

Applicant:

Z

Respondent:

Secretary for Justice

Date of Decision:

28 March 2023

DECISION

The Secretary's Decision

[1] In a decision dated 30 November 2022, the Secretary for Justice ("the Secretary") declined approval of the Applicant as a Lead Provider of criminal legal aid services at approval level 3 (as defined in the Schedule to the Legal Services (Quality Assurance) Regulations 2011 – "the Regulations").

[2] Under the Regulations, an applicant for approval level 3 ("PAL 3") was required to have:¹

- (a) at least 36 months' recent experience working on approval level 2 criminal proceedings; and
- (b) appeared as counsel with substantial and active involvement in at least 4 approval level 3 or 4 criminal proceedings where—
 - (i) at least 1 charge carries a maximum penalty of 10 years' imprisonment or more; or
 - (ii) the person charged is likely to face cumulative sentences of more than 10 years' imprisonment.

[3] In addition to those minimum requirements, the Secretary was required to have regard to certain other matters. For the purposes of this decision, it is necessary to mention only two of them. First, the Secretary was required to take into account the Applicant's experience as a lawyer.² Secondly, the Secretary had to be satisfied that the Applicant had the appropriate level of knowledge and skill

¹ Legal Services (Quality Assurance) Regulations 2011, Schedule, clause 4.

² Regulation 6(2)(b) of the Regulations.

to provide legal aid services ... in each area of law to which the application related.³

[4] The Applicant's application was referred to a Selection Committee under Part 2 of the Regulations, and that Committee recommended that the application be declined. The Applicant applied for an internal review of that decision, and a different Selection Committee was convened to consider his application. Again, the Committee recommendation was to decline the application. The Secretary accepted the recommendation of the second Selection Committee, and the Applicant was notified that his application had been declined on 30 November 2022.

[5] The Secretary's stated reasons for declining the application were:

- (a) that the Applicant had not shown substantial and active involvement in the minimum number of trials, cases, or proceedings as specified in clause 4(b) of the Schedule to the Regulations; and
- (b) that the Applicant had not shown that he had the appropriate level of knowledge or skill (as required by Regulation 6(2)(c)).

[6] The Secretary recommended that the Applicant make a new application after he had gained more experience in criminal proceedings at PAL 3 or higher, being cases which proceeded to the end of trial and in which the Applicant could show that his involvement was both substantial and active.

Background

[7] The Applicant has been practising as a barrister since 2018, with substantial involvement in criminal cases at approval level 2 ("PAL 2"). Since 2018, he has appeared as lead counsel in 14 criminal cases at that level. In addition, he has substantial prior experience working in positions involving aspects of the criminal justice system.

[8] The Applicant has previously applied for approval in criminal proceedings at PAL 3. Following an internal review of his earlier application, he was advised on 22 February 2022 that his application had been declined, as the Secretary was not satisfied that the Applicant had "the relevant period of recent experience as

³ Regulation 6(2)(c) of the Regulations.

specified in the Schedule to the Regulations”. The Secretary recommended that the Applicant submit a new application after taking the following action:

- Gain the minimum period of recent experience of 36 months on Criminal PAL 2 proceedings; and
- Provide one further case example in which you were actively and substantially involved, of a matter where the maximum penalty was 14 years’ imprisonment or more.

[9] The Applicant applied again for criminal PAL 3 status later in 2022. By then, he had been instructed as lead counsel in six PAL 3 criminal proceedings.

[10] He had also been involved as junior counsel in two complex approval level 4 (“PAL 4”) criminal proceedings. He has provided references from each of the senior counsel involved in these cases. In the earlier of these cases (the Applicant’s work appears to have been carried out in 2019), senior counsel spoke primarily about the Applicant’s pre-trial work, saying that he ably prepared and presented one pre-trial application, and that he prepared for trial in an orderly and concise manner. He carried out research work effectively, and interacted well with other senior counsel and the court. Senior counsel had “no hesitation in confirming the Applicant’s written ability and advocacy skills in relation to criminal trials”.

[11] Senior counsel in the other PAL 4 case confirmed that the Applicant had been substantially involved in preparatory work, including preparing a brief of evidence for the client, preparing an opening address to the jury, and preparing material for cross-examination of any co-defendants who might give evidence. The Applicant was also said to have conducted (competently and well) a number of in-trial legal arguments over the production of exhibits. Senior counsel was impressed with the way the Applicant prepared for the cross-examination, and with his organisational skills and ability to be concise and to isolate the point to be argued. The Applicant was said to have worked diligently, fitting in well with other senior counsel. Senior counsel had no hesitation in recommending the Applicant to operate without supervision on PAL 3 criminal proceedings.

[12] Two other references were supplied by senior counsel in other cases. One of them, supporting the Applicant for PAL 3 criminal work, simply said that the Applicant “is a very competent lawyer”. The other reference stated that the referee had been present when the Applicant had conducted proceedings in both judge alone and jury trial matters, and that the Applicant “represents his clients with strong advocacy skills”.

The Review Application

[13] The Applicant filed his application for review on 6 December 2022.

[14] Briefly, he contends that he has had substantial and active involvement in over four criminal proceedings at PAL 3 or 4, and that the Secretary failed to place sufficient weight on that experience. He acknowledges that his PAL 3 cases have not gone to a completed trial, but contends that that fact should not prejudice his application. First, clause 4 of the Schedule refers to “proceedings”, not trials. Secondly, if completed trials were a mandatory requirement, counsel would be wrongly encouraged to take cases to trial (contrary to their clients’ interests) in order to satisfy the “substantial and active involvement” requirements of the Regulations. The Applicant also pointed to the complexity of one of the PAL 3 cases in which he was lead counsel, noting that he was granted temporary PAL 3 status in that case when it was heading for trial. In the event, the case was successfully resolved without going to trial.

[15] The Applicant next contends that the “goalposts” appeared to keep changing with each negative recommendation by the various Selection Committees. He was first asked to submit further evidence of his examination-in-chief and cross-examination experience, but when he did that, he was told he had submitted too much information. When his application then went before another Selection Committee for reassessment, he was asked for evidence of closings. He had previously submitted a number of examples of examination, cross-examination, and closings, in PAL 2 cases, and the Applicant contends that there is nothing in the Schedule that says this is also needed at PAL 3 level.

[16] The Applicant emphasised his significant experience, including experience obtained prior to his entry into legal practice. He submitted that the Secretary failed to place sufficient weight on that experience.

The Secretary’s Response

[17] The Secretary provided written submissions on 13 January 2023.

[18] On the requirements for PAL 3 approval generally, the Secretary noted that this case is the first to be considered under new guidelines published by the Secretary in July 2021 as a step-by-step guide to making a legal aid provider application (“the Guidelines”). In the Guidelines, the Secretary sets out an indicative guide of what may be considered acceptable for approval at various

approval levels, once the minimum standards set out in the Schedule to the Regulations have been satisfied. The key question, to be determined on the merits of each application, will be whether an applicant is sufficiently experienced and competent to provide the relevant services.

[19] With reference to the concept of “substantial and active involvement”, as that expression is used in clause 4(b) of the Schedule to the Regulations, the Guidelines say that what is required is that an applicant, while engaged as counsel, should have made “a significant contribution to all or most key parts of the case or proceeding”.

[20] On the question of case samples, the Guidelines note that the examples provided by an applicant to demonstrate substantial and active involvement as counsel in a case should address:

- (a) pre-court or preparation matters; and
- (b) the court proceedings themselves (including attendance at court, making opening addresses, addressing the court, closing addresses and presenting submissions).

[21] The Guidelines acknowledge that the realities of practice might make it impossible for an applicant to show that they have made a significant contribution to most key parts of every case on which they rely (eg, a matter may settle at an earlier stage, or the lead provider might not give the applicant (as junior) the opportunity to be involved in every stage). In such circumstances, the Guidelines advise that the applicant should provide case examples that, together, show the applicant’s experience across all (or at least most) key tasks and activities in the relevant area of law, and that the applicant can run a matter from start to finish on their own. For example, an applicant may provide eight examples that, together, are the equivalent of a significant contribution to all or most key parts of four PAL 3 or 4 proceedings.

[22] The Guidelines contain specific examples of the kind of experience the Secretary might find acceptable for each particular level. For criminal proceedings at PAL 3, the Guidelines indicate that an applicant should have:

Appeared as counsel with substantial and active involvement in 10 Criminal PAL 3 or 4 proceedings that have progressed to at least the close of the Crown case, including at least three proceedings where at least one charge was for a sexual offence carrying a maximum penalty of 14 years imprisonment or more.

[23] Counsel for the Secretary noted in his submissions that the Guidelines “reflect a more critical evaluation of a provider’s experience and competence”.

[24] The Secretary submitted that the transition from PAL 2 to PAL 3 is considered to be the most critical in the criminal hierarchy. At PAL 3, a provider must be able to conduct jury trials for serious violent and sexual offending. The Secretary is particularly concerned that a provider has developed the skills to be able to competently conduct jury trials for serious sexual offending.

[25] Dealing specifically with this case, the Secretary accepted that the Applicant is an experienced provider at PAL 2, and that he is on the verge of qualifying for PAL 3 status. However, none of his PAL 3 cases have proceeded to the end of trial, and his in-trial involvement in the two PAL 4 cases has been limited, with no experience of cross-examination or preparing a closing address. The Secretary has therefore been unable to assess his in-trial competence at PAL 3.

[26] The Secretary noted that the Applicant has two private sexual violation trials (which, if they proceed, will qualify as PAL 3 proceedings), scheduled for hearing later this year. The Secretary suggested that the Applicant apply again for PAL 3 approval after at least one of those cases has gone to trial.

[27] Having regard to those considerations, the Secretary submitted that the Applicant has failed to demonstrate that he has had a substantial and active involvement in enough cases to meet the clause 4(b) requirements for PAL 3. He is missing experience in crucial parts of the criminal process at PAL 3 and 4. And even if he strictly did meet the minimum standard in clause 4(b), the Secretary is not satisfied under Regulation 6(2)(c) that he has the required level of knowledge and skill to be approved at PAL 3. The essence of the statutory requirements is that the Secretary must be satisfied that an applicant can run a PAL 3 proceeding from start to finish unaided, and at this point the Secretary is not so satisfied.

The Applicant’s Reply

[28] The Applicant filed submissions in response on 13 January 2023.

[29] He accepted that the only issues in the case are:

- (a) whether he has met the minimum requirements in clause 4(b) of the Schedule; and

- (b) overall, whether he is sufficiently experienced and competent to be approved as a PAL 3 provider in criminal proceedings.

[30] The Applicant accepted the Secretary's proposed test for "substantial and active involvement", as that expression is used in clause 4(b) of the Schedule to the Regulations (referring to *AE v Secretary for Justice* RA005/12). He did not challenge the Guidelines, and he accepted the Secretary's submissions relating to the importance of the transition from PAL 2 to PAL 3.

[31] The Applicant submitted that, in applying the test for substantial and active involvement, the Secretary placed insufficient weight on such matters as researching the law, interviewing witnesses, briefing evidence, drafting documents, making submissions and appearing at sentencing. The Applicant's strength in those areas has been confirmed by the references provided by senior counsel in the two PAL 4 matters in which the Applicant appeared as junior counsel. He referred to one sexual violation case where the accused pleaded guilty and the Applicant made submissions on sentencing, and also to the complex PAL 3 criminal proceeding where he was approved on a temporary basis as a lead provider. While the latter case did not proceed to a full trial, the Applicant made submissions on sentencing.

[32] The Applicant says that more weight should have been given to the views of his senior and experienced referees and to his lengthy experience prior to his commencement in practice as a barrister.

Discussion

Issues

[33] The first issue in this case is whether the Applicant has shown that he has had "substantial and active involvement" in at least four cases of the kind described in clause 4(b) of the Regulations. If he has not, his application for review cannot succeed. Previous decisions of the Review Authority have made it clear that Regulation 6(2)(a), which requires the Secretary to "apply" the relevant experience and competence requirements set out in the Schedule, effectively makes it mandatory for an applicant to meet those requirements.⁴ I agree with those authorities.

⁴ See for example *L v Secretary for Justice* [2012] NZRA 000010.

[34] If the Applicant has demonstrated the level of involvement in PAL 3 or 4 cases required by clause 4(b), the second issue will be whether he has shown that he has the appropriate level of knowledge or skill, as required by Regulation 6(2)(c).

[35] There are no issues over the Applicant's experience, his service delivery systems (Regulation 9), or the "fit and proper person" requirements set out in Regulation 10.

"Substantial and active involvement"

— Previous decisions of the Review Authority

[36] In one of the earlier decisions of the Review Authority under the Legal Services Act 2011, the Authority referred to two "requirements" of clause 4 of the Schedule. The first requirement, imposed by clause 4(a), was expected to be satisfied by the applicant having appeared as counsel for defendants at trial, thereby gaining practical experience in all facets of a criminal trial (by virtue of being approved as a provider for Category 2 criminal proceedings).⁵

[37] The second requirement was said to have stipulated 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 the case in question was Category 3). This second requirement was said to "rule out an appearance as an observer of proceedings".⁶

[38] The Authority went on to adopt the following interpretation of the expression "substantial and active involvement":⁷

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.

⁵ *AE v Secretary for Justice* [2012] NZRA 005 at [15].

⁶ At [16].

⁷ At [17].

[39] In a later case, *SB v Secretary for Justice*⁸, the Review Authority confirmed that the concept of substantial and active involvement does not require that the applicant must have completed a trial at the relevant level.

[40] In later 2012 cases, the Authority confirmed that it was not necessary for an applicant to have completed every one of the steps referred to in *AE v Secretary for Justice* (as noted above). In one such case⁹, the Authority said:

I hold that in each case example there must however be demonstrated an appearance as counsel, aspects of preparation and aspects of courtroom activity. That is necessary to give meaning to the words “appeared as counsel” with substantial and active involvement ...

[41] In *K v Secretary for Justice*¹⁰, the Authority said:

I did not indicate [in earlier decisions, including *AE v Secretary for Justice*] that the steps were exhaustive or that all steps must be present ... I held that in every case example there must be demonstrated an appearance as counsel showing aspects of preparation and courtroom activity ... The test for substantial and active involvement must show, from the steps outlined, that an applicant had exposure to and experience in dealing with criminal matters and of courtroom activity in respect of those matters.

[42] In *S v Secretary for Justice*, the Authority said:¹¹

[22] The Secretary has acknowledged that case examples do not need to show involvement in all steps of the proceeding. There nevertheless has to be substantial and active involvement shown in each of the case examples that have been submitted ...

[23] ... It is not necessary that the applicant has conducted an approval category 3 criminal proceeding alone, but he must show from the case examples and work samples that he has the ability to undertake a trial from start to finish.

[43] The other case to which I will refer is a 2012 decision, *T v Secretary for Justice*, where the Authority confirmed his view that it was not necessary to demonstrate all tasks/skills in respect of every case example provided. The Authority considered that it was the sum of all of the aspects viewed overall of the case examples, which would demonstrate substantial and active involvement.¹²

— *Supplementary submissions of counsel*

[44] I invited supplementary submissions from counsel on the meaning of “substantial and active involvement”, as that expression is used in clause 4(b).

⁸ *SB v Secretary for Justice* [2012] NZRA 000006 at [15].

⁹ *L v Secretary for Justice* [2012] NZRA 000010 at [21].

¹⁰ *K v Secretary for Justice* [2013] NZRA 000007 at [30].

¹¹ *S v Secretary for Justice* [2016] NZRA 001 at [22] and [23].

¹² *T v Secretary for Justice* [2012] NZRA 000020.

(a) The Secretary

[45] While clauses 2(b) and (3) of the Schedule, dealing respectively with PAL 1 and 2 criminal provider applications, call for substantial and active involvement in criminal “trials” (not in “criminal proceedings”), Mr Hurd submitted that the fact that clause 4(b) does not specifically require experience in criminal “trials”, does not remove or reduce the need for substantial in-trial experience in PAL 3 and 4 applications. He submitted that the word “trials” is used in a different context in clauses 2(b) and 3(b), the different wording being intended to draw a distinction between police and Crown prosecutions. That distinction is irrelevant to PAL 3 and 4 cases, as all proceedings at those levels are Crown proceedings.

[46] The terms “proceedings” and “trials” are in fact used interchangeably in the Schedule.

[47] In support of his “interchangeable” argument, Mr Hurd referred to an earlier version of clause 5 (dealing with PAL 4 proceedings), which was revoked and replaced on 19 September 2011. Clause 5, as it originally stood, read:

5 Category 4 criminal proceedings

- (1) For category 4 criminal proceedings, the applicant must have—
 - (a) at least 24 months’ recent experience working on category 3 criminal proceedings; and
 - (b) appeared as counsel for the defence with substantial and active involvement in at least four category 3 or 4 criminal proceedings.
- (2) The experience referred to in subclause (1) must be gained in relation to trials 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 where the defendant, if convicted, is liable to a sentence of preventive detention.

[48] The new clause 5 removed “for the defence” from subclause (1)(b), and revoked subclause (2).

[49] Mr Hurd relied on the use of the word “trials” in the first line of clause 5(2) – as the experience required by clause 5(1) was experience in “criminal proceedings”, and that experience was required by clause 5(2) to have been gained “in relation to trials on indictment before a jury or before a Judge alone”, the expressions “trials” and “criminal proceedings” must have been intended to have the same meaning.

[50] Mr Hurd submitted that there is no policy reason why the requirement for in-trial experience would be dropped for PAL 3 and 4 approvals. In-trial experience at the relevant level will be important to the “qualitative assessment” of a provider’s competence [ie, the broader assessment under Regulation 6(1), taking into account the Regulation 6(2)(b) and (c) factors], and it would make no sense not to require it in the “quantitative requirements” [ie, the Schedule requirements]. The “quantitative” and “qualitative” requirements should be aligned “to a degree”.

(b) The Applicant

[51] The Applicant first submitted that the Regulations, which should be clear and unambiguous, are in fact “confused and muddled”. That is illustrated in this case, where the Secretary first indicated that the Applicant would have to demonstrate certain criteria (which he did), but then rejected his subsequent PAL 3 application because he did not meet other criteria. The confused wording of the Regulations does not lead to a good competency framework.

[52] Specifically on the issue of the extent of in-trial experience required by clause 4(b), the Applicant submitted that there is a clear difference between the use of the word “trials” in PAL 1 and PAL 2, and the use of the word “proceedings” in PAL 3 and above. This appears to suggest that there is no specific requirement listed to conduct a trial (including such steps as cross-examination and closing arguments) once the provider applies for a (criminal) level higher than PAL 2. That may be because a PAL 2 provider will have already demonstrated an ability to conduct trials, including cross-examination and closings.

— *My view*

[53] In my view, Regulation 6(2)(a) and the Schedule provisions were intended to serve only as “gatekeeping” provisions, setting minimum standards that an applicant must show in terms of recent experience and substantial, actual involvement in cases at the level to which the application relates. Once an applicant has satisfied those minimum requirements, the sufficiency or otherwise of the applicant’s experience, knowledge, and skill in particular areas were intended to be dealt with substantially under Regulation 6(2)(b) and (c), and as part of the overall assessment required by Regulation 6(1).

[54] I agree that the Secretary must be satisfied that the applicant has the capability to manage a case at the relevant level from start to finish, but in my view that is not a determination to be made under clause 4(b); it is a significant part of the broader determination the Secretary must make under Regulation 6(1).

[55] On the interpretation of clause 4(b), I agree with the earlier decisions of the Review Authority which have held that “substantial and active involvement” requires that, in each case relied upon, the applicant must have demonstrated an appearance as counsel, aspects of preparation and aspects of courtroom activity. That follows from the clause 4(b) requirement that an applicant must have “appeared as counsel ...”.

[56] I agree also that, to satisfy the “substantial and active involvement” test, it is not necessary for an applicant to have completed every one of the typical criminal litigation tasks identified by the Authority in *AE v Secretary for Justice*. And I accept the view expressed in decisions of the Authority such as *T v Secretary for Justice*,¹³ that “substantial and active involvement” may be demonstrated for the purposes of clause 4(b) by considering the applicant’s examples collectively, and considering whether, as a whole, they show that the applicant has had substantial involvement in a sufficient number of criminal jury trial tasks (as identified in *AE v Secretary for Justice*) that the examples may fairly be regarded as the *equivalent* of active and substantial involvement in four PAL 3 criminal proceedings.¹⁴

[57] While many applicants for PAL 3 criminal proceedings approval may endeavour to meet the test of substantial and active involvement in four PAL 3 criminal proceedings requirements by relying on individual tasks performed in numerous different proceedings, the decision-maker must still consider what the applicant did in each case relied upon. If it can fairly be said that the applicant made a substantial and significant contribution to all or most key parts of a given criminal proceeding, that proceeding must in my view qualify as one of the required four PAL 3 criminal proceedings for the purposes of clause 4(b).

¹³ Above note 10.

¹⁴ The Regulations must be interpreted in the light of their context and purpose, and it seems to me that the above interpretation is both available on the wording of clause 4(b), and necessary to give effect to one of its apparent purposes (providing a pathway for competent PAL 2 criminal proceedings providers to advance their cases under clause 4(b), notwithstanding that most or all of their appearances in PAL 3 criminal proceedings may have been as junior counsel, with little or no opportunity to carry out, in a given PAL 3 proceeding, many of the typical criminal jury tasks identified in *AE v Secretary for Justice*).

[58] Difficulties may arise, as they do in this case, where an applicant's four PAL 3 case examples include one or more criminal proceedings that did not go to trial. Neither the definition of "approval level 3 criminal proceedings" in Regulation 1,¹⁵ nor clause 4(b) itself, say anything about the need for a trial, and Regulation 4 (and Regulation 5 for that matter) does not state that the applicant must have derived any particular experience in criminal proceedings from a case relied upon.

[59] By contrast, clause 2(b) of the Schedule requires that a PAL 1 applicant must have appeared as counsel with substantial and active involvement in "at least three trials in criminal proceedings". Very similar wording is employed, in respect of PAL 2 applicants, in clause 3(b) ("*... in at least three trials in proceedings that are Crown prosecutions*").

[60] Mr Hurd submitted that the expressions "trials" and "proceedings" are used interchangeably in the Schedule. In support, he submitted that the language of clause 2(b) of the Schedule can be distinguished because it is concerned with criminal proceedings that are not Crown proceedings, while clauses 3 to 5 all relate to Crown proceedings. That may be true as far as it goes, but I do not see how it could support Mr Hurd's "used interchangeably" submission.

[61] Nor do I consider that the wording of the revoked clause 5(2) assists the Secretary on the "used interchangeably" argument. First, clause 5(2) appears to have allowed the Secretary to take into account a committal hearing, which would not have qualified as a "trial" when clause 5(2) was in force. Secondly, and most obviously, clause 5(2) has been revoked, and it is not clear that it now offers any useful guidance on the interpretation of clause 4(b). Thirdly, the word "trial" is used in the Schedule in clauses 2 and 3, and the contexts in those clauses make it clear that a "trial" is something different from (and less than) a "proceeding".

[62] The use of the words "trials" and "proceedings" in such close proximity in clauses 2 and 3 suggests that the words were intended to have separate meanings, and there is nothing to suggest that the ordinary meanings (under which a proceeding that has commenced may or may not proceed to a trial) were not intended.¹⁶ The contrast with clauses 4 and 5, where the requirements are for

¹⁵ "Approval level 3 criminal proceedings" means any proceeding – (a) that is a Crown prosecution; and (b) where the person charged may be liable to a penalty of more than 10 years' imprisonment; and (c) that is not an approval level 4 criminal proceeding.

¹⁶ Neither "trial" nor "proceeding" is defined in the Schedule. Clause 1(3) of the Schedule provides that any term in the Schedule that is defined in the Criminal Procedure Act 2011 is to have the

substantial and active involvement in criminal *proceedings* at particular levels (with no mention of “trials”) is obvious, and in my view the differences in the corresponding wording of clauses 2 and 3 on the one hand, and clauses 4 and 5 on the other, was deliberate.

[63] The clear inference is that trial experience at PAL level 3 is not expressly required for an applicant for PAL 3 approval to meet the “substantial and active involvement” requirement of clause 4(b).

[64] In my view, the absence of any reference to “trials” in PAL criminal proceedings means that an applicant for approval at PAL 3 in criminal proceedings must be free to contend that his or her appearances as counsel in a particular PAL 3 criminal proceeding that has not gone to trial nevertheless qualify as one of the required four PAL 3 criminal proceedings for the purposes of clause 4(b). The applicant’s appearances as counsel in such a case must meet the “significant contribution to all or most key parts of the proceeding” test, and the applicant’s appearances and contributions must be capable of being fairly described as “substantial”. Each case will turn on its own facts, but if such an applicant was lead counsel in the PAL 3 proceeding, with sole responsibility for all tactical and strategic advice given to the client in that proceeding, that is likely to be a factor assisting the applicant.

[65] Does that mean that a PAL 3 applicant may rely solely on four PAL 3 cases where early guilty pleas were entered, and the applicant was not required to take any significant steps other than make submissions on sentence? While each case must be judged on its own merits, I doubt that such an application could succeed – in a particularly straightforward case of that kind, it may be that there would be nothing required of counsel that could fairly be described as “significant”, or that (in combination) the applicant’s contributions to the case could not be fairly described as “substantial”. And even if the applicant’s involvement in cases of that sort did qualify as “substantial and active”, any deficiencies in experience, knowledge or skill would still fall to be considered under Regulation 6(2)(b) and (c) and Regulation 6(1).

meaning ascribed to it in that Act, but the Act contains no definition of “proceeding”, and it defines “trial” as being either a judge alone trial or a jury trial.

[66] Mr Hurd submitted that in order for the process to work efficiently and effectively the:

... quantitative requirements have to align with the qualitative requirements to a degree. Otherwise, the result would be to encourage applications by providers who meet the quantitative requirements but have no hope of meeting the qualitative ones.

[67] But such concerns do not in my view justify the “front end loading” of the Schedule provisions with experience, knowledge or skill requirements (not included in the Schedule) that the framers of the Regulations left to be addressed under Regulation 6(2)(b) and (c), and Regulation 6(1). If the Schedule sets the “entry level” bar too low for PAL 3 and/or 4 applications, the answer is to amend the Schedule.

[68] None of what I have said above is intended to minimise the importance that may be accorded any of the “typical” criminal litigation tasks identified by the Review Authority in *AE v Secretary for Justice* at [17]. The essence of the Secretary’s task under Regulation 6 is to decide whether or not the applicant has the capability to manage a case at the relevant level from start to finish, and that is likely to involve an assessment of the applicant’s ability to perform each of the tasks identified in [17] of the decision in *AE v Secretary for Justice*. That broad assessment will not, however, be undertaken at the threshold, or gateway, levels prescribed by Regulation 6(2)(a) and the Schedule. It will be undertaken in the course of the Secretary’s assessments under Regulation 6(2)(b) and (c).

— *Application of “substantial and active involvement” requirement in this case*

[69] The Applicant has demonstrated that he has appeared as counsel with “active involvement” in at least four PAL 3 or 4 criminal proceedings. The issue is whether his active involvement in each case can fairly be described as “substantial”. In my view it can.

[70] The Applicant appears to have been sole counsel in three of the PAL 3 cases on which he relies, and although none of them proceeded to trial, his involvement as counsel in the tasks that did have to be performed in each case was in my view both active and substantial.¹⁷

¹⁷ In one of these cases, involving sexual assault allegations against two small children, the Applicant carried out client discussions, led evidence, examined an expert witness, and prepared a memorandum seeking a discharge under section 147 of the Criminal Procedure Act 2011. In the second of these cases, involving representative charges of possession and administration of class B controlled drugs, the Applicant carried out necessary client briefing, led evidence, and examined an expert witness. He drafted sentence indication submissions, and later made

[71] In a fourth case, involving sexual violation and sexual assault charges, the Applicant appears to have had more senior counsel involved to some limited extent, but whether or not that is so his activity as counsel in the case does appear to have been substantial. He led evidence, examined an expert witness, and appeared on bail and name suppression applications. He was engaged in client discussions and advice, and drafted (and appeared in support of) sentence indication submissions.

[72] In all of these cases, the Applicant has demonstrated, as counsel, “aspects of preparation and aspects of courtroom activity”,¹⁸ and in my view his “active” involvement in each case meets the “substantial” test.

[73] The Applicant also relied on his experience as junior counsel in two very large criminal PAL 4 proceedings, but in view of his substantial and active involvement as counsel in the four PAL 3 proceedings to which I have referred, there is no need to consider the PAL 4 cases under this heading.

Knowledge and skill – Relevant statutory provisions and previous decisions of the Review Authority

[74] Regulation 6(2)(c) materially provides:

6 Experience and competence requirements

- (1) If the applicant is a lawyer and is applying to be a lead provider or to provide specified legal services, he or she must be experienced and competent in each area of law in which he or she intends to provide legal aid services or specified legal services.
- (2) In deciding whether the applicant meets the criteria in subclause (1), the Secretary must—
 - ...
 - ...
 - (c) 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.

...

submissions on sentencing. The case appears to have had aspects of complexity, with a significant amount of disclosure. The third case was a court martial (accepted as being equivalent to a PAL 3 proceeding in the High Court) involving the alleged use and supply of a class B controlled drug. There was a substantial preliminary hearing, at which the Applicant led evidence, cross-examined one witness, and made a closing address on the evidence adduced. A guilty plea was entered after the preliminary hearing, when certain evidence was held to be admissible.

¹⁸ *L v Secretary for Justice*, above note 7.

[75] In *J v Secretary for Justice*,¹⁹ the Authority noted that there are no prescribed requirements for assessing the skill and competence of an applicant. The assessment therefore involves an exercise of judgement by the decision-maker.²⁰ The Authority noted some considerations that may inform the exercise of that judgement – the length of time the applicant has been involved in the relevant category, the existence or otherwise of complaints about the applicant’s knowledge and skill levels, and any personal matters that might bear on the applicant’s character, fitness or suitability. However, I do not understand that to have been intended as an exhaustive list, or that each consideration mentioned would be relevant in every case.

[76] In my view, the assessment of knowledge and skill must start with the applicant’s actual knowledge and skill levels. The next step is to assess whether those knowledge and skill levels are sufficient to enable the applicant to manage a case at the relevant level from start to finish. The applicant’s references provided under Regulation 9B may assist in the assessment; they are required to be directed to the applicant’s skill in the area of law to which the application relates, and they must reflect the referees’ direct experience and knowledge of that skill.²¹

— *Application in this case*

[77] The Secretary accepts that the Applicant is an experienced provider at PAL 2, and considers that he is on the verge of qualifying for PAL 3 status.²² However, the Secretary submits that a PAL 3 provider must be able to conduct jury trials for serious violent and sexual offending, and in this case the Applicant has no demonstrated experience of cross-examination or delivering a closing address in a PAL 3 or 4 case. The Secretary is also particularly concerned that a PAL 3 provider should have developed the skills to be able to competently conduct jury trials for serious sexual offending.

[78] The Guidelines appear to reflect those concerns. For a PAL 3 criminal proceeding, the Secretary has indicated that an applicant should have appeared as counsel with substantial and active involvement in 10 PAL 3 cases that have progressed at least to the end of the Crown case, including at least three proceedings where at least one charge is for a sexual offence carrying a maximum term of imprisonment of 14 years or more. In his submissions, Mr Hurd noted that

¹⁹ *J v Secretary for Justice* [2012] NZRA 000027.

²⁰ At [32].

²¹ Regulation 9B(4).

²² He has already received a temporary appointment in one PAL 3 case.

the Guidelines “reflect a more critical evaluation of a provider’s experience and competence”.

[79] In response, the Applicant points to his very considerable experience in the field of criminal law over a period of roughly 17 years, and to the opinions of his referees, each of whom supports his application for PAL 3 status.

[80] In the end, I consider the Secretary has set the bar too high for this particular applicant. It appears that he has very substantial cross-examination experience (far more than many PAL 3 applicants might have) in cases below PAL 3 and 4, and the reference from his lead counsel in the most recent of the PAL 4 cases in which he appeared as junior included the statement that lead counsel was “impressed with how [the Applicant] has prepared for the cross-examination of witnesses that related directly to our client”. It appears that, in the end, it was not necessary for the Applicant to conduct the planned cross-examinations in the case just mentioned. However, planning plays a significant part in many successful cross-examinations, and the reference shows that the Applicant completed the part of the task he was required to complete, effectively and well.

[81] More generally, lead counsel in this PAL 4 case appears to have good knowledge of the Applicant and his capabilities. Lead counsel said that he had “seen [the Applicant] in action many times ...” and that he had “no hesitation in recommending him to operate without supervision on PAL 3 matters”.

[82] Another referee noted that he had been present when the Applicant had conducted proceedings in both the judge alone and jury trial jurisdictions. He said that the Applicant “represents his clients with strong advocacy skills”. A third referee described the Applicant as a “very competent lawyer”.

[83] In the circumstances just described, I do not consider that the Applicant has any lack of knowledge or skill in cross-examination such as might prevent him from competently running a PAL 3 criminal proceeding from the start to the end of a trial.

[84] A lack of demonstrated PAL 3 or 4 experience in giving a closing address may provide a barrier to some PAL 3 applicants. If they are appearing as junior counsel, they are unlikely to have been given the opportunity to deliver the closing address. They may or may not have an opportunity to contribute to the closing

address in some way, but in many cases time pressures on lead counsel at the end of a substantial trial may mean that that does not occur.

[85] In those circumstances, the exercise of judgement on the knowledge/skill issue may be better informed by considering the extent to which an applicant has delivered closing addresses at lower levels, and the opinions of the applicant's referees on the applicant's capabilities. In this case, the Applicant will have delivered closing addresses in a number of cases at PAL 2 level, and his general advocacy skills are the subject of specific favourable comment ("strong") in one of his references. He also appears to have performed very well on his feet in the most recent of the two PAL 4 cases in which he has appeared as junior counsel. The reference provided by lead counsel in that case states that the Applicant made submissions on no fewer than 20 in-trial legal issues, leading the argument for all 16 counsel and juniors. The trial judge is reported to have expressed gratitude to the Applicant for his efforts.

[86] Taking the Applicant's experience and his strong supporting references into account, I do not believe that he lacks the necessary level of knowledge or skill to competently deliver closing addresses in PAL 3 criminal proceedings.

[87] The Secretary has expressed a general concern that applicants must have the skills to competently conduct jury trials for serious violent and sexual offending. That appears to have been an issue in this case, where the Secretary has suggested that the Applicant apply again for PAL 3 status after at least one of two (private) sexual violation cases in which he is instructed has proceeded to trial.

[88] This appears to be the real issue in the case. Should the Applicant be required to wait until one of these sexual violation cases has gone to trial (if either of them does) before he is granted PAL 3 status?

[89] Sexual violation cases are certainly an important part of the PAL 3 jurisdiction, and the maintenance of appropriate quality assurance standards for counsel practising in this area is important. But the Applicant is not entirely lacking experience in this area. One of the PAL 3 cases on which he has relied was a sexual violation case, and another case involved allegations of sexual assault against two small children. While neither case proceeded to a trial, the Applicant's involvement does demonstrate a degree of experience in cases of this sort. In addition, two private individuals have entrusted the Applicant with the defence of sexual violation charges brought against them. I do not put much weight on the latter factor, as the cases have apparently not yet progressed very far. However,

they do suggest that the Applicant has likely been involved, at the very least, in some degree of planning and pre-trial defence preparation in cases involving serious sexual offending.

[90] In the circumstances just described, and taking into account the very positive views of the Applicant's referees ("a very competent lawyer", with "strong" advocacy skills), I think it improbable that the Applicant would be deficient in his knowledge of relevant statutory and case law relevant to charges of serious sexual offending. The question is whether he has the necessary skill level to run such cases.

[91] I think he has. The Secretary has not pointed to any forensic skills (as opposed to a knowledge of relevant law) that the Applicant will require for cases of this sort that he does not already possess, and I have nothing before me to suggest that his existing skills, developed over some 17 years' experience in criminal law cases, would not be sufficient for him to competently run a sexual violation proceeding from the start to the end of a trial.

[92] The Guidelines suggest that the Secretary is concerned to increase the quality of services provided by PAL 3 providers, and that was effectively confirmed by Mr Hurd in his submissions. But in the end it is the Regulations that must prevail. The broad exercise of judgement that is required by Regulation 6(2)(c) (and ultimately Regulation 6(1), informed among other things by references provided under Regulation 9B), cannot be circumscribed by informal indicia of the kind provided in the Guidelines.

[93] In my view, the Applicant meets the knowledge/skill requirements of Regulation 6(2)(c), and he has shown that he is sufficiently experienced and competent in the area of criminal proceedings at PAL 3. The decision made on 30 November 2022 refusing approval will accordingly be reversed.

Decision

[94] Pursuant to section 86(1) of the Legal Services Act 2011, the decision of the Secretary dated 30 November 2022 refusing the Applicant's application for approval to provide services in approval level 3 criminal proceedings, is reversed.

[95] The Applicant has asked that his name not be published. That has been the practice of the Authority in earlier cases, and I agree that it is appropriate in this case. There will accordingly be an order that any publication of the decision is to have the Applicant's name anonymised to a single initial.

.....
W A Smith
Review Authority