

Applicant

AE

Respondent

Secretary for Justice

Date of Decision:

3 April 2012

DECISION

INTRODUCTION

[1] In a decision dated 10 February 2012, the Secretary for Justice declined approval of the applicant as a provider of Category 3 Criminal proceedings under the Legal Services Act 2011.

[2] The Secretary determined that the applicant did not meet the criteria for approval as a lead provider in Criminal PC 3 because he had not demonstrated experience and competence in that category and therefore did not meet the criteria for approval in Criminal PC 3. The Secretary determined that the applicant had not demonstrated the appropriate level of knowledge and skill to provide legal aid services in that category

[3] The Secretary accepted the recommendation of the Selection Committee in that the applicant did not have experience to run a Criminal PC 3 matter on his own and would benefit from obtaining further experience in PC 3 matters as a junior.

[4] The Selection Committee noted that some of the applicant's experience was limited to researching and drafting pre-trial argument submissions or drafting sentencing submissions. It considered that he did not hold a great breadth of experience in serious criminal trials. It considered that the applicant needed more trial experience where he would be undertaking the opening, leading evidence, cross-examination and closing address.

[5] The applicant seeks a review of the Secretary's decision.

BACKGROUND

[6] The applicant commenced practise in August 2006 and has been an employed barrister from March 2009 until April 2011. Prior to that he practised as a barrister on his own account. He recommenced as a self-employed barrister in April 2011.

[7] He reports that he has engaged in criminal proceedings and appeal-related work along with civil and family matters. He has as well appeared and presented submissions in the Supreme Court in respect of four different criminal appeals and was lead provider in two of those matters.

[8] The applicant says that he has been practising criminal law full time for the past 5.5 years.

THE APPLICATION

[9] The applicant seeks a review of the Secretary's decision declining approval as a category 3 provider in criminal proceedings for the following reasons:

- (a) He has spent more than 90 per cent of his time on criminal related work.
- (b) He has had involvement with a number of category 3 and 4 trials and had contributed in a significant way with many of them.
- (c) He has had favourable judicial comment in criminal appeals of which he gives an example.
- (d) He has appeared and presented submissions in the Supreme Court in respect of four criminal appeals being the lead provider in two of the cases.
- (e) He has demonstrated a good grasp and knowledge of the criminal law.
- (f) He has the support of two reputable criminal lawyers who have worked with him in a number of cases.

- (g) He has had success in a number of criminal trials and has never been the subject of complaint.

[10] In response to the Application for Review, the Secretary relies on the reasons for decision given in the decision of 10 February 2012.

[11] In reply, the applicant argues;

- (a) that he had a favourable assessment at Ministry level before referral of his application to the Selection Committee.
- (b) that his application exceeded the requirements regarding the minimum number and degree of involvement for the relevant level.
- (c) that the Committee's recommendation is not supported given his significant trial involvement for the examples he provided and that he had been involved in a large number of other level PC 3 and 4 cases over the specified period of time.
- (d) That his involvement in PC2 level criminal trials has mostly been on his own.
- (e) that there is very real little essential difference between Category 2 and Category 3 criminal matters. The defence, trial strategy and difficulties that might arise at trial of a Category 3 criminal proceeding will unlikely vary considerably from a matter under Category 2.
- (f) that he has strong references from prominent criminal lawyers who are category PC 4 providers and who have observed and worked with him on a number of matters.
- (g) that he has the support of a partner in the Crown Solicitor's office at Timaru, who observed him run a PC 3 trial on his own over three days at the Timaru District Court on 5, 6, and 7 March this year.

DISCUSSION

[12] The Schedule to the Legal Services (Quality Assurance) Regulations 2011 defines Category 3 criminal proceedings to mean any trial or indictment before a jury or judge alone where the person charged may be liable to a penalty of more than 10 years' imprisonment.

[13] The Schedule goes on in clause 4 to provide that an applicant for Category 3 criminal proceedings must have at least 36 months' recent experience working on category 2 criminal proceedings and have appeared as counsel with substantial and active involvement in at least four category 3 or 4 criminal proceedings where at least one charge carries a maximum penalty of more than 10 years' imprisonment (except life imprisonment or where the defendant is liable to preventive detention) or where the defendant is likely to face cumulative sentences of more than 10 years' imprisonment.

[14] There are thus two qualifying requirements that an applicant must satisfy to gain approval as a provider of Category 3 criminal proceedings. The first is at least 36 months' recent experience working on Category 2 criminal proceedings. The second requirement is to have appeared as counsel with substantial and active involvement in at least four category 3 or 4 criminal proceedings.

[15] The first requirement is expected to be satisfied by the applicant having appeared as counsel for defendants at trial thereby gaining practical experience in all the facets of a criminal trial and that is by virtue of being approved as a provider for Category 2 criminal proceedings.

[16] The second requirement stipulates two matters that an applicant for approval as a provider of Category 3 criminal proceedings must satisfy. First the applicant must have appeared as counsel and secondly must have had substantial and active involvement in the specified category of criminal proceeding which in this case is Category 3. That requirement rules out an appearance as counsel who merely is an observer of the proceedings.

[17] My view of the test for "substantial and active involvement" is that an applicant for approval is not required to show that he or she has conducted a Category 3 criminal proceeding alone. Substantial and active involvement, will encompass such steps as researching the law, interviewing witnesses, briefing

of evidence, drafting documents, examining witnesses, cross-examination, making submissions, making opening/closing addresses, appearing at sentence, and appearances in support of or in response to an appeal.

[18] The applicant has the requisite level of working experience in Category 2 criminal proceedings. In respect of Category 3 criminal proceedings, he has carried out research, briefed witnesses, drafted documents and considered the reports of experts. He has carried out opening and closing addresses and led evidence, and has examined and cross-examined witnesses. He has appeared at sentencing. He has appeared as counsel in the Court of Appeal and in the Supreme Court.

DECISION

[19] I find that he has satisfied the requirement for “substantial and active involvement”. I find the Secretary has erred in following the recommendation of the Selection Committee that it was necessary for the applicant to have a Category 3 criminal proceeding trial experience where he had undertaken the opening, leading evidence, cross-examination and closing address. He has experience of those matters by reason of his work in Category 2 criminal proceedings.

[20] I accordingly find that the applicant has met the requirements set out in the Schedule to the Legal Services (Quality Assurance) Regulations.

[21] I agree with the Secretary and the Selection Committee that the applicant has experience and knowledge in Category 3 Criminal proceedings. He has supportive references from experienced and senior criminal lawyers. He is described as highly confident and has not been the subject of any complaint.

[22] There are thus no matters which require the exercise of a discretion against granting approval notwithstanding meeting the qualifying requirements.

[23] I therefore, pursuant to section 86(1) of the Legal Services Act 2011 reverse the decision of the Secretary made on 10 February 2012 declining approval of the applicant as a provider of legal aid services in respect of Category 3 criminal proceedings.

BJ Kendall
Review Authority