience”. That was the combined effect of cls 6(1) and 6(5)–(7) of the Legal Services Regulations.

[55] Just prior to Mr McGuire’s submission of his application to the Ministry of Justice on 10 August 2015 he had been corresponding with the internal assessor about his application. The assessor advised Mr McGuire “the Secretary can waive recency” but needed to be satisfied that he met the relevant competence and experience requirements in all other respects. If Mr McGuire was unable to provide more recent examples of his work he was invited to provide reasoning in support of waiver.

[56] Ms Davis made the same point and repeated the invitation when she wrote to Mr McGuire a week later advising that his application for approval in Criminal PAL 1 had been lodged. If Mr McGuire could not provide case examples within the past five years he was asked to provide a short submission supporting waiver of the recency requirement.

[57] In declining Mr McGuire’s application the Secretary:

- (a) acknowledged Mr McGuire’s experience in the criminal law area since his admission in 1992;
- (b) considered the Selection Committee’s particular concern that Mr McGuire had no recent court experience under the Criminal Procedure Act 2011; and
- (c) considered Mr McGuire’s submission that without approval to provide legal aid services he had no opportunity to gain recent experience.

[58] I have reached the clear view that the Secretary made no error in declining Mr McGuire's application for the reasons she gave. I expressed concern during the hearing about what struck me at the time as a paucity of reasoning. On reflection, where a decision-maker receives some 600 applications a year, it is to be expected that the decision-maker's written decisions and the reasons they must contain, will be succinct. The Secretary's decision contains a concise yet sufficient explanation of her reasons for declining Mr McGuire's application.

[59] The Secretary's observation that "legal aid is not a training ground for lawyers" is unobjectionable. To my mind, such a view reflects one of the objects of the Legal Services Act which was to reform the provision of legal aid services and create a quality assurance framework system within which high-quality legal services would be provided by competent lawyers. The Secretary was not satisfied that Mr McGuire met the experience and competence requirements in all other respects such that she, or the wider public, could be assured of the provision of quality services.

[60] Similarly, it was entirely legitimate for the Secretary to hold a particular concern that the experience Mr McGuire undoubtedly had in the criminal law area did not include examples of cases demonstrating knowledge and skill in the criminal law area since enactment of the Criminal Procedure Act.

[61] The Criminal Procedure Act restated and reformed the law relating to criminal procedure. As the learned authors of Adams on Criminal Law observe, the Act "leaves few aspects of criminal procedure untouched." Most particularly:³³

- (a) The statutory reforms overhauled offence categories and jurisdiction.
- (b) The Criminal Procedure Act includes only high-level requirements. Matters of detailed court procedure are provided in court rules. "Judicial officers, counsel and unrepresented defendants, need to be familiar with and apply both the Act and relevant rules and regulations."

³³ Simon France (ed) Adams on Criminal Procedure (looseleaf ed, Thomson Reuters, Wellington), at 01-19.

- (c) The Criminal Procedure Act overtook many of the provisions of the Summary Proceedings Act and Crimes Act.
- (d) The reforms trenched on the law relating to who may conduct proceedings; how a proceeding is commenced; pre-trial procedure; the approach to election of trial by jury; case management; proceeding in the absence of the defendant; name suppression; and appeals.

[62] Further, in June 2013, the Law Society advised the profession of imminent updates to be made to the Ministry of Justice’s website in preparation for the coming into force of the Criminal Procedure Act. The Law Society observed that the Act introduces “the most significant changes to criminal procedure in 50 years”.³⁴

[63] Against the backdrop of such substantial change, it is difficult to conceive of an applicant for approval in the criminal law area being able to satisfy the statutory criteria for competence if lacking substantive court experience under the reformed system. Mr McGuire did not meet the requirement for “recent experience” in Criminal PAL 1 and did not satisfy the Secretary that she should waive that requirement. I find no error of law or fact in the Secretary’s assessment nor her decision to decline Mr McGuire’s application.

[64] Relevantly, the Review Authority agreed with the Secretary’s decision. The Review Authority found no matters to persuade him the requirement for recent experience should be waived.³⁵

[65] There is one final point under this ground of review. Mr McGuire argued the fact the Secretary “admitted” paragraphs [10] to [15] of his statement of claim “prove that I must have had ‘recent experience’ under regulation 3 and experience under the Criminal Procedure Act 2011”.

³⁴ New Zealand Law Society “Criminal Procedure Act: 12 terms you need to know before 1 July” (26 June 2013) New Zealand Law Society<www.lawsociety.org.nz>.

³⁵ *McGuire v Secretary for Justice* above, n 25.

[66] The submission misconceives the pleaded admissions. Paragraphs [10] to [15] of the statement of claim plead uncontentious facts, for example, that:

- (a) Mr McGuire was a level 1 criminal legal aid and duty solicitor lead provider from February 1995 until September 2010;
- (b) Mr McGuire stated in his application he had appeared as counsel with substantial and active involvement in approximately 31 criminal law cases in 2010;
- (c) Mr McGuire stated in his application he had appeared as counsel with substantial and active involvement in approximately two criminal law cases in 2011 and two in 2015;
- (d) The Selection Committee knew Mr McGuire had been a lead legal aid provider of Criminal PAL 1 and duty solicitor for over 15 years;
- (e) The Selection Committee was advised Mr McGuire had completed the litigation skills programme in 2000 and the duty solicitor instruction and approval course in 1995; and
- (f) The Selection Committee was told Mr McGuire had helped train other duty solicitors.

[67] With some qualifications, the Secretary admitted these particular paragraphs. She could hardly have done otherwise. These six paragraphs contained pleadings of (largely) incontestable facts. But the factual situations set out in (a)–(f) do not result in Mr McGuire satisfying the statutory criteria for approval as a legal aid provider. To claim that the Secretary’s admissions “prove” Mr McGuire had the requisite experience for approval of his application is to misunderstand, at a fundamental level, the role and effect of pleadings.

[68] This head of review is not made out.

Ground (b): did the Secretary wrongly decide Mr McGuire did not meet the fit and proper person requirement?

Mr McGuire's position

[69] Mr McGuire's pleaded position is that the Secretary wrongly decided Mr McGuire had not satisfied her he was a fit and proper person to provide legal aid services.³⁶ Mr McGuire's brief submissions on the points were to the following effect:

- (a) He was unable to follow the reasoning in counsel's submissions addressing the point but argued that, as the Secretary had admitted in her statement of defence the content of the certificate of standing issued by the Law Society, the submissions of counsel were irrelevant.
- (b) In any event there is no evidence of any discussions between the relevant bodies about the "fit and proper person" criterion.
- (c) The failure to carefully and thoroughly assess his character was unfair.

The Secretary's position

[70] Mr McKillop submitted it was not necessary for the Secretary to "exhaustively consider" whether Mr McGuire met the fit and proper person criterion because his application failed at an earlier hurdle.

Assessment

[71] Regulation 9C(3)(b) of the Legal Services Regulations requires the Secretary to be satisfied that any complaints upheld against an applicant, when considered individually or together, would not adversely affect the integrity of the legal services system or breach any practice standards. Regulation 9C provides:

9C Applicant must be fit and proper person

- (1) Every applicant must satisfy the Secretary that he or she is a fit and proper person to provide legal aid services or specified legal services.

³⁶ Third amended statement of claim, [31].

- (2) For the purposes of subclause (1), an applicant must provide to the Secretary—
 - (a) details of any conviction of the applicant for an offence punishable by imprisonment; and
 - (b) details of any complaint upheld against the applicant under the Act or the former Act.
- (3) In deciding whether an applicant meets the criterion in subclause (1), the Secretary must be satisfied that—
 - (a) any convictions of the applicant, when considered individually or together, would not adversely affect—
 - (i) the applicant’s relationship with a client who is an aided person; or
 - (ii) the integrity of the legal services system; and
 - (b) any complaints upheld against the applicant under the Act or the former Act, when considered individually or together, would not—
 - (i) adversely affect the integrity of the legal services system; or
 - (ii) breach any practice standards; and
 - (c) any complaints upheld against the applicant under the Lawyers and Conveyancers Act 2006, when considered individually or together, would not—
 - (i) adversely affect the integrity of the legal services system; or
 - (ii) breach any practice standards.
- (4) An applicant need not comply with subclause (2)(b) if the applicant has received written notice from the Secretary that compliance with that provision is not required.
- (5) If the Secretary gives notice that an applicant is not required to comply with subclause (2)(b), subclause (3)(b) does not apply.

[72] More generally s 55 of the Lawyers and Conveyancers Act 2006 provides criteria for assessing whether someone is a fit and proper person at the time of their application for admission as a barrister and solicitor. The High Court and Law Society may consider any relevant matter, including:³⁷

- (a) the person’s character;
- (b) the person’s offending, history of bankruptcy or history as a director of liquidated companies;

³⁷ Lawyers and Conveyancers Act 2006, s 55(1).

- (c) whether the person is subject to an unresolved complaint or current investigation or charge by a regulatory body for legal practice under a corresponding foreign law; and
- (d) whether the person is a subject of current disciplinary action in another profession or occupation in New Zealand or a foreign country.

[73] Mr McGuire seeks to draw some support for his position by pointing to the Secretary's statement of defence and the Secretary's admission (of Mr McGuire's pleading) that "[t]he certificate stated that 'the New Zealand Law Society considers that [he plaintiff] is of good standing'". All the admission signifies, however, is that the Secretary agrees the certificate contains those words.

[74] I accept Mr McKillop's submission that Mr McGuire's approach effectively collapses the professional entry criteria in reg 5 into the fit and proper person criteria in reg 9C. The two are quite distinct. Whether an applicant is a fit and proper person at the time of the application for admission as a barrister and solicitor involves different considerations from an assessment of whether an applicant for approval to be a legal aid provider is a fit and proper person to provide legal aid services. In the latter context the Secretary may consider outstanding or upheld complaints (for example) which indicate the applicant may threaten the integrity of the legal services system, their relationship with legal aid clients, or breach practice standards.

[75] At the Selection Committee stage Mr McGuire asked that his application not be judged on the basis of standards committee determinations which were subject to challenge. The Selection Committee made no recommendation regarding the fit and proper person criterion although it did express concern about the regularity of complaints since cancellation of Mr McGuire's contract in 2010.

[76] It is obvious from the face of the decision itself that the Secretary reached her concluded view about the merits of Mr McGuire's application on the basis Mr McGuire had not demonstrated he had the appropriate level of knowledge and skill to provide legal aid services as a lead provider. The Secretary was not satisfied that Mr McGuire was experienced and competent in the area of law in which he intended

to provide legal aid services, and was not satisfied that the criteria prescribed in regs 6(2)(a) and (c) were met. It was therefore unnecessary for the Secretary to turn her mind to the fit and proper person requirements of reg 9C. To this extent my view differs from the submission advanced on behalf of the first respondent that it was not necessary for the Secretary to “exhaustively consider” the fit and proper person criteria. The Secretary was either required to be satisfied that criteria were met, or she was not required to be satisfied. It is difficult to envisage the circumstances under which the Secretary is required to consider, but not exhaustively so, any particular statutory criteria.

[77] I have some sympathy for Mr McGuire’s concern about the articulated reasons for the Secretary’s decision. I have set out at [31] above the summary of reasons that appears at the beginning of the Secretary’s decision. They include this statement:

- Applicant **has not** satisfied the Secretary that he is a fit and proper person to provide legal aid services.

[78] This part of the Secretary’s decision appears to inaccurately summarise the decision itself. On the fourth page of the decision, having considered the requirements of reg 6(2)(c) (appropriate level of knowledge and skill), the Secretary concludes:

On balance, I am not satisfied that Mr McGruie has the appropriate level of knowledge and skill to provide legal aid services as a lead provider at Criminal PAL 1. *The application for approval as a lead provider at Criminal Pal 1 is declined.* (Emphasis added)

[79] The Secretary then turned to “further considerations – fit and proper person”. The key point is that by this time, as the emphasised words show, the Secretary had determined the application. And she had determined it without reference to the “fit and proper person” criteria.

[80] I am satisfied the Secretary did not decide the application on the basis of, or after taking into account, the fit and proper person criteria. Her decision cannot therefore be impugned for wrongful assessment of this criteria.

[81] This second ground of review is not established.

Ground (c): Was the Selection Committee improperly constituted?

Mr McGuire's position

[82] Referring to his statement of claim and his pleading that he had no personal or professional dealings with any of the selection committee members Mr McGuire took issue with the first defendant's pleaded response. The Secretary pleaded that:

- 4.3 On 28 May 2015 Mr McGuire complained that two members of the Taranaki-Whanganui-Manawatū Selection Committee had a conflict of interest;
- 4.4 As a result, the application was considered by the Southern Selection Committee (responsible for South Island applications).

[83] Mr McGuire says the Secretary is wrong; that he asked for his 2013 application to be considered by a different selection committee that excluded the members he claimed were conflicted. Mr McGuire is adamant he "said nothing about the selection committee that was to consider and assess the 2015 application". Furthermore, Mr McGuire submitted, there was no evidence from the Secretary as to why a differently constituted Midland 2 Selection Committee could not have considered his 2015 application. The membership of the Selection Committee did not, therefore, comply with reg 11(2)(a) of the Legal Services Regulations.

The Secretary's position

[84] Mr McKillop submitted this ground of review should be dismissed as reg 11(2)(a) does not require committee members to have knowledge of the applicant. As well, Mr McGuire did not object at the time he was informed his application would be sent to a "neutral region".

Assessment

[85] Selection committees are constituted under s 78 of the Legal Services Act. There is no statutory requirement that members have pre-existing knowledge of applicants. Nor does reg 11(2)(a) require committee members to have knowledge of the applicant. Regulation 11(2) provides:

- (2) When assessing any application, a selection committee—
- (a) must assess the application on the basis of the information provided in the application *and the committee's knowledge of the applicant*; and
 - (b) may verify any information provided with the application by seeking further evidence from the applicant and by referring any such information to any 1 or more of the following:

...

(Emphasis added)

[86] I do not read the emphasised words as requiring a committee to be comprised of members who have personal knowledge of an applicant. Clearly, the “knowledge” of an applicant which reg 11(2)(a) requires a selection committee to assess may have been gained in a number of ways including by inquiry, information from any one or more of the sources of information for which reg 11(2)(b) specifically provides, or from personal acquaintance or personal knowledge of an applicant.

[87] As to Mr McGuire’s assertion that the Secretary incorrectly pleaded he complained about a conflict of interest involving two members of the Midlands 2 Selection Committee and sought their exclusion from considering his 2015 application, I have reviewed the extensive communications between Mr McGuire and the Ministry. Mr McGuire is correct. In an email sent 28 May 2015 headed “Legal Aid Application to be a Provider” Mr McGuire noted that members of the Selection Committee which made a recommendation on his 2013 application included two members (Ms Woods and Mr Coles) who were members of the Manawatu Standards Committee which made adverse decisions against him in 2012. They did the same in 2014. Towards the end of his lengthy email Mr McGuire stated:

I would like my 2013 application to be reconsidered in light of the potential issues with Ms Woods and Mr Coles. Neither of them should have been on the Selection Committee

[88] But the fact Mr McGuire asked for his 2013 application to be reconsidered in light of his asserted issues with Ms Woods and Mr Coles does not advance his argument. In 2015 Mr McGuire raised with the Ministry conflict of interest issues about members of the committee which considered his 2013 application. Ms Davis deposed to the fact she considered it was best to avoid any potential for a further

conflict of interest claim by having a different committee assess Mr McGuire's application. Ms Davis wrote to Mr McGuire on 15 September 2015 advising that she would go through his application to ensure the Ministry had all the necessary information. If the application was complete Ms Davis would send it to the Selection Committee for a recommendation. Ms Davis added:

I imagine that there is a conflict of interest in the Taranaki-Whanganui-Manawatū Selection Committee assessing your application, so I will instead ask for it to be assessed in a neutral region.

[89] Mr McGuire emailed his reply within minutes. He thanked Ms Davis for the feedback and asked whether there was any way he could also address the Selection Committee to put his application into context. Ms Davis replied to the effect that, as she had previously indicated, Mr McGuire was welcome to provide submissions or a cover letter to provide more information to accompany his application.

[90] The point is, Mr McGuire raised no objection in 2015 to the proposal that his application was to be sent to a selection committee in a "neutral region". Having reviewed the evidence it is clear that the Secretary was perfectly correct to plead that "on 28 May 2015 Mr McGuire complained that two members of the...Selection Committee had a conflict of interest". The more important point is that the pleading is neither here nor there in terms of the alleged wrongful constitution of the Selection Committee.

[91] Mr McGuire has not established that the Selection Committee was improperly constituted because of a failure to comply with reg 11(2)(a) of the Legal Services Regulations, or for any other reason.

Ground (d): Was the Selection Committee's recommendation in error?

Mr McGuire's position

[92] The argument under this head is that the Selection Committee made an error of law in (mis)directing itself that it was unable to make an assessment under reg 9C as to whether or not Mr McGuire was a fit and proper person to provide legal aid services. Mr McGuire's point is that a selection committee's powers are limited to

assessing applications and advising the Secretary of the suitability of applicants under s 78(1) of the Legal Services Act. Therefore, the Selection Committee had no power under reg 9C to assess whether or not he was a fit and proper person to provide legal aid services. Consequently, the Selection Committee's process miscarried and its recommendation was ultra vires.

Secretary's position

[93] Mr McKillop submitted the Selection Committee was wrong to state that it was unable to make an assessment as to whether or not Mr McGuire is a fit and proper person to provide legal aid services but the only relevant issue is whether that statement impacted on the Secretary's decision. That submission was advanced in reliance on the Court of Appeal's analysis of the statutory role of selection committees which is limited to giving advice to the Secretary about the suitability of applicants for approval, as "Such advice has no legal effect".³⁸

[94] Mr McKillop further submitted that unless the Selection Committee recommendation has some "down-stream effect on the reviewable decision of the Secretary or the Review Authority, a judicial review claim alleging flaws in a Selection Committee recommendation cannot be sustained".

Assessment

[95] I have reservations about the breadth of the submission set out in the immediately preceding paragraph but to my mind, the relevant point is that, in recommending that the Secretary decline the application, the Selection Committee's reasons did not transgress the limits of its proper function.

[96] The statement which Mr McGuire protests, and which Mr McKillop characterises as "wrong", was made under a heading "Other comments". Under this heading the Committee, having set out its reasons for the recommendation it made, went on to express concern about the regularity of the complaints being made against Mr McGuire since the cancellation of his legal service provider approvals in 2010.

³⁸ *McGuire for Secretary for Justice* [2018] NZCA 37 at [33].

The Selection Committee noted that of the four complaints identified in Mr McGuire's application, three were yet to be finally determined. In that context, the Committee observed it was unable to make an assessment under reg 9C as to whether or not Mr McGuire was a fit and proper person to provide legal aid services.

[97] In other words, the Selection Committee's observation was an aside. It had already made the assessments necessary to formulating its recommendation and had provided the reasons for its recommendation.

[98] Not having misdirected itself, this ground of review is not made out.

Claim against the second defendant

[99] Mr McGuire's application for judicial review against the second defendant is limited to the proposition that a certificate of standing issued to him on 6 May 2015 "was wrong in fact and in law". Mr McGuire asks the Court to declare the certificate invalid "for unfairness and unreasonableness" and to set it aside.

[100] Mr McGuire's essential case is that he submitted the 2015 certificate in support of his application for legal aid provider approval. The certificate was wrong and contributed to the Selection Committee's recommendation against his application and contributed also to the Secretary's decision to decline his application.

[101] The invalidity of the 2015 certificate is demonstrated by the "huge differences" between it and two consecutive certificates (dated 28 July 2016 rewritten, Mr McGuire says, in a certificate issued 1 September 2016). There was a confidential settlement with the Law Society in 26 August 2016 accounting for the rewritten certificate.

Law Society's position

[102] The Law Society maintains the certificate was not wrong (in fact or in law), nor unfair or unreasonable. In his written and oral submissions Mr Collins, counsel for the Law Society, emphasised the factual accuracy of the 2015 certificate at the time

it was issued and the lawfulness of the certificate in terms of the legislative framework within which it was issued.

Assessment

[103] The 2015 certificate is headed “Legal Aid Provider Certificate of Standing”. It consists of seven paragraphs. The first two paragraphs state facts personal to Mr McGuire: the date on which he was admitted as a barrister and solicitor (on 4 September 1992); that he holds a current practising certificate as a barrister and solicitor; and that he is entitled to practice as such on his own account. The last paragraph consists of a single sentence: that the Law Society considers he is of good standing.

[104] The remaining four paragraphs particularise upheld complaints against Mr McGuire as at 6 May 2015. Specifically, the certificate recites the following disciplinary events:

- (a) On 3 December 2012, the Manawatu Standards Committee made a determination of unsatisfactory conduct and ordered Mr McGuire be censured, refund fees, apologise to the complainant and pay costs. On 4 September 2014, the Legal Complaints Review Officer confirmed the decision of the Standards Committee. On 26 February 2015 Mr McGuire filed judicial review proceedings.
- (b) Mr McGuire pleaded guilty to a charge of unsatisfactory conduct before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. On 3 October, the Tribunal censured Mr McGuire and ordered him to contribute to costs. The High Court quashed the censure but upheld the costs order. Mr McGuire filed a notice of appeal in the Court of Appeal on 17 March 2015.
- (c) On 11 July 2014, a Manawatu Standards Committee made a determination of unsatisfactory conduct, censured Mr McGuire and ordered him to cancel and reduce fees for work. On 22 January 2015

Mr McGuire filed judicial review proceedings.

- (d) On 1 August 2014, the Manawatu Standards Committee determined unsatisfactory conduct on the part of Mr McGuire, censured him and ordered him to take steps to rectify at his own expense an advertising error.

[105] Mr McGuire's contention that the 2015 certificate is wrong in law prompts a consideration of the statutory framework. The operative legislative provisions have been set out in some detail. For immediate purposes, the key relevant points are:

- (a) A person must not provide legal aid services unless approved by the Secretary to provide the service and he or she complies with any conditions of that approval.³⁹
- (b) The Secretary may approve a person to provide legal aid services if satisfied the person meets the criteria prescribed in regulations.⁴⁰
- (c) Regulation 5(1) of the Legal Services Regulations requires the applicant, if the applicant is a lawyer, to provide a certified copy of the applicant's certificate of standing issued by the Law Society. The certificate must provide evidence of the applicant's current practising certificate and include information about any complaints upheld against the applicant under the Lawyers and Conveyancers Act 2006.⁴¹
- (d) Thus, unless the applicant is an existing provider of legal aid services, or has written notice from the Secretary that compliance with reg 5(1) is not required, a certificate of standing must be produced by an applicant in support of his or her application.⁴² And, as Mr Collins submitted, it is the "sole function" of the Law Society (in relation to

³⁹ Legal Services Act 2011, s 75.

⁴⁰ Section 77(1).

⁴¹ Legal Services Regulations, reg 5(1).

⁴² Under reg 5(1A) the Secretary may waive compliance with reg 5(1).

lawyers applying for approval to practice as legal aid service providers) to issue a certificate of standing if the lawyer has standing.

[106] Mr Collins relied on a recent decision of Osborne AJ⁴³ in support of an argument that:⁴⁴

...the [Law Society] as the regulator of the legal profession, is entitled to provide a certificate of standing which includes information that it regards as being relevant to the question of standing.

[107] But the facts of that case were different and the Associate Judge was required to determine a different question from the questions before me. The certificate of standing before Osborne AJ included recitations of open complaints against Mr McGuire. Mr McGuire argued that the Law Society was precluded by reg 5 from including reference to open complaints in a certificate of standing.⁴⁵ Osborne AJ analysed the meaning of “include” in the context of reg 5(1) and determined that the Law Society was not required to exclude from its certificate of standing, in relation to Mr McGuire, the details of outstanding or unresolved complaints.⁴⁶

[108] In this case Mr McGuire’s argument centres on the fairness of the Secretary making an assessment about whether or not he was a fit and proper person, on the basis of a certificate of standing that was subsequently “rewritten” following mediation and settlement with the Law Society. Mr McGuire’s claim against the second defendant is answered by the following four propositions.

[109] First, as I have determined, the Secretary did not reach the point of deciding whether or not Mr McGuire met the fit and proper person criterion. She made her decision to decline the application before turning her mind to these “further considerations”. Hence, even if the 2015 certificate was wrongly issued, (contrary to the conclusion I have reached), the 2015 certificate did not influence the Secretary in her decision to decline Mr McGuire’s application.

⁴³ *McGuire v New Zealand Law Society* [2018] NZHC 983.

⁴⁴ Submissions on behalf of the Second Defendant, dated 8 August 2018, at [2.11].

⁴⁵ *McGuire v New Zealand Law Society*, above n 43, at [56].

⁴⁶ At [59].

[110] Secondly, the 2015 certificate was not “rewritten”. Certificates of standing are valid for three months from the date of issue. The three-month period of validity is stated on each certificate. A certificate of standing was issued on 1 September 2016. Mr McGuire describes the later certificate as “hugely” different from the 2015 certificate and seems to regard the 2016 certificate as having changed the content of the 2015 certificate. A certificate of standing must reflect the position as at the date of its issue. If, over time, an applicant’s circumstances change in a relevant way, the applicant should expect the contents of sequential certificates of standing to reflect the changed circumstances. It is erroneous to regard a certificate as being “rewritten” by a later certificate that reflects an applicant’s altered or updated circumstances. More fundamentally, the Secretary made her decision on 27 October 2015. Certificates of standing issued subsequent to the impugned decision would be irrelevant to an assessment of the validity of a certificate issued prior to 27 October 2015.

[111] Thirdly, pursuant to reg 5(1) a certificate of standing *must* include information about any complaints upheld against an applicant under the Lawyers and Conveyancers Act 2001. Mr McGuire does not dispute that the 2015 certificate contained information about complaints upheld against him. His quarrel is with the accuracy of the information in the 2015 certificate.

[112] The fourth, and final, point concerns the factual accuracy of the contents of the 2015 certificate. I have reviewed the evidence, including the affidavit evidence of Neil Mallon, Law Society Acting General Manager, Regulatory, who exhibited copies of the relevant determinations and court decisions. There can be no doubt that, as at 6 May 2015 (the date of issue) the 2015 certificate accurately states the position with regard to each of the upheld complaints against Mr McGuire. It was necessary for the certificate of standing to include not only the upheld complaints against Mr McGuire (as required by reg 5(1)) but also, in fairness to Mr McGuire, any formal challenge Mr McGuire had made to those determinations. The certificate contained that information. As at 6 May 2015 of course, the outcome of those challenges could not be, and was not, known.

[113] Mr McGuire says it is important that the certificate be set aside because, unless it is expunged, he must disclose it to someone who asks for it. I understand

Mr McGuire's concern but I think it is more theoretical than real. It is hard to see the relevance of a certificate of standing that was good for only a three-month period between May and August 2015. As well, Mr McGuire would be able to demonstrate to a person who had an interest in that particular certificate the effect of subsequent court decisions on the determinations recited in the certificate.

[114] Mr McGuire has not established the certificate of standing was wrong in fact or law. The application to set aside the 2015 certificate of standing is dismissed.

Result

[115] The application for judicial review is dismissed.

[116] Costs follow the event but if the parties are unable to agree costs they may file focussed memoranda not exceeding five pages, Mr McGuire filing his memorandum within 10 working days of service on him of any memoranda filed by the defendants.

Karen Clark J

Solicitors:
Crown Law Office, Wellington for First Defendant