

Applicant

AQ

Respondent

Secretary for Justice

Date of Decision:

5 March 2013

DECISION

INTRODUCTION

1. In a decision dated 24 December 2012, The Secretary for Justice (the Secretary) declined to approve the Applicant as a provider of legal aid services in respect of Civil, Criminal PC 1-4, Mental Health, Refugee, Court of Appeal and Supreme Court proceedings.
2. The Secretary communicated his decision to the Applicant by letter of 7 January 2013.
3. The Secretary's decision records that the Applicant has not demonstrated experience and competence in the matters referred to in that:
 - a. He had not provided the requisite number of case examples required for each area of law.
 - b. He provided 5 Civil case examples of which 1 was as a judge and thus did not meet the requirements of the criteria in Clause 8(b) and (c) of the Schedule to the Legal Services (Quality Assurance) Regulations 2011 (the Regulations).
 - c. He did not provide any case examples or work samples for Mental Health and Refugee areas of law.
 - d. He provided only 2 examples for Court of Appeal and Supreme Court and did not provide work samples.

- e. He provided only 1 case example for PC4.
4. The decision refers to the discretion the Secretary has in respect of an applicant who is unable to satisfy the relevant experience and competence requirements set out in the schedule to the Regulations. The Secretary noted that he may take into account an applicant's experience gained more than five years previous to the date of the application. The Secretary went on to say that while overseas experience can be taken into account, the lack of case examples demonstrating experience and competence posed a hurdle for the Applicant. He decided that the application must fail because of the Applicant's inability to provide the requisite number of case examples in each area of law.
 5. The Secretary held that the discretion under reg 6(5) is limited to taking into account experience gained more than five years previous to the application.
 6. The Secretary's decision does not disclose whether or not approval has been granted to the Applicant to provide legal aid services in respect of Duty Solicitor, PDLA, and Maori Land/ Appellate Courts and Waitangi Tribunal. His letter to the applicant dated 7 January 2013, however, does advise the Applicant that he has been declined approval in respect of Duty Solicitor and PDLA. It also informs him that his application for Maori Land Court/ Appellate Courts and Waitangi Tribunal was deemed incomplete and was not referred to the Waitangi Selection Committee.
 7. The Applicant seeks a review of the Secretary's decision.

BACKGROUND

8. The Applicant gained admission as a Barrister and Solicitor in New Zealand on 24 November 2010. Prior to coming to New Zealand in 2009, the Applicant had practised law since 1977. He has practised in the Jurisdictions of Ireland, South Africa and Lesotho.
9. He has wide experience in civil litigation, family matters, employment and labour law, administrative and constitutional law and criminal law

including working under the *pro deo* system which is described as the South African equivalent to the Legal Aid System in New Zealand.

10. The Applicant held the status of Senior Counsel in South Africa from 2006 and was an Acting Judge in the High Court of South Africa in the years 2000, 2003, 2007 and 2008 for different periods and in the various divisions of the Court. He presided over civil, criminal trials and appeals. He also held appointments as Head of Investigations of the South African Post-Apartheid Truth Reconciliation Commission and to the Regional Police Inspectorate which appointment included the monitoring and reporting on the role of the apartheid South African security forces during the first non-racial democratic elections.

THE APPLICATION

11. The Applicant seeks a review of the Secretary's decision for reasons which he set out in writing received on 30 January 2013, I summarise the relevant submissions as follows:
 - a. His application for approval as a lead provider of legal aid services was made on the basis that the Secretary exercise his discretion to dispense with the statutory requirement of case experience in New Zealand.
 - b. It is trite that he does not have the requisite number of case experiences required by the Regulations.
 - c. That length of practice as a litigator and the nature of such practice contribute to the assessment of an applicant's competence.
 - d. That a proper interpretation of the Secretary's discretion under the Act and Regulations is that where there is no or insufficient New Zealand legal experience, the Secretary must have recourse to other relevant information to determine competence of an applicant to become a legal aid provider.

- e. That in the absence of sufficient New Zealand case samples, the Secretary should have had regard to his extensive litigation and adjudication experience in other jurisdictions.

12. The Secretary responded to the application on 8 February 2013 and made the following points of relevance:

- a. The prescribed number of cases for each category or area of law is the prescribed minimum to assess an applicant's experience for approval. The giving of the requisite number of case examples and a work sample allows an assessment to be made by Ministry advisers and the Selection Committee.
- b. The lack of case examples posed a hurdle for the applicant when considering reg 6 and the discretion available to the Secretary. Regulation 6(2)(a) is mandatory requiring the Secretary to apply the relevant experience and competence requirements set out in the Schedule. He refers to the Authority's decision in 2012 NZRA 0021 in support of this submission.
- c. While acknowledging that overseas legal experience can be taken into account, the lack of the required number of case examples demonstrating experience and competence meant that the applicant did not meet the relevant experience and competence requirements set out in the Schedule for the areas of law applied for.

13. The Applicant answered the Secretary's submission in writing dated 18 February 2013. He submitted:

- a. That on a proper interpretation of reg 6(2) any one of the requirements set out would suffice to determine whether or not an applicant meets the criteria for experience and competence.
- b. That the scheme of reg 6(5) suggests that the Secretary can determine experience and competence of an applicant without having recourse to New Zealand case work examples by being satisfied that the "*applicant meets the relevant experience and competence requirements in all other respects*" and as well has "*the appropriate level of knowledge and skill to provide legal aid services in each area of law to which the application relates*".

- c. That the Secretary's refusal to exercise his discretion in favour of the Applicant because of the absence of New Zealand case examples was irregular and contrary to the law.
- d. That the Regulations provide for the discretion primarily in circumstances where an applicant does not have the necessary case law experience in New Zealand but is nonetheless highly qualified, experienced and competent in the legal field.
- e. That he had provided samples of his work as an Acting High Court Judge, pleadings and affidavits drafted as a legal practitioner and other relevant documents relevant to determining the extent of his competence and experience as a lawyer over 30 years.

DISCUSSION

14. The matters set out in reg 6(2) are mandatory and each must be satisfied. The use of the word '*and*' at the end of each sub clause makes that clear. If any one of them is not met then an application for approval as a provider of legal aid services will fail. That was the reason for my decision in 2012 NZRA 0021. There was no discretion available to the Secretary under the law applicable at the time of the application in that case.
15. On 2 July 2012, reg 6 was amended. New sub clauses 4 – 7 were inserted. The effect of these new sub clauses was to give the Secretary discretion to approve an applicant as a provider of legal aid services notwithstanding that the applicant could not satisfy the '*recent experience*' requirements set out in the Schedule.
16. The Applicant relies on the exercise of that discretion for the success of his application.
17. For his application to succeed, the Applicant must satisfy the Secretary that;
- a. he meets the relevant experience and competence requirements apart from it being recent experience; and
 - b. show experience as a lawyer; and

- c. that he has the appropriate level of knowledge and skill to provide legal aid services or specified legal services in each area of law to which the application relates.

18. I do not find anything in reg 6(5) that requires experience and competence to be confined to legal experience in New Zealand.

19. The question then is whether the Applicant can satisfy the matters set out in para 17.

20. I find that the Applicant can meet the required tests for the following reasons:

- a. He has extensive experience in all categories of criminal law.
- b. He has wide experience in civil litigation.
- c. Both of the above matters demonstrate his experience as a lawyer.
- d. Combined with (c) above, his work as a *pro deo* lawyer and his time as an Acting Judge of the High Court of South Africa demonstrate that he has the appropriated level of knowledge and skill to provide legal aid services.
- e. He has been admitted as a Barrister and Solicitor in New Zealand and has approval to practise as a barrister sole.

21. The Applicant has not demonstrated that he has experience and competence in the areas of Mental Health, Refugee and Maori Land/Appellate Courts or Waitangi Tribunal.

DECISION

22. Accordingly, I modify the decision under review by granting approval of the Applicant as a lead provider of legal aid services for;

- a. Civil
- b. Criminal PC 1-4

- c. Court of Appeal and Supreme Court
- d. Duty Solicitor
- e. PDLA

23. The approval will be for a period of 3 years from 1 March 2013.

BJ Kendall
Review Authority