

Applicant

AE

Respondent

Secretary for Justice

Date of Decision:

9 December 2014

DECISION

INTRODUCTION

1. In a decision dated 22 October 2014, The Secretary for Justice (“the Secretary”) declined approval of the Applicant as a Lead Provider for Criminal PAL 1 trials
2. The Secretary decided that the Applicant did not meet the criteria for approval under the Legal Services Act 2011 and the Legal Services (Quality Assurance) Regulations 2011 as a provider for the principal reason that the applicant had not demonstrated substantial and active involvement appearing as counsel in at least 3 trials in criminal proceedings.
3. The Secretary was satisfied that the applicant had over two years’ recent experience in criminal law practice and thus met the requirement of clause 2(a) of the Schedule to the Legal Services (Quality Assurance) Regulations 2011.
4. As to substantial and active involvement in at least 3 trials in criminal proceedings as required by clause 2(b) , the Secretary expressed the view that the applicant’s involvement was limited to research, briefing witnesses and drafting documents and cross-examination of one witness in one trial.

5. The Secretary recognised that the applicant's involvement in two other matters provided him with good experience but did little to assist in making an assessment of his competence.
6. The applicant seeks to review the Secretary's decision.

BACKGROUND

7. The applicant was admitted as a barrister and solicitor of New Zealand in May 2012. He has been an employed solicitor since then concentrating on criminal work.
8. Prior to that date, he gained experience as a legal advisor with his present employer and with another firm and also the Inland Revenue Department.
9. At the time of his application for approval as a lead provider under the Act, the applicant held approval as a supervised provider for Civil.

THE APPLICATION

10. The applicant seeks a review of the Secretary's decision for the following reasons set out in his written submission of 12 November 2014. He submitted that the Secretary had erred in the following respects:
 - a. By failing to consider substantial and active involvement in criminal proceedings that were higher than PAL1, as competence towards PAL 1.
 - b. By determining that he did not meet the competence requirements for PAL 1.
11. As to the ground advanced in para 10(a), it is not necessary to discuss this at length for the reason that the Secretary has acknowledged in his response dated 27 November that involvement in criminal proceedings that are higher than the category for which approval is sought can be properly taken into account in assessing competence for that particular category.
12. As to the ground advanced in para 10(b), the applicant argues that the following particulars when considered together demonstrate that he has

had active and substantial involvement as required by clause 2(b) of the schedule to the Regulations:

- a. The conduct of a fully defended hearing.
- b. Drafting of documents and submissions, legal research, briefing of witnesses, and appearance as counsel at case review hearings and call overs.
- c. Appearances as counsel at PAL1 sentencings, case review applications, bail applications and call overs which are all steps showing substantial and active involvement in PAL 1 criminal proceedings.

13. The Secretary's response to the application for review is as follows:

- a. He did take into account the applicant's involvement in the higher category proceedings referred to, but did not consider that it demonstrated substantial and active involvement. The involvement in a PAL 2 criminal proceeding and a criminal appeal was limited to some research, drafting of documents, the briefing of one witness, and cross-examination of one witness.
- b. That the applicant's reference to the actions described in para 12(c) were not recorded in the case examples form submitted by the applicant.
- c. That the information supplied by the applicant's case examples showed that in two of the proceedings the defendants did not attend court, and in the matter that went to a hearing, the applicant appeared as junior counsel and cross-examined one witness.

14. The applicant replied to the Secretary's response on 3 December 2014. The essential point of his reply is that when the additional case examples provided are considered with the case examples originally submitted there is sufficient information to establish his competency to undertake PAL 1 proceedings.

DISCUSSION

15. I have now reviewed the eight case examples that the applicant has submitted. I set out his involvement and activity in each as follows;

- a. Lai.- Briefed evidence
- b. Poasa - Research drafting and sentencing
- c. Gill – cross-examined 2 witnesses
- d. Gaitz - Research, brief evidence and drafting for S105 procedure
- e. Paranihi - Research, Drafting and cross-examination of 1 witness
- f. Rudkin – Research and drafting.
- g. Baeck – Research drafting, briefing evidence and cross-examination of 2 witnesses.
- h. Lennie – drafting cross-examination for 1 witness.

16. It will be seen that the appearances of the applicant as counsel in court have been limited to 3 occasions and those have been as junior counsel.

17. It is correct that the applicant has gained experience and knowledge of criminal proceedings in a variety of proceedings and thus meets the recent experience requirement under clause 2(a) of the schedule to the regulations.

18. Clause 2(b) of the schedule to the regulations requires that an applicant for approval for level 1 criminal proceedings must have relevantly appeared as counsel with substantial and active involvement in at least 3 trials in criminal proceedings. That requirement is mandatory. Thus it is that involvement in matters that are not trials cannot be taken into account when determining the question of substantial and active involvement for the purposes of clause 2 (b).

19. When I review the information that the applicant has provided, I am unable to conclude that he has demonstrated appearance as counsel in court who, in the words of the Secretary, *has been on his feet doing the hard yards.*

20. The applicant has not demonstrated an appearance as counsel, aspects of preparation and aspects of courtroom activity in at least 3 criminal trials in such a way as to give meaning to words set out in the schedule.
(*RA 005/12, RA 006/12 and RA009/12*)

DECISION

21. I agree with the comment of the Secretary that the case examples submitted by the applicant do not disclose the level of his engagement in courtroom activity.

22. I accordingly confirm the decision of the Secretary.

BJ Kendall
Review Authority