

Applicant: Y

Respondent: Secretary for Justice

Date of Decision: 12 April 2023

DECISION

Application for Approval as a Provider of Criminal Legal Aid Services

[1] The Applicant applied to the Secretary for Justice (“the Secretary”) for approval to provide criminal legal aid services at approval level 4 (as defined in the Schedule (“Schedule”) to the Legal Services (Quality Assurance) Regulations 2011 – “the Regulations”).

[2] Under the Regulations, an applicant for approval level 4 (“PAL 4”) was required to:¹

- (a) have at least 24 months’ recent experience working on approval level 3 criminal proceedings; and
- (b) have appeared as counsel with substantial and active involvement in at least 4 approval level 3 or 4 criminal proceedings where at least 1 of those proceedings is an approval level 4 criminal proceeding.

[3] An “approval level 4 criminal proceeding” is defined as follows in clause 1 of the Regulations:

approval level 4 criminal proceedings means any proceeding where the person charged—

- (a) is charged with—
 - (i) an offence listed in Schedule 1 of the Criminal Procedure Act 2011; or
 - (ii) any offence not listed in that schedule that is punishable by imprisonment for life; or

¹ Legal Services (Quality Assurance) Regulations 2011, Schedule, clause 5.

(b) may be liable to a sentence of preventive detention.

[4] In addition to those minimum requirements, the Secretary was required to take into account the Applicant's experience as a lawyer,² and to be satisfied that the Applicant had the appropriate level of knowledge and skill to provide legal aid services in each area of law to which the application related.³ Overall, where the Applicant was a lawyer, and was applying to be a lead provider, he or she had to be experienced and competent in each area of law in which he or she intended to provide legal aid services.⁴

[5] The Regulations contain certain other criteria for approval, including criteria dealing with professional entry requirements (Regulation 5), and service delivery systems (Regulation 9). An applicant must also be a "fit and proper person" (Regulation 9(c)). None of those criteria are in issue in this application, and it is not necessary to refer to them any further.

The Secretary's Response and the Applicant's Request for an Internal Review

[6] By letter dated 4 October 2022, the Secretary declined the application. The Secretary's reasons for declining the Applicant's application were explained as follows in the letter of 4 October 2022:

- (a) The Secretary considered that the Applicant had not demonstrated substantial and active involvement in the minimum number of trials, cases or proceedings, as specified in the Schedule to the Regulations; and
- (b) The Applicant had not demonstrated the appropriate level of knowledge and skill for approval as specified in Regulation 6(2)(c).

[7] The Applicant applied for an internal review of the Secretary's decision. He provided certain additional case examples from 2014 and 2015, and also provided a reference from an experienced approval level 4 ("PAL 4") criminal legal aid provider, who had been lead counsel for the relevant defendants in the additional case examples provided by the Applicant.

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

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

⁴ Regulation 6(1) of the Regulations.

The Secretary's Decision Following the Internal Review

[8] The application was again declined by the Secretary, by letter dated 28 November 2022. The Secretary remained unsatisfied that the Applicant had reached the required threshold for substantial and active involvement in the number of cases required by clause 5(b) of the Schedule. Of the additional information provided, the Secretary noted that only two of the Applicant's PAL 4 case examples went to trial. The other PAL 4 examples were resolved before trial. The remaining case examples were criminal PAL 3 matters.

[9] The Secretary acknowledged that the Applicant played a leading role in the PAL 3 examples, but was not satisfied that his involvement in the criminal PAL 4 examples could be said to be "substantial and active" (in the sense of involvement in most, or all, of the key parts of the proceeding).

[10] The letter declining the application for internal review advised that the Secretary was "unlikely to find that an applicant meets the Schedule (and the separate knowledge and skill) requirements for approval without evidence of their substantive involvement in criminal PAL 4 trials". The Secretary did not accept that pre-trial involvement was equivalent to trial experience.

[11] The Secretary considered that the Applicant's PAL 4 trial experience appeared to be limited to a non-speaking role as junior counsel in two trials. He had not demonstrated evidence of involvement in any key tasks, such as opening or closing the defence case or examining witnesses, in a criminal PAL 4 trial.

[12] The Secretary recommended that the Applicant re-apply for criminal PAL 4 approval, after he had taken certain steps. First, he should be able to provide two additional case examples demonstrating substantial and active involvement in criminal PAL 4 trials. That substantial and active involvement should include an active speaking role at trial, and demonstrate involvement in key trial tasks. Secondly, the Applicant should provide an additional reference from a PAL 4 (or equivalent) counsel, specifically discussing the Applicant's suitability for criminal PAL 4 approval.

The Review Application

[13] On 21 December 2022, the Applicant applied under section 82 of the Legal Services Act 2011 (“the Act”) for review of the Secretary’s decision of 28 November 2022 declining his application for approval.

[14] The Applicant challenged the Secretary’s finding that his application did not satisfy the “substantial and active involvement” requirement of clause 5(b) of the Schedule. He also challenged the Secretary’s finding that he failed to meet the skill and knowledge requirements of Regulation 6(2)(c), and thus did not meet the overall “experienced and competent” standard established by Regulation 6(1).

[15] It is not necessary for me to refer in any detail to the Applicant’s grounds for contending that the Secretary erred in finding that he had not satisfied the requirements of clause 5(b) of the Schedule. Following the release of my decision in *Z v Secretary for Justice*⁵ on 28 March 2023, counsel for the Secretary advised that the Secretary now accepts that the Applicant in this case meets the requirements of clause 5(b) of the Schedule, and (for reasons I will state later in this decision) I believe that concession was properly made. The sole remaining issue is whether the Applicant is sufficiently experienced and competent to be approved at PAL 4, under Regulation 6.

[16] As stated in *Z v Secretary for Justice*, the essence of the Secretary’s task under Regulation 6 is to decide whether an applicant, who has met the Schedule requirements, has the capability to manage a case (as lead counsel) at the relevant level from start to finish.⁶ The Applicant’s contentions on that issue are summarised below.

[17] The Applicant submitted that the Secretary had given no or insufficient weight to his participation in two PAL 4 criminal proceedings (“S” and “R no 1”), and that failure by the Secretary permeated the whole decision-making process.

[18] He acknowledged that neither “S” nor “R no 1” proceeded to trial, but he was lead counsel in both cases and they did involve substantial and active involvement on his part. The Applicant listed 17 particular steps taken by him in the “S” case, and 18 steps taken by him in the “R no 1” case.

[19] The Applicant played a leading role in the PAL 3 cases on which he relied, and that has not been denied by the Secretary. He submitted that the Secretary

⁵ *Z v Secretary for Justice* [2023] NZRA 001.

⁶ At [54].

should have considered the tasks and activities undertaken by him collectively, with all of his experience,⁷ to determine whether or not he could run a PAL 4 criminal matter from start to finish by himself.

[20] The Applicant offered three reasons why the Secretary should have been confident that he could run a PAL 4 criminal proceeding from start to finish:

- (a) The Applicant had been sole counsel in a PAL 3 criminal proceeding (“*R no 2*”) which he ran from start to finish. That was admittedly a PAL 3 criminal proceeding, but it could have been a PAL 4 criminal proceeding if certain factors, which would not have affected what the Applicant was required to do in the case, had been present. (If the Applicant’s client had not been acquitted on all charges, and if he had been previously convicted of a qualifying offence, he would have been exposed to the risk of a sentence of preventive detention. That would have brought the case within the definition of “approval level 4 criminal proceedings” in clause 1 of the Schedule.)
- (b) The Secretary should have considered the Applicant capable of running a PAL 4 criminal proceeding from start to finish, because of the scope and extent of his contributions in the “*S*” and “*R no 1*” cases. In those cases, he argued interlocutory applications relating to admissibility of evidence, which were of crucial importance to the defendants (the admissibility issues would determine whether or not a dismissal would be achieved, or a guilty plea entered if the applications were unsuccessful). The tasks and activities carried out by the Applicant would have been the same if the matters had been heard in a judge alone trial proceeding on a technical defence basis.
- (c) The Applicant’s substantial experience in other cases. He submitted a further list of 10 cases in New Zealand, and a further six cases in an offshore jurisdiction, which together were said to independently show that he has experience across all (or at least most) key tasks and activities in the relevant area of law.

[21] If the Secretary had misgivings over the value of the Applicant’s contributions in “*S*” and “*R no 1*”, the Secretary should have made inquiry as to whether or not the Applicant was capable of running a criminal PAL 4 matter, including a trial, from start to finish, including conducting interlocutory applications

⁷ The Applicant has practised in the field of criminal law for a period of approximately 14 years.

and running the case to trial. The Secretary would also have had regard to the Applicant's general experience.

The Secretary's Response

[22] For the Secretary, Mr Hurd noted that the Applicant meets the minimum requirement of 24 months' recent experience at PAL 3, and he has more recently advised that the Secretary now accepts that the Applicant meets the requirements of clause 5(b) of the Schedule. The question is whether, overall, he is sufficiently experienced and competent to be approved at PAL 4.

[23] On that question, the Secretary considers that the Applicant needs further in-trial experience at the PAL 4 level before the Secretary can be satisfied that he has the appropriate level of knowledge and skill to provide services at that level.

[24] Mr Hurd referred to various parts of the Secretary's July 2021 document "Applying to be a legal aid provider – Step-by-step guide" ("the Guidelines"), including a table containing three columns for each of the areas of law for which applicants might seek approval. In respect of PAL 4 criminal proceedings, the first two columns simply set out the requirements of clause 5 of the Schedule. The third column sets out what is described as an "Indicative number of cases or proceedings (substantial and active involvement)". Underneath that heading, the following appears:

Appeared as counsel with substantial and active involvement in 10 Criminal PAL 3 or 4 proceedings that progressed to at least the close of the Crown case where at least:

- 3 were Criminal PAL 4 proceedings, and
- 1 charge was for a sexual offence carrying a maximum penalty of 14 years' imprisonment or more.

[25] The third column quoted above is said to provide a general guide about the level at which the Secretary is likely to be satisfied that a typical applicant has the necessary practical experience for approval. The Guidelines make it clear that the column 3 indicia are no more than a guide, and an applicant is not required to have done the stated number of cases or proceedings for approval. Provided an applicant satisfies the minimum requirements, the key question will be whether an applicant is sufficiently experienced and competent to provide the relevant service(s), and that is to be determined on the merits of each application.

[26] Mr Hurd noted that PAL 4 proceedings are the most serious criminal proceedings, involving the potentially indeterminate sentences of life imprisonment and preventive detention. The Guidelines' statements on PAL 4 applications reflect the seriousness of PAL 4 proceedings, including the potential consequences for the accused.

[27] The Applicant has provided examples of the following:

- (a) two completed PAL 3 trials where he was lead counsel, one of which was a sexual violation case;
- (b) one case which started out as a PAL 3 case, where the Applicant was successful in getting the charge downgraded to a PAL 1 charge;
- (c) one PAL 4 case where the Applicant was lead counsel, but which did not go to trial as the defendant pleaded guilty after a challenge to the admissibility of evidence was unsuccessful;
- (d) one PAL 4 case where the Applicant was successful in challenging the admissibility of evidence, resulting in the Crown offering no evidence; and
- (e) three other PAL 4 cases where the Applicant was junior counsel, with what appears to have been a limited non-speaking role (no documentation was provided).

[28] In the Secretary's view, those cases do not demonstrate the level of in-trial experience at the PAL 4 level that the Secretary needs to be satisfied that the Applicant has the appropriate level of experience, knowledge and skill to be approved at PAL 4.

[29] Based on the totality of the information in the application, the Secretary is not satisfied that the Applicant is sufficiently experienced and competent to be approved at PAL 4. An applicant for PAL 4 approval must be able to run a PAL 4 proceeding from start to finish unaided, and because he has been unable to assess the Applicant's in-trial competence at the PAL 4 level, the Secretary is not satisfied that the Applicant can do that.

The Applicant's Reply

[30] In view of the late concession made for the Secretary that the Applicant meets the requirements of clause 5(b) of the Schedule, it is not necessary to summarise the Applicant's submissions directed to that issue.

[31] The Applicant was critical of the Secretary's requirement for "in-trial" experience, describing the requirement as "artificial and arbitrary". He submitted that the Secretary failed to consider, or properly consider, the PAL 4 proceedings in which he had been involved, and the totality of his experience. He referred to the general list of 10 cases provided in support of his application, saying that they were all jury trials conducted solely by the Applicant from start to finish.

[32] On the required standard for PAL 4 approval, the Applicant relied on the 2012 decision of the Review Authority in *AD v Secretary for Justice*.⁸ That was a case where an applicant for PAL 4 approval relied on a PAL 4 manslaughter case which was resolved (with certain concessions from the Crown leading to a change of plea to "guilty"), after the jury was empanelled. There was no trial. The applicant in *AD v Secretary for Justice* argued that "there is nothing technically different [in a PAL 4 criminal proceeding] in the skills of opening, closing, leading evidence, cross-examination and arguing legal issues, all of which [the applicant] has done many times over 16 years in all Courts including the Supreme Court". The Applicant submitted that *AD v Secretary for Justice* is almost exactly on point in the present application.

[33] On the evidence, the Applicant described his involvement in PAL 4 criminal proceedings, as follows:

- (a) "S" – this was a PAL 4 proceeding in which the Applicant appeared as lead counsel throughout. The case involved a hearing challenging the admissibility of the Crown's evidence. The issue of admissibility was critical to a conviction, and the proceeding was resolved when the impugned evidence was suppressed. The Applicant's work included preparing and successfully advancing a bail application, preparing briefs of evidence, and cross-examining two police sergeants. He was required to make submissions to the court and cross-examine the key police witnesses. *Viva voce* evidence which is the subject of cross-examination requires much greater skill and ability than that required of the applicant in *AD v Secretary for*

⁸ *AD v Secretary for Justice* [2012] NZRA 000006.

Justice, and the Secretary should have been able to assess the Applicant's experience and competency from that factor among others.

- (b) "*R no 1*" – this was a proceeding, in which the accused was charged with possessing methamphetamine for supply, in which the Crown successfully resisted an application to suppress evidence. The proceeding concluded after a change of plea and subsequent sentencing. The Applicant was involved in obtaining a sentence indication, which required extensive working knowledge of applicable case law relating to such charges, and in the subsequent sentencing, which provided the Applicant with further PAL 4 experience.
- (c) The Applicant referred to three additional PAL 4 proceedings, in which he attended court at the very least in respect of each case as junior counsel to an experienced PAL 4 criminal law practitioner.

[34] The Applicant accepted that the six offshore cases to which he had referred, were cases where he appeared as junior counsel. Most of them were sufficiently serious to warrant a PAL 4 category if heard in New Zealand. At the very least, the Applicant attended court in each case every day.

[35] The Applicant also referred to three PAL 3 cases, including "*R no 2*", in which he was sole counsel. These PAL 3 cases proceeded to the end of trial in each case. The "*R no 2*" case was a case involving a rape charge and related offences, and the Applicant ran the case unaided from start to finish (securing acquittals in respect of all alleged offences). The "*R no 2*" case should have been regarded as equivalent to a PAL 4 case.

[36] Overall, the Secretary did not have a sufficient basis to decline the application for insufficient in-trial experience. In declining the application for that reason, the Secretary has applied a previously rejected artificial distinction between the varying situations which demonstrate PAL 4 criminal proceeding experience. Having regard to the three actual hearings in cases run by the Applicant ("*S*", "*R no 1*", and "*R no 2*"), and to the totality of the evidence, the application should have been approved.

Discussion

Legal principles

[37] I reviewed a number of the Schedule provisions, and the more general Regulation 6 requirements, at some length in my very recent decision in *Z v Secretary for Justice*.⁹ It is not necessary to repeat here all that I said in that decision. However, it may be useful if I repeat the following from my decision in that case:

[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).

...

[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).

...

⁹ Above note 5.

[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).

...

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.
- ...

[75] In *J v Secretary for Justice*,¹⁰ 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.¹¹ 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.¹²

¹⁰ *J v Secretary for Justice* [2012] NZRA 000027.

¹¹ At [32].

¹² Regulation 9B(4).

Application of legal principles in this case

[38] The Secretary was in my view correct in conceding that the Applicant meets the requirements of clause 5 of the Schedule. First, the Secretary acknowledges that the Applicant has at least 24 months' recent experience working on approval level 3 criminal proceedings, so the requirements of clause 5(a) of the Schedule are met.

[39] Turning to the "substantial and active involvement" requirement of clause 5(b), there appears to be no issue over the Applicant's PAL 3 cases. The Secretary has acknowledged that the Applicant played a leading role in his PAL 3 case examples, and the Applicant highlights three PAL 3 cases in which he was sole counsel, that proceeded to trial. I am also satisfied that the Applicant appeared as counsel with "substantial and active involvement" (as I interpreted that expression in *Z v Secretary for Justice*¹³) in the "S" and "R no 1" PAL 4 cases.

[40] In combination, the Applicant's contributions as counsel in PAL 3 cases, and in the two PAL 4 cases relied upon by him, are sufficient to satisfy the requirements of clause 5(b) of the Schedule.

[41] On the overall standard required for PAL 4 approval under Regulation 6 (which requires consideration of an applicant's skill, knowledge, and overall competence to run a PAL 4 proceeding, unaided, from beginning to end), the Applicant relied on the Authority's decision in *AD v Secretary for Justice*.¹⁴ The Applicant referred to a submission made by the applicant in that case, which was not expressly rejected by the Authority, that "... there is nothing technically different in the skills of opening, closing, leading evidence, cross-examination and arguing legal issues, all of which [the applicant] has done many times over her 16 years of practice in all of the courts including the Supreme Court".

[42] The Authority's decision in *AD v Secretary for Justice* (reversing the Secretary's decision to decline approval of the applicant for PAL 4 work) contains only briefly stated reasons. The principal factor that appears to have influenced the Authority was the applicant's substantial experience over her years of practice in criminal proceedings.

[43] There was nothing inherently wrong with the Authority putting significant weight on an applicant's long experience. Each case will turn on its own facts, and

¹³ *Z v Secretary for Justice*, above n 5, at [64].

¹⁴ Above n 8.

in a given case it may be entirely appropriate to infer that an applicant with long experience has developed a sufficient level of skill that he or she can be approved at a particular legal aid provider level. People develop skills by doing things, and if they have been doing them for a long time, without complaint, that may be a good indicator that their skills are well-developed.

[44] Relying on *AD v Secretary for Justice*, the Applicant submits that the same broad skills are required in tasks such as opening, examination, cross-examination, and closing, irrespective of whether the case is a PAL 2, 3, or 4 case. That may be true to some extent, but some counsel will perform those tasks with a greater degree of skill or knowledge than others. And in my view the Regulations require the Secretary to have regard to such differences. Regulation 6(2)(c) requires that the Secretary must be satisfied that an applicant has the *appropriate* level of knowledge and skill to provide legal aid services in the particular “area of law” to which the application relates, and in the context of the Regulations (and the Schedule in particular) it seems to me that the expression “area of law” must have been intended to refer to one of the specific types of legal proceeding described in clauses 2 to 14 of the Schedule (so that PAL 1, say, would be a different “area of law” from PAL 3 or PAL 4). So there still needs to be an examination of the skill and knowledge levels of the particular applicant, and whether those levels are appropriate for PAL 4 approval. In conducting that examination, the Secretary is entitled to exercise a degree of care that is proportionate to the more serious cases that are encountered at that level.

[45] Some evidence of an applicant’s relevant knowledge and skill may be provided by proof of attendance at a litigation skills course, or some equivalent training course. The Secretary may also be assisted by the quality (or otherwise) of an applicant’s work samples, and, in appropriate cases, draw inferences from successful outcomes achieved over a number of cases. But proof of attendance at a litigation skills course may say little about an applicant’s readiness to progress from, say, PAL 2 to PAL 3, or PAL 3 to PAL 4, and an applicant’s samples of work carried out at the level applied for may provide only a snapshot of how the applicant performed in a few specific fact situations. In the end, the best evidence of an applicant’s skill and knowledge is likely to be in the form of such inferences as can be drawn from an applicant’s demonstrated experience at or immediately below the level sought, supplemented by references provided by senior counsel (PAL 4 or equivalent) who have observed the applicant in court and can say that they believe he or she is ready to step up to the next PAL level.

[46] The Applicant submits that the Secretary failed to place sufficient weight on his experience. He referred in support to the PAL 3 and PAL 4 cases already mentioned, and to 10 additional jury cases in which he appeared as lead counsel, and six cases in which he appeared in an offshore jurisdiction. The offshore cases do not offer much assistance, as it is not clear that the Applicant had sufficient in-court involvement in them, and the majority of the 10 New Zealand cases relied upon by the Applicant appear to have been PAL 2 cases.

[47] I have considered the various steps taken by the Applicant in the two PAL 4 cases in which he was lead counsel ("*S*" and "*R no 1*"), and I note that both cases were dealt with in the District Court, with no jury. Neither proceeded to trial, and the pre-trial hearings, while no doubt important in each case, appear to have been limited in their scope to the admissibility of particular evidence. The Applicant did appear in three other PAL 4 cases as junior, but it is not clear that his involvement in those cases was significant enough to be of much value in assessing his level of knowledge and skill as a PAL 4 candidate.

[48] The Applicant's strongest evidence was his successful defence in the "*R no 2*" case, which was a PAL 3 case that went to trial before a jury. I think this case pushes him close to satisfying the knowledge and skill requirements for PAL 4, and a stronger reference from one or more senior criminal law practitioners may have been sufficient for him to bridge the gap in his knowledge and skill levels that are apparent from his case examples, and the knowledge and skill level required for PAL 4 approval. Unfortunately, I do not consider his references, considered together, are sufficient to bridge that gap and satisfy the requirements of Regulation 6(2)(c) and Regulation 6(1).

[49] The Applicant provided a copy of a certificate showing that he had attended a week-long intensive litigation skills course in March 2020. But for the reasons mentioned at [45] above, attendance at a training course of that sort is of limited value when considering whether an applicant is ready to move from PAL 3 to PAL 4.

[50] In this case, the Applicant provided three references, including a reference from an experienced approval level 4 criminal legal aid provider ("the PAL 4 referee"). But the Secretary was concerned that the reference from the PAL 4 referee did not specifically discuss the Applicant's suitability for criminal PAL 4 approval. The Secretary accordingly recommended that the Applicant re-apply for criminal PAL 4 approval after he had taken two steps, one of which was providing

an additional reference from a PAL 4 (or equivalent) counsel, specifically discussing the Applicant's suitability for criminal PAL 4 approval.

[51] The Applicant initially elected not to go down that path. Instead of obtaining the additional reference and making a further application to the Secretary, he lodged the present application for review. He chose not to file with his review application copies of any of the references upon which he had relied before the Secretary, although he did provide copies of those references after they were referred to in Mr Hurd's submissions and I offered the Applicant the opportunity to produce them if he wished to do so.¹⁵

[52] The principal reference provided by the Applicant was a reference dated 11 September 2022 from the PAL 4 referee. The PAL 4 referee completed both the "Lead or Limited References", and "Supervised References" sections of the referee declaration form, the latter section being intended for comment on a referee's confidence in the applicant's ability to carry out the relevant tasks under supervision.

[53] Under the heading "Lead or Limited References", the PAL 4 referee said:

[The Applicant] is competent and confident, displays sound knowledge in the matters that he has been involved with namely possession for supply of methamphetamine and murder.

[54] Under the heading "Supervised References", the PAL 4 referee said:

[The Applicant] is competent and provides sound advice. His preparation is impeccable and he is an effective communicator between Judges, Court Staff and Defendants which include Defendants from a diverse range of backgrounds. He is extremely polite and diplomatic when engaging with Prosecutors.

[55] In the "Confirmation" section of the referee declaration, the PAL 4 referee confirmed that he considered the Applicant sufficiently skilled and knowledgeable in the area of law in question (criminal law) to be approved to provide legal aid services in a lead capacity, but he did not say anything about the Applicant's "skill", as opposed to his "knowledge" (as demonstrated in the methamphetamine and murder cases in which the PAL 3 referee had observed him) beyond generally describing the Applicant as "competent and confident". He did not describe the tasks undertaken by the Applicant in the cases in which he had observed him,

¹⁵ The Applicant also provided a number of additional documents (some appearing to relate to a separate application made by the Applicant which is not the subject of the present application for review). If these additional documents were intended to be submitted in support of the present review application, I decline to accept them. The Applicant had already made submissions in reply, and my invitation to him to provide copies of the references (and brief submissions on them) did not extend to supplementing his case by providing further, unsolicited material.

other than describing his preparation as “impeccable”. The reference given by the PAL 4 referee offered no opinion on the issue of whether or not the Applicant’s skill and knowledge were sufficient to equip him to lead a PAL 4 criminal proceeding from the start to the end of a trial.

[56] The Applicant’s other references included one reference from an experienced lawyer who was also a family member. Again, it is not clear from this reference that the referee, who has instructed the Applicant to appear as counsel, has seen sufficient of him appearing in court to form a useful view on whether his knowledge and skill levels are sufficient that he should be regarded as capable of running a PAL 4 case, as lead provider, to the end of a trial.

[57] The Applicant’s third reference was from a non-lawyer, but one with significant experience of the criminal courts and those who appear in them. He spoke highly of the Applicant’s performance in one case where the referee had attended most of the hearings, describing the Applicant as “very competent”. He had also instructed the Applicant in a historic rape trial, in which the Applicant secured an acquittal for his client. He spoke highly of the Applicant’s diligence and general personal qualities, saying that the Applicant “conducts himself very professionally during court hearings”.

[58] While the Applicant’s second and third referees spoke warmly of his personal qualities, and his broad general competence, neither of them was in my view well-positioned to form a technical view of the Applicant’s skill and knowledge in performing the various tasks likely to be required of defence counsel in a PAL 4 criminal proceeding.

[59] In the end, I do not believe the Secretary erred in refusing the application. In coming to that view, I take into account the fact that the stakes are higher in PAL 4 proceedings than they are in criminal proceedings at lower levels, and it is appropriate in those circumstances that the Secretary should approach applications for PAL 4 approval with a degree of care that is proportionate to the kinds of case for which approval is sought. In the absence of additional experience in PAL 3 and PAL 4 cases, I consider it was appropriate for the Secretary to ask for the additional reference from a PAL 4 (or equivalent) provider, specifically discussing the Applicant’s suitability for criminal PAL 4 approval, before the Applicant’s application could be granted.

Decision

[60] Pursuant to section 86(1) of the Legal Services Act 2011, the decision of the Secretary refusing the Applicant's application for approval to provide services in approval level 4 criminal proceedings, is confirmed.

[61] In accordance with the Authority's practice in earlier cases, I consider it appropriate in this case that the Applicant's name should not be published. There will accordingly be an order that any publication of this decision is to have the Applicant's name anonymised to a single initial.

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W A Smith
Review Authority