

Applicant

AD

Respondent

Secretary for Justice

Date of Decision:

2 April 2012

DECISION

INTRODUCTION

[1] The applicant seeks a review of the Decision of the Secretary for Justice dated 7 February 2012.

[2] In that decision the Secretary gave approval for the applicant to be a lead provider for legal aid services under the Legal Services Act 2011 for Criminal PC 1, 2, and 3, Mental Health and Court of Appeal/Supreme Court. In addition the applicant received approval for Specified Legal Services for PDLA and Duty Solicitor.

[3] The Secretary declined approval as a lead provider in Criminal Proceedings Category 4.

[4] In doing so, the Secretary considered the recommendations of the Selection Committee on the basis that the information which the applicant provided did not demonstrate an appropriate level of knowledge and experience to provide legal services in Criminal PC 4 matters. The Secretary considered that the applicant had not demonstrated substantive and active involvement in PC 4 matters that had proceeded to full trial. The Secretary considered that the applicant should undertake further PC trials in which she would undertake the opening, leading evidence, cross-examination and closing address.

BACKGROUND

[5] The applicant has been a Barrister for 16 years and over that time has been actively involved in the Criminal Jurisdiction having appeared in the District Court, the High Court, Court of Appeal and the Supreme Court.

[6] She has been a provider of legal aid services under the previous legislation and has relevantly held approvals for some years in respect of Criminal Proceedings Categories 1, 2, and 3 and as Duty Solicitor. In addition she has approval for Mental Health, the Police Detention Legal Assistance and to appear in the Supreme Court.

[7] The material I have shows that, in respect of category 3 matters, she has conducted trials as senior counsel since 2006 for offences of aggravated robbery, rape, drugs and serious assaults. She has had active involvement in Category 4 matters the most important and extensive of which was a manslaughter trial which resulted in a guilty plea after the jury had been empanelled and there had been prior extensive legal argument over a day and a half resulting in the Crown making a concession for sentencing purposes.

[8] It appears that the applicant sought approval as a Category 4 provider in 2008, but it is not clear whether approval was declined or the application was not proceeded with.

THE APPLICATION

[9] The applicant argues that she should have approval as a legal aid provider for Category 4 criminal proceedings because:

- (a) She has had continuous, active involvement within the trial jurisdiction for 16 years.
- (b) She has a complaint-free record.
- (c) She has numerous ongoing trials before the courts.
- (d) She has the support of an experienced and senior lawyer who has been a level 4 provider for many years.
- (e) She has well exceeded the legislative criteria for approval.

[10] In response, the Secretary relies on the decision of 7 February 2012 and the reasons contained in it.

DISCUSSION

[11] Clause 1 of the Schedule to the Legal Services (Quality Assurance) Regulations 2011 defines Category 4 criminal proceedings to mean any trial or indictment before a jury or a judge alone and where the defendant may be liable to a sentence of life imprisonment or preventive detention. The clause requires the applicant to have acquired the necessary experience through her involvement in criminal proceedings in the High Court, a District Court, or a Youth Court.

[12] Clause 5 of the Schedule requires an applicant for category 4 approval to have at least 24 months' recent experience working on category 3 criminal proceedings and to have appeared as counsel for the defence with substantial and active involvement in at least four category 3 or 4 criminal proceedings.

[13] The clause goes on to state that the experience must be gained in relation to trial on indictment before a jury or before a judge-alone (including the committal hearing), where any charge carries a maximum penalty of life imprisonment or liability to a sentence of preventive detention if convicted.

[14] There are no category 3 criminal proceedings which carry liability to a sentence of life imprisonment. There are category 3 criminal proceedings in respect of serious sexual offences which can carry liability to the sentence of preventive detention because of the history of prior offending of the person convicted of such an offence.

[15] On that basis an applicant could gain approval as a provider for category 4 criminal proceedings by having the requisite experience in respect of category 3 criminal proceedings only.

[16] In this matter, the applicant does have experience by reason of her involvement in both category 3 and category 4 criminal proceedings over the stated period of 24 months.

[17] I note that the applicant has met the requirements for approval as a lead provider in respect of category 3 criminal proceedings and has demonstrated experience and competence therein.

[18] She takes issue with the finding that she has not demonstrated experience and competence in category 4 criminal proceedings. She argues that she has had active and substantial involvement in the criminal proceeding relating to the Category 4 matter. She says that “substantial and active involvement” as set out in clause 5 of the schedule does not require there to be a completed trial.

[19] I accept that submission. The applicant has had involvement in one major category 4 criminal proceeding. Her involvement was substantial. She prepared preliminary briefs of evidence including that of specialist report writers. She reviewed relevant evidence relating to admissibility of evidence obtained during a police interview and severance. She explained the evidence to the defendant who had mental health difficulties to ensure that he understood the relevance and implications of it. Her work included preparation of the following matters;

- (a) of the opening for the defence;
- (b) cross-examination of an eye witness; a police officer; and the defendant’s examination in chief which she was to lead.

[20] Her lead counsel has reported on the great deal of effort she put into the trial and thorough preparation. He had no concerns about her ability, presentation, ethics or thoroughness in preparation.

[21] I accept the applicant’s submission that the category 4 criminal proceeding reflects the seriousness of charges that are laid and the seriousness of potential penalties.

[22] She further argues that there is nothing technically different in the skills of opening, closing, leading evidence, cross-examination and arguing legal issues, all of which she has done many times over her 16 years of practice in all of the courts including the Supreme Court.

DECISION

[23] When I consider the applicant's level of experience over her years of practice in criminal proceedings and my view of "substantial and active involvement" in clause 5 of the Schedule, I find that the Secretary set too high a threshold for the applicant to meet before gaining approval for Category 4 criminal proceedings.

[24] I do not consider that the granting of approval for Category 4 criminal proceedings would diminish the effect of section 3(b) of the Act to deliver legal services in the most effective and efficient manner.

[25] For the reasons set out above, I, pursuant to section 86(1) of the Act, reverse the Secretary's decision to decline approval of the applicant to provide legal aid services in respect of Category 4 criminal proceedings.

BJ Kendall
Review Authority