

**REVIEW AUTHORITY  
NEW ZEALAND**

**2012 NZRA 000025**

**Applicant**

**AP**

**Respondent**

**Secretary for Justice**

**Date of Decision:**

**30 January 2013**

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## **DECISION**

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### **INTRODUCTION**

1. In a decision dated 1 October 2012, The Secretary for Justice (the Secretary) declined approval of the Applicant as a lead provider of Category 2 and Category 3 Criminal Proceedings under the Legal Services Act 2011(the Act).
2. The Secretary decided that the Applicant did not meet the criteria under the Act and the Legal Services (Quality assurance) Regulations 2011 (the Regulations) as a lead provider in the abovementioned categories because:
  - a. He had not demonstrated experience and competence in the particular categories.
  - b. He did not provide 4 case examples for category 3 or 4 trials on indictment before a jury or before a judge alone for PC3 approval.
  - c. He did not provide case examples that demonstrated substantial and active involvement as counsel in at least 3 trials on indictment before a jury or before a judge alone for PC2 approval.
  - d. He had not demonstrated the necessary trial experience.

- e. The Applicant in seeking the exercise of discretion in relation to recent experience under reg 6(4) of the Regulations nevertheless had not undertaken a trial on indictment for more than 10 years.
3. The Applicant seeks a review of the Secretary's decision.

## **BACKGROUND**

4. The Applicant was admitted as a Barrister and Solicitor in New Zealand on 11 February 1977. From that date to the present he has remained in practice. He has been a sole practitioner since July 1985.
5. At the time of his application for approval under the present legislation the Applicant held approvals as a lead provider of Criminal Proceedings Categories 1, 2, and 3 and Duty Solicitor.

## **THE APPLICATION**

6. The Applicant seeks a review of the Secretary's decision for the reason that the Secretary failed to properly exercise his discretion pursuant to the Regulations in respect of the prescriptive requirements, and in particular, failed to take into account adequately or at all;
  - a. The Applicant's previous experience including jury trial experience in criminal practice over the past 33 years; and
  - b. His competence in acting at Criminal 2 and Criminal 3 levels over the past 5 years.
7. The Applicant expanded on his grounds for seeking a review by letter of 16 July 2012 in which he made the following relevant points:
  - a. He was sole counsel in the early 1990s in four indictable jury trials for two clients charged with rape.
  - b. He as well conducted jury trials in respect of a client charged with theft and another for a client charged with threatening to kill.

- c. He provided case examples of cases he had conducted in the District Court over the past 5 years involving assault with a weapon; assault and wilful damage; assault; and breach of Protection Order; male assaults female and wilful damage.
  - d. The case examples were in addition to 4 examples submitted at the time of his application for approval.
8. The Secretary responded to the application for review on 23 November 2012 and made the following points:
  - a. The Applicant's most recent experience in Criminal PC3 matters occurred in the late 1990s.
  - b. That while the matters put forward were of sufficient gravity there was a concern that the experience portrayed was not an accurate indication of the Applicant's current competence.
  - c. That he was not satisfied that the Applicant had demonstrated the appropriate level of knowledge and skill to undertake proceedings in Criminal PC2 and Criminal PC3 given that the Applicant had undertaken one trial only in the past 5 years in respect of Criminal PC3 and had not appeared in a trial on indictment in the past 10 years and thus could not satisfy the knowledge and skill requirements in respect of Criminal PC2.
9. The applicant responded to the Secretary's submission through Counsel by memorandum of 12 December 2012.
10. In respect of the application to be approved for Criminal PC2 Counsel emphasised;
  - a. That the decision maker has run together the "recent experience" criterion under cl 3(a) of the Schedule to the Regulations and the "substantial and active involvement in at least 3 trials on indictment before a jury of a judge alone", thereby effectively requiring the Applicant to show recent "substantive and active involvement in trials on indictment".

- b. That in terms of recent experience, the Applicant was only required to have at least 24 months' recent experience "working on" PC1 proceedings, which criterion he plainly satisfied.
- c. That in terms of cl 3(b), the Applicant was required to have appeared as counsel with substantial and active involvement in at least 3 "trials on indictment before a jury or before a judge alone". The Applicant had provided confirmation that he had in the past conducted as sole defence counsel at least three – indeed four – trials on indictment.
- d. That while that experience was not "recent", the Regulations did not require it to be.
- e. That at the least the Applicant should have approval for Criminal PC2 work.

11. That in respect of the application for approval for Criminal PC3, Counsel submitted:

- a. That the decision maker had misinterpreted cl 4 of the Schedule to the Regulations in appearing to have required the applicant to have shown recent "substantial and active involvement" in at least four PC3 or PC4 criminal proceedings.
- b. That the "recent" requirement prescribed by cl 4(a) is that of "at least 36 months' recent experience working on category 2 criminal proceedings".
- c. That the Applicant had many years of legal aid experience at PC2 right down to the time of submitting his application and thus his "experience working on" PC2 cases was well in excess of 36 months' and was also "recent" being within 5 years immediately before the application.
- d. That the Secretary is required to address and determine the two criteria stated in cls 4(a) and (b) of the Schedule separately. The Applicant has satisfied the first criterion for the reasons stated at (c) above.

- e. That the second criterion for PC3 in terms of experience and competence is stated in cl 4(b) to require an appearance as counsel “with substantial and active involvement” in at least four PC3 or PC4 criminal proceedings differs from the requirement set out in cl 2(b) of the Schedule. That clause requires appearances as counsel with substantial and active in at least three defended hearings and cl 3(b) which requires appearances as counsel with substantial and active involvement in at least 3 trials on indictment before a jury or a judge alone. Clause 4(b) does not require that the applicant’s involvement in PC3 or PC4 criminal proceedings be by way of trial or defended hearing.
- f. That there is no “recent” requirement in respect of the cl 4(b) criterion.
- g. That the case examples originally submitted together with the further detail of 4 earlier jury trials have satisfied the criterion in cl 4(b) given that the “substantial and active involvement” need not have been in relation to a defended hearing or trial. In any event the four earlier jury trials in which the applicant appeared as sole counsel would satisfy the criterion.
- h. That the criteria for the particular categories in the Schedule do not exist as an end in themselves. The fundamental requirement so far as experience and competence are concerned is that of reg 6(1). In relation to that requirement reg 6(2) requires the Secretary not only to apply the relevant experience and competence requirements set out in the schedule, but also to take into account or be satisfied as to the further matters stated in regs 6(2) and (c).
- i. That as a matter of interpretation reg 6(2) contemplates a stepped overall assessment and decision as to the sufficiency of an applicant’s experience and competence.
- j. That the different language used within reg6(2) is both revealing and deliberate. Under (a), the Secretary must “apply” the relevant requirements set out in the schedule. Under (b), the Secretary must “take into account” the applicant’s overall experience in practice. Finally under (c), the Secretary must “be satisfied that”

the applicant has the appropriate level of knowledge and skill to provide the legal services in question. Thus reg 6 read as a whole only requires the decision maker to “apply” the requirements set out in the Schedule, as a step along the way to ultimately being satisfied as to the necessary level of knowledge and skill

- k. Therefore, the assessment and decision as to the requisite experience and competence under reg 6 must be made on the basis of an overall assessment. In the Applicant’s case, that did not happen. In particular, the specified “recent experience” criteria in the schedule, while requiring to be addressed, must not be permitted to dominate the overall fate of the application which is what appears to have happened in the Applicant’s case

## **DISCUSSION**

12. I accept the submission that reg 6(1) establishes the fundamental requirement so far as experience and competence are concerned. In reaching a decision as to whether or not an applicant meets the fundamental criteria the Secretary must, however, take into account or be satisfied as to the matters stated in regs 6 (2)(b) and (c). Those matters are cumulative so that each must be present or satisfied. Thus, if an applicant does not meet the relevant experience and competence requirements set out in the Schedule, an application for approval cannot succeed even if all other matters are satisfied.

13. Regulation 6 has been amended. Subclauses (4- 7) came into force on 2 July 2012 and are applicable to applications for approval made after that date. The Secretary now has discretion to determine such an application favourably where an applicant does not meet the recent experience requirement set out in the Schedule but who has met the relevant experience and competence requirements in all other respects.

14. That discretion is not available to the Applicant who lodged his application for approval in December 2011. The amended subclauses are not stated to apply retrospectively.

15. I consider now the application to be approved for Category 3 Criminal Proceedings. I do so for the reason that if the Applicant is successful in

respect of that matter, approval for Category 2 Criminal Proceedings would follow without further enquiry

16. Counsel for the Applicant has argued for a separate determination of the two requirements stated in cls 4(a) and (b). The first requirement set out in clause 4(a) is “at least 36 months’ recent experience working on category 2 criminal proceedings”. The second requirement set out in cl 4(c) is an appearance as counsel “with substantial and active involvement” in at least four category 3 or 4 criminal proceedings. There is no restriction of “recent experience” in meeting that requirement.

17. I accept those submissions. If the criteria set out in cls 4(a) and (b) are to be run together, then the wording of the subclauses would have to make it plain that “36 months recent experience” was applicable to appearance as counsel by commencing the wording of cl 4(b) with “within the period of 36 months” or similar

18. As an alternative, if “36 months recent experience” is to apply to cls 4(a) and (b), those words could have been placed before (a). The clause would appear thus;

For category 3 criminal proceedings, the applicant must have at least 36 months recent experience of –

(a) Working on category 2 criminal proceedings: and

(b) Appearances as counsel *et seq* –).

19. I find that the present wording of clause applies the “36 months recent experience” requirement to cl 4(a) only.

20. Given my acceptance of Counsel’s submission, I am able to satisfy myself that the Applicant has met the requirements for approval as a lead provider in respect of Criminal Proceedings Category 3 for the following reasons:

a. His application and the case examples provided show that he has had 36 months recent experience working on Category 2 criminal proceedings; and

b. He has appeared as counsel with substantial and active involvement in at least 4 Category 3 or 4 criminal proceedings as

evidenced by his appearance as sole counsel in 4 rape trials. In addition there are the other case examples which he submitted showing detailed information and which displayed thoroughness on his part.

21. It follows, that being satisfied in respect of category 3 criminal proceedings, approval in respect of category 2 criminal proceedings can also occur

## **DECISION**

22. For the reasons that I have set out above, pursuant to s 86(1) of the Act, I reverse the decision of the Secretary made on 1 October 2012 declining approval of the Applicant as a lead provider of legal aid services in respect of Category 2 and 3 criminal proceedings

BJ Kendall  
Review Authority