

Applicant

AG

Respondent

Secretary for Justice

Date of Decision:

1 June 2012

DECISION

INTRODUCTION

[1] In a decision dated 13 March 2012, the Secretary for Justice declined approval of the applicant as a provider of Category 2 Criminal Proceedings and the Police Detention Legal Assistance Scheme.

[2] The Secretary decided that the applicant did not meet the criteria for approval under the Legal Services Act 2011 and Legal Services (Quality Assurance) Regulations 2011 as a lead provider in Criminal PC2 and PDLA because she had not undertaken any sentencing in indictable matters and required more experience in trial proceedings. The Secretary noted the references given by Senior Counsel but concluded that the applicant needed to demonstrate substantial and active involvement in the courtroom.

[3] In reaching that decision, the Secretary adopted the recommendation of the Selection Committee which had considered the applicant's application for approval as a lead provider in the matters referred to.

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

BACKGROUND

[5] The applicant was admitted as a Barrister and Solicitor in New Zealand in February 2007. She had employment with the Public Defence Service until September 2010. From then down to the present she has practised as a

Barrister Sole in Chambers with others. She has chosen to specialise in Criminal Proceedings.

[6] At the time of her application for approval under the current legislation, the applicant had approval under Criminal PC1 and Duty Solicitor. Those approvals continue following the Secretary's decision of 13 March 2012.

THE APPLICATION

[7] The applicant seeks a review of the Secretary's decision for the following reasons set out in writing on 16 April 2012:

- a) That she has completed the required trial work to bring her within the criteria for approval.
- b) That she has had active and substantial involvement in more than three trials, appeared in callovers, and appeared in the High Court.
- c) That the decision is inconsistent with others where approvals in Category PC2 have been given to members of the Public Defence Service and of the Private Bar who have less trial experience.

[8] The Secretary responded to the application on 14 May 2012, and made the following points:

- a) That the applicant had been junior counsel in all the cases in respect of which she had provided examples for trials on indictment.
- b) The Selection Committee decided that she did not satisfy the criteria for approval because it considered it important that an applicant should have undertaken sentencing in indictable matters and that she required more court experience in trial proceedings.
- c) That further trial information submitted since making her application for approval was not relevant as it did not form part of the original application.

- d) That applications for approval made under the previous legislation were assessed against different criteria and were accordingly not relevant to the present matter.

[9] The applicant answered the Secretary's response on 27 May with the following points:

- a) The five indictable trials produced results that did not lead on to sentencing.
- b) That she has attended both the 'Litigation Skills Programme' and the course on 'How to Run a District Court Jury Trial'
- c) That she has significant experience in the District Court in summary sentencing matters, many of which involved serious charges, multiple charges and the necessity for written submissions. Many of the cases could have arisen in the indictable jurisdiction where the same tariffs and guideline judgements would have been applicable.
- d) That while the Act and Regulations do not define 'substantial and active' involvement, the Provider Manual produced by the Ministry provides guidance where it states that a substantial and active role includes:
- i. "verifiable information about preparation and participation in particular cases demonstrating a significant contribution to legal proceedings'
 - ii. 'Demonstration of a substantial and active role includes"
 - Preparing and presenting a case to a degree of proficiency in technical and strategic issues and
 - Showing actual involvement with, clients, witnesses, Police, opposing counsel and the court'

DISCUSSION

[10] It is accepted that the applicant has had at least 24 months' recent experience working on Category 1 criminal proceedings and has appeared as counsel in at least three trials on indictment before a jury or before a judge alone.

[11] The question is whether her appearances as counsel in the trials on indictment have been 'with substantial and active involvement' as required by clause 3(b) of the Schedule to the Legal Services (Quality Assurance) Regulations 2011.

[12] In my decision *AE v Secretary for Justice* [2012] NZRA 000005 of 3 April 2012, I said at para [16] that the requirement for substantial and active involvement ruled out an appearance as counsel "*who merely is an observer of the proceedings*".

[13] I said at para [17] that:

“...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”.

Those remarks are compatible with the definition referred to in the Provider Manual quoted in para [9] above.

[14] The applicant has carried out research, briefed witnesses, and drafted documents. She has carried out opening statements for the defence, led evidence and cross-examined witnesses including the Police.

[15] Although desirable, I do not find it necessary that the applicant should have undertaken sentencing in indictable matters. The applicant makes a strong point in relation to sentencing when she says that many of her summary sentencing matters involved serious charges, multiple charges and could have arisen in the indictable jurisdiction involving the same tariffs and applicable guideline judgments.

DECISION

[16] When I bring together all the matters referred to above, I find that the applicant has satisfied the requirement for “substantial and active involvement”. I find that the Secretary has erred in following the recommendation of the Selection Committee that the applicant should have demonstrated experience in indictable sentencing matters and that she should demonstrate substantial and active involvement in the courtroom. She does have experience in sentencing matters by reason of her involvement in Category 1 Criminal Proceedings and has extensive and satisfactory courtroom experience.

[17] I accordingly find that the applicant has met the requirements set out in the Schedule to the Legal Services (Quality Assurance) Regulations in respect of Category 2 Criminal Proceedings and PDLA.

[18] I agree with the Selection Committee and the Secretary that the applicant has supportive references from experienced counsel; has displayed competence and confidence; and has not been the subject of complaint in respect of her professional conduct.

[19] There are therefore, no matters requiring the exercise of a discretion against the granting of approval notwithstanding meeting the qualifying requirements. The applicant is incorrect in her assertion that section 77 does not allow the Secretary a discretion in that regard. The word **'may'** in section 77(1) is the empowering word as opposed to **'must'** and thus does confer a discretion on the Secretary who must, of course, act fairly in the exercise of that discretion.

[20] I therefore, pursuant to section 86(1) of the Legal Services Act 2011 reverse the decision of the Secretary made on 13 March 2012 declining approval of the applicant as a provider of legal aid services in respect of Category 2 Criminal proceedings and PDLA.

Dated at Auckland this 1st day of June 2012

BJ Kendall
Review Authority