

Applicant

AH

Respondent

Secretary for Justice

Date of Decision:

17 August 2012

DECISION

INTRODUCTION

1. In a decision dated 12 June 2012 the Secretary for Justice (the Secretary) declined to approve the Applicant as a lead provider in Criminal Proceedings Category 3.
2. The Secretary's reason for not doing so was that the Applicant had not provided case examples which demonstrated substantial and active involvement in at least 4 category 3 or 4 criminal proceedings.
3. The Applicant seeks a review of that decision

BACKGROUND

4. The Applicant was admitted as a barrister and solicitor in New Zealand in 1973. He has practised principally in the area of criminal proceedings since then.
5. Prior to the commencement of The Legal Services Act 2011 (the Act) he held approvals as a lead provider for Criminal PC 3, Family and Civil. He held approval as a Duty Lawyer and had been a duty lawyer from the time the scheme commenced. He was as well a duty lawyer supervisor at the North Shore Court from March 2011
6. The Applicant's application for approval as a lead provider was received by the Secretary on 28 November 2011. In that application he sought

approval as a lead provider in Criminal Proceedings 1, 2, and 3 and Duty Solicitor

7. In support of his application he referred to case examples in respect of:
 - a. A Parole Board Hearing which he described as a Criminal Proceeding Category 3.
 - b. A charge of wounding with intent which did not proceed to trial because the defendant absconded prior to trial.
 - c. A trial of a defendant on a charge of injuring with intent (Category 3). – S 189 Crimes Act - 14 years imprisonment
 - d. A trial of a defendant on a charge of Injuring with intent to injure (Category 2) – S 189(2) Crimes Act – 5 years imprisonment.
8. The Applicant provided work samples in respect of the case examples mentioned in paragraph 7(a), (c) and (d).
9. On the 17 April 2012, The Secretary notified the Applicant that in order to be approved for Criminal Proceedings Category 3 he was required to submit 4 case examples at either PC 3 or PC 4.
10. The Applicant replied that it would be extremely difficult for him to find two more case examples as requested of him.

The Application

11. The Applicant seeks a review of the Secretary's decision declining approval in respect of Criminal Proceedings Category 3. He set out his reasons in his application as "*I am an experienced and qualified criminal lawyer entitled to Approval for Criminal Proceedings Category 3*".
12. Subsequently the Applicant specified the grounds upon which he sought review in a letter of 16 July 2012::
 - a. As being an experienced criminal legal aid provider having been approved on the assignment list for PC 3 assignments since 23 October 2001 – a period of about 11 years.
 - b. Having had 25 PC 3 assignments from October 2001 to March 2011.

- c. That all assignments were completed without complaint by the aided person or the Legal Services Agency.
- d. That his lengthy and satisfactory service should be taken into account.

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

- a. A Parole Board Hearing is not an example that comes within the definition of a Category 3 proceeding.
- b. The Applicant did not demonstrate that he met the competence and experience requirements stipulated by clause 4(b) of the Schedule to the Legal Services (Quality Assurance) Regulations 2011 (the Regulations). Of the case examples that the Applicant provided, only one was at Criminal PC 3 or 4. The other case examples were at Criminal PC 1 or 2.
- c. The Applicant had demonstrated that he had met the competence and experience requirements of clause 4(a) of the Schedule to the Regulations.

14. The Secretary did invite the Applicant to provide further case examples that demonstrated active and substantial involvement in Criminal PC 3 or PC 4 cases. The Secretary did so because the preliminary assessment was that the Applicant had not qualified for approval.

15. The Secretary considered in those circumstances that it was in the interests of natural justice to notify the Applicant of the recommendation to decline approval and give him the opportunity to provide further information.

16. The Applicant's response was that it would be extremely difficult for him to provide any further case examples as requested.

17. The Selection Committee (the Committee) then considered the application on the materials it had before it. It considered it was unable to recommend the Applicant for approval as a lead provider for Criminal PC 3 cases.

Discussion

18. The Act came into force on 1 July 2011. Section 145 repealed the Legal Services Act 2000. Section 146 revoked The Legal Services Regulations 2006
19. The Act in subpart 2 of Part 3 established a quality assurance system for providers of legal services.
20. Section 75 provides that a person must not provide a legal aid service or specified legal service unless that person is approved by the Secretary to do so and if approved then complies with any conditions of such approval.
21. Section 76 of the Act requires an application to provide legal aid services to be made to the Secretary in the prescribed manner.
22. Section 4 of the Act defines '*prescribed manner*' as the manner prescribed by the Secretary. The Secretary has prescribed such an application form.
23. Section 135(1) of the Act was a transitional provision whereby a listed provider under the repealed act was approved to continue to provide those services for a period of 6 months after the commencement of the Act namely until 1 January 2012.
24. Section 135(2) provides that if a person makes an application within the prescribed period of 6 months for approval to provide legal aid services, then the approval conferred by subsection (1) continues until the Secretary decides the application.
25. The Regulations made under the Act and the Schedule set out the criteria to be met by an applicant. Regulation 6(1) requires that an applicant be experienced and competent in each area of law and category of proceedings which that applicant intends to provide legal aid services.
26. Regulation 6(2) establishes what the Secretary must take into account in deciding whether an applicant meets the criteria. The Secretary must:
 - a. Apply the relevant experience and competence requirements set out in the Schedule; and

- b. Take into account the applicant's experience as a lawyer in the private sector or as a provider; and
- c. Be satisfied that the applicant has the appropriate level of knowledge and skill to provide legal aid services in each area or category of proceedings applied for.

27. Clause 1(1) of the Schedule provides that Category 3 criminal proceedings means any trial or indictment –

- a. Before a jury or before a judge alone; and
- b. Where the person charged may be liable to a penalty of more than 10 years imprisonment.

28. Clause 4 of the Schedule requires that an applicant for approval in respect of category 3 criminal proceedings must have –

- a. At least 36 months' recent experience working on category 2 criminal proceedings; and
- b. Appeared as counsel with substantial and active involvement in at least 4 category 3 of 4 criminal proceedings where –
 - i. At least 1 charge carries a maximum penalty of more than 10 years' imprisonmentor
 - ii. The defendant is likely to face cumulative sentences of more than 10 years' imprisonment.

29. An applicant for approval for category 3 criminal proceedings must provide the Secretary with sufficient information about at least 4 case examples which will allow the Secretary to arrive at a decision whether or not to grant approval. The application form for use by an applicant for approval makes that quite clear.

30. The Applicant provided one such case example with detail that showed substantial and active involvement in the matter. He also provided a work sample in respect of the case.

31. The Secretary has accepted that the Applicant has met the requirement under cl 4 (a) of the Schedule.

32. He has been unable to satisfy himself that the Applicant has satisfied the mandatory requirements of cl 4(b) because of the Applicant's failure to supply the required number of case examples.

33. The Applicant has sought to address the requirement in another way by advancing in his grounds in support of the application for review his many years of experience as a lawyer practising in criminal law having been approved for PC 3 assignments and as having had 25 such assignments in the past.
34. Those are general matters which the Secretary can take into when considering the requirements of regs 6(2) (b) and (c).
35. When I have regard to the specific and mandatory requirements of the Schedule I find that the matters advanced by the Applicant do not meet those requirements.
36. I find that the Secretary was correct in his decision not to grant the Applicant approval for category 3 criminal proceedings.

Decision

37. Accordingly, I confirm the decision of the Secretary declining the Applicant approval for Category 3 criminal proceedings.
38. The Secretary has indicated that the Applicant is at liberty to re-apply for approval with further information.
39. The regulations were reprinted as at 2 July 2012. I draw attention to the amendments to regs 6, 9A and 9B inserted on 2 July 2012.

BJ Kendall,

Review Authority