

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES) OR IDENTIFYING PARTICULARS OF APPLICANT

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2023-004-006249
[2023] NZDC 20539**

UNDER	Section 10(3) of the Criminal Records (Clean Slate) Act 2004
IN THE MATTER OF	An application for an historical offence to be disregarded for the purposes of the Criminal Records (Clean Slate) Act 2004
BETWEEN	[KYLE CURTIS] Applicant
AND	THE ATTORNEY-GENERAL Respondent

Hearing: On the papers

Judgment: 27 September 2023

DECISION OF JUDGE B L SELLARS KC

[1] The applicant [Kyle Curtis] applies for his conviction for a specified offence to be disregarded pursuant to s 10(4) of the Criminal Records (Clean Slate) Act 2004. Mr [Curtis] has a conviction for indecent assault of a girl under 16 years old.¹

[2] The Attorney-General appears as contradictor. Having considered the application and evidence filed in support of the application the respondent acknowledges that there appears to be a proper basis upon which the application may

¹ Section 134(2)(a) Crimes Act 1961.

be granted and submits that it is open to the Court to make the order sought. This matter is dealt with on the papers without an oral hearing.

[3] Mr [Curtis] pleaded guilty to the charge at the earliest opportunity and was sentenced [in mid-1997] to a fine of \$500 and supervision.

[4] Mr [Curtis] resided in Thailand between 2003-2022. He has provided a certificate dated 20 July 2023 from Thailand Police stating that he has “no behaviour endangering the peace and order of the security of the state”. A search of the police records database confirms that there is no information recorded on that database of any relevance to this application.

[5] The legal regime is helpfully summarised in the Attorney-General’s submissions as follows:

Clean Slate Act

- 4.1 The Clean Slate Act establishes a scheme to limit the effect of an individual's convictions provided the individual satisfies the relevant eligibility criteria.

Eligibility Criteria

- 4.2 Section 7 of the Act prescribes the eligibility criteria. The key requirements to be eligible are that the applicant must:
- (a) never have had a custodial sentence imposed;
 - (b) have completed a rehabilitation period, or in other words, remained conviction-free for the last seven years; and never have been convicted of a specified offence.

- 4.3 If an individual satisfies the criteria, he or she is deemed to not have a criminal record. Consequently, the individual is able to tell anyone who asks that he or she does not have a criminal record.

Ability to apply for conviction to be disregarded

- 4.4 Section 10 of the Act provides for some individuals who are prima facie ineligible under s 7 of the Act to nonetheless be able to take advantage of the "clean slate" scheme by way of an application to the District Court

- 10 Individual may apply to District Court for order that rehabilitation period need not be completed or conviction be disregarded.

[...]

- (3) An individual who is otherwise eligible under section 7(1) may make an application to a District Court for an order under subsection (4) if a court imposed a non-custodial sentence on the offender for a conviction for a specified offence.
- (4) The court may order that the conviction for the specified offence must be disregarded for the purposes of section 7(1)(d).
- (5) In considering an application under this section, a court must balance the interests of individuals in concealing their criminal records against the wider public interest in the safety of the community (recognising that an awareness of an individual's previous convictions is appropriate in certain cases).
- (6) Subject to any rules of court, a court may call for and receive as evidence any statement, document, information, matter, or thing that, in the court's opinion, may assist it to deal effectually with the application.
- (7) On an application under ... subsection (3), the court must either make the relevant order under ... subsection (4) or decline to do so.
- (8) A District Court may transfer an application under this section to the High Court if it considers that it is appropriate to do so.

4.5 On such an application, the Court may.

- (a) make an order that all or some of the applicant's convictions for specified offences be disregarded;
- (b) decline to make such an order; or
- (c) transfer the application to the High Court.

4.6 If the Court grants an order, the applicant is treated as if he or she meets the eligibility criteria, and is, therefore, deemed to have a clean slate.

4.7 As set out in *D v New Zealand Police*, the Clean Slate Act does create exceptions to its regime:

For example, if someone has applied to act in a role predominantly involving the care and protection of a child or young person, he or she must disclose any criminal record. So

too someone applying for a firearms licence. Other exceptions also exist.

Judicial approach to balancing test

4.8 In *D v New Zealand Police*, Downs J considered the balancing test and suggested the following five steps to be a useful way to approach the exercise:

- (a) First, start by identifying the applicant's interests by asking why the application has been brought, and what interests it seeks to protect.
- (b) Second, identify the broader interest(s) in an individual concealing their criminal records that are at play, for example, privacy or autonomy.
- (c) Third, articulate the wider public interest in the safety of the community.
- (d) Fourth, the mere fact that the applicant has not been convicted of another offence will not be decisive. As to that, Downs J noted:

The Act acknowledges sexual offending can continue undetected, which is one reason the enactment requires a person with a conviction for a specified offence to apply for concealment of that conviction even though he or she has been conviction-free for seven years.

- (e) Fifth, consider the "totality of the circumstances". This would include matters such as the circumstances of the specified offence, the impact on the victim, the passage of time since the offence, the applicant's personal circumstances, expert opinion in relation to risk, consideration of those who may be affected by concealment of the applicant's criminal records and attendant risk.

Applying balancing test

[6] Mr [Curtis] has provided two affidavits in support of his application. One from himself and one from Mr [Scott Simmons] a business advisor. I have considered the evidence and now turn to the factors set out in *D v New Zealand Police*:²

- (a) The applicant's interests:

² *D v New Zealand Police* [2018] NZHC 3349.

Mr [Curtis] graduated in 1998/1999. As a result of this conviction he came to the conclusion that he would not be able to practise law. Instead he turned to teaching English and then obtained a corporate position in Thailand in 2003. As a result of his experience he appears to qualify for a senior management position with a New Zealand company. His interest in concealing this conviction is to allow him to gain such employment. He states that with the stigma of the conviction he has no prospect of being considered for any significant position. That is confirmed by Mr [Simmons].

- (b) The broader interest(s) in individuals concealing their criminal records that are at play here that appears to be privacy.
- (c) The wider public interest in the safety of the community:

Mr [Curtis] details the background to the indecent assault conviction in his affidavit. He had a troubled childhood and adolescence which led him to issues with alcohol and drugs. On the night of the offence he was very drunk. At 2.00 in the morning he met the victim at a 24-hour dairy whilst he was walking home from a party. After some conversation he placed his hand on her buttock outside her clothing and squeezed it. She was instantly distressed and called the police from a nearby petrol station. The applicant came to the same petrol station to catch a taxi and was told the police had been called. He waited for the police to arrive. He admitted the assault and was arrested.

I consider that Mr [Curtis]'s offending was impulsive and isolated.

- (d) The mere factor that the applicant has not been convicted of another offence will not be decisive:

As set out above Mr [Curtis] has not been convicted of any offending since nor are there any relevant notations on police records.

(e) The totality of the circumstances:

I accept that in the totality of the circumstances the application should be granted. The offending occurred some 26 years ago when Mr [Curtis] was in his early 20s. He has explained fully the circumstances behind the offending and the lack of judgment involved. He was cooperative, entered an early guilty plea and completed his sentence. Mr [Curtis] has two other convictions for earlier offending but they are not of a sexual nature. Mr [Curtis] is currently employed as a contractor for his previous employer. However, he cannot progress in his field of employment as a result of this conviction.

[7] The application is granted and I order that his conviction for indecent assault pursuant to s 134(2)(a) of the Crimes Act 1961 should be disregarded.

Judge BL Sellars KC

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 27/09/2023