

**REVIEW AUTHORITY
NEW ZEALAND**

2012 NZRA 000010

Applicant

AJ

Respondent

Secretary for Justice

Date of Decision:

4 August 2012

DECISION

INTRODUCTION

1. In a decision dated 22 May 2012, the Secretary for Justice ('the Secretary') declined approval of the applicant as a lead provider for Category 2 Criminal Proceedings and the Police Detention Legal Assistance Scheme. The applicant gained approval as a lead provider in respect of Category 1 Criminal Proceedings and as a Duty Solicitor.
2. The Secretary determined that the applicant did not meet the criteria for approval under the Legal Services Act 2011 ('the Act') and the Legal Services (Quality Assurance) Regulations 2011 ('the Regulations') because he had not demonstrated appearance as counsel with substantial and active involvement in at least 3 trials on indictment before a jury or before a judge alone.
3. The Secretary commented that the cases examples which the applicant provided to the selection committee demonstrated pre-trial preparation but did not demonstrate courtroom activity as trial counsel.
4. The applicant seeks a review of that decision.

BACKGROUND

5. The applicant was admitted as a Barrister in South Africa and Lesotho and as a Barrister and Solicitor in New South Wales. He practised at the Pretoria Bar for more than 20 years. He gained Silk in 1992. He has extensive experience as a trial lawyer in criminal and civil matters in South Africa including appearances as lead counsel in the Supreme Court of Appeal of South Africa. He has held appointment as Acting Justice of the High Court of South Africa. He trained as a Litigation Skills Trainer through the Inns of Court Law School, London and was actively involved in Litigation skills training at the Pretoria Bar for many years.
6. Since his arrival in New Zealand, the applicant gained admission as a Barrister and Solicitor in April 2004. He had employment as a Senior Solicitor with the Ministry of Social Development being responsible for Prosecutions until October 2006. He joined the Auckland District Law Society as Professional Standards Director and from October 2008 held the same position with the New Zealand Law Society until March 2010. Since then he has practised as a barrister sole specialising in criminal proceedings and regulatory matters.
7. He has attended 28 CLE seminars in New Zealand and presented at several others.
8. At the time of his application for approval under the Act, the Applicant held approval as a provider under Criminal PC1 and as Duty Solicitor.

THE APPLICATION

9. The applicant seeks a review of the Secretary's decision for the following reasons which are set out in writing on 18 June 2012: He submitted that the Secretary committed the following errors in considering his application for approval:
 - a. By viewing his involvement in the case samples submitted in respect of Category 2 criminal proceedings at the same level.
 - b. By interpreting the requirement of "substantial and active involvement in at least 3 trials" as requiring involvement in

courtroom activity by trial counsel and by concluding that a failure to demonstrate involvement in opening, cross-examination, adducing evidence and closing as an absolute bar to approval of the application. In the alternative as jurisdictional facts that would preclude the Secretary from considering the application.

- c. By failing to take into account his experience as a lawyer.

10. The applicant has submitted as follows:

- a. In respect of (a) in para 9 he was Counsel assisting in 2 matters and was lead counsel in respect of the 3rd matter.
- b. In respect of the requirement of “substantial and active involvement in at least 3 trials, he submitted that the Secretary is not permitted to arbitrarily narrow the term down to courtroom activity and that reg 6(2) requires a more holistic approach. In addition to being satisfied about the experience and competence requirement in the Schedule to the Regulations, the Secretary must as well take into account the experience of the applicant as a lawyer and be satisfied that the applicant has the appropriate level of knowledge and skill to do the work in the category/(ies) applied for.
- c. In respect of his argument that the Secretary failed to take into account his experience as a lawyer, the applicant submitted that the Secretary’s approach to his application was wrong in principle in that:
 - i. The Secretary concluded that the application was doomed to failure because of absence of demonstrated involvement in court room activity.
 - ii. That because of an absence of discretion in that regard, consideration of his experience as a lawyer would be pointless.
 - iii. That the Secretary’s approach was wrong in that he simply looked at the three case examples and did not as well consider his experience as a lawyer and his level of

knowledge and skill and has therefore not correctly applied reg 6(2) of the Regulations.

11. The Secretary has replied to the application on the 5th July 2012 and has submitted the following:

a. That contrary to the submission of the applicant, the Secretary has a limited discretion in the Regulations because:

- i. Regulation 6(2) sets out three sources, (a) – (c) which must be considered in deciding whether the applicant meets the experience and competence criteria before any discretion can be exercised.
- ii. Regulation 6(2)(a) provides that the Secretary *must apply* the requirements in the Schedule. Application of the requirements in the Schedule is mandatory and not discretionary. The word “must” is used as well in the Schedule.
- iii. The Secretary may decline approval if not satisfied, (despite having met the requirements in the Schedule and reg6(2)(a) that an applicant has the appropriate level of knowledge and experience. (Regulation 6(2)(b) and (c).
- iv. That the use of the word ‘*and*’ between reg6(2) (a), (b) and (c) emphasises that the requirements are not mutually exclusive and must all be considered to grant approval.
- v. That it follows that a person would not meet the criteria in reg6(2) by merely meeting one only of the requirements set out in that reg under (a), (b) or (c).
- vi. Regulation 4 cites the schedule as a source of the criteria for approval. The schedule contains mandatory requirements.

b. That Secretary did take into account the applicant’s experience as a lawyer by having regard to his overseas experience as a lawyer, his involvement in numerous cases in South Africa as

evidenced by his application under the previous Legal Aid legislation,

- c. As to the requirement for active and substantial involvement as contained in cl 3(b) of the Schedule, the submission is that active and substantial involvement can be split into two essential areas of participation namely preparation (pre-court) and court (proceedings). Those two areas of participation reflect involvement in research, client contact, liaising with the Crown or opposing counsel, drafting submissions and court documents together with leading evidence, examining and cross examining witnesses and experts, addressing the Court, opening and closing addresses and presenting submissions.
- d. The Secretary expresses the view that it is not necessary to demonstrate all the tasks in all the case examples provided. Some case examples may demonstrate a limited range of aspects compared to others, but together the case examples must demonstrate active and substantial experience.
- e. The Secretary's submission is that, with those considerations taken into account, the applicant did not demonstrate the required level of involvement.

12. The applicant has answered the Secretary's response by letter of 23 July 2012.

13. He sets out in detail the pre-trial matters in which he was involved and which indicate substantial activity on his part. He earlier acknowledged that, while he was second counsel in 3 matters and was present in the courtroom he was not involved in an active manner.

14. He accepts that the issue on review is narrow. He defines it as being whether the requirement of "active and substantial involvement" can only be satisfied by delivering the opening address, leading and cross-examining witnesses and making the closing address in the case examples provided.

15. His submission is that the nature and extent of involvement should be assessed with reference to the whole trial process – both the preparation and the court process. He submits that there is nothing in the

Regulations to suggest that the concept of “active and substantial involvement” in trials should be divided into two distinct areas of involvement that should be separately satisfied.

DISCUSSION

16. It is clear and accepted that the applicant has had at least 24 months experience working on category 1 criminal proceedings as required by cl 3(a) of the Schedule to Regulations.
17. His long experience of practice in criminal proceedings in the Jurisdiction of South Africa combined with experience gained since his admission as a barrister and solicitor in New Zealand in 2004 indicates that he satisfies the requirements of regs 6(2)(b) and (c).
18. The issue then is whether he has satisfied the mandatory requirements of reg 6(2)(a) of the Regulations as to relevant experience and competence as prescribed in the Schedule. Unless that requirement is met the Secretary has no discretion that may be exercised under s77 of the Act.
19. I have discussed what matters are to be considered in determining what is “substantial and active involvement” in my decisions under **RA 005/12, RA 006/12 and RA 009/12**. I held that my remarks 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*” were compatible with the definition referred to in the Provider Manual produced by the Ministry of Justice.
20. I accept the submission of the Secretary that it is not necessary that an applicant demonstrate all the tasks in all case examples provided. The Secretary accepts that some case examples may demonstrate a limited range of aspects compared to others, but when taken together the case examples must demonstrate active and substantial experience.
21. It follows, that in order to meet the test, it is not necessary to require an applicant to have completed every of the steps referred to in para 17 above. I hold that in each case example there must however be

demonstrated an appearance as Counsel; aspects of preparation; and aspects of court room activity. That is necessary to give meaning to the words “*appeared as counsel with substantial and active involvement*”, as set out in cl 3(b) of the Schedule to the Regulations

22. I must therefore reject the applicant’s submission that the Secretary was in error in considering involvement under the aspects or division of involvement in preparation and courtroom activity.

DECISION

23. The case examples which the applicant has provided as mandatorily required by reg 6(4) of the Regulations, do not disclose the nature of his appearance as counsel or of the level his engagement in court room activity. He has endeavoured to explain his court room activity in respect of each example, but I am not persuaded that it was sufficient to meet the test of “*substantial and active involvement*”.

24. I accordingly confirm the decision of the Secretary

BJ Kendall

Review Authority