

Applicant

AR

Respondent

Secretary for Justice

Date of Decision:

15 July 2013

DECISION

INTRODUCTION

1. The Applicant applied for temporary approval to act for the appellant in an application to vacate pleas of guilty for a Criminal PC3 matter. The appellant had pleaded guilty to 10 charges while represented by another lawyer. He has asked the Applicant to act for him in his appeal against his conviction.
2. The Secretary for Justice (the Secretary) declined approval in a decision dated 30 May 2013.
3. The Secretary in reaching a decision to decline approval noted the following:
 - a. The Applicant's experience in appellate work was largely limited to lower level offences. His work included preparation of submissions for two appeals in the Court of Appeal and involvement in a number of appeals related to summary offences. In 2012 he appeared in the Court of Appeal to appeal against a pre-trial ruling.
 - b. There are 78 legal aid providers in Auckland who have approval for Criminal PC3, PC4 and Court of Appeal and Supreme Court.
 - c. The need for counsel to have substantial experience in the area of law for which approval is asked is not outweighed by the Applicant's relationship with the Appellant.

- d. Given the number of providers with sufficient experience and required approvals, it is not necessary to grant the Applicant temporary approval in order to meet the services required by the appellant.
4. The Applicant seeks a review of the Secretary's decision

THE APPLICATION

5. The Applicant submits that one highly relevant factor has not been taken into account in reaching the decision to grant temporary approval and that is that he has the Appellant's full confidence.
6. He lists the following in support of that contention:
- a. He has spent considerable time discussing options, legal and other consequences of those options and the grounds of appeal
 - b. That he has made it clear to the Appellant that he would pursue his fully informed instructions.
 - c. As a consequence the Appellant has confidence in the Applicant's representation and should be assigned as his Counsel under legal aid.
 - d. The Appellant is fully aware of his right to complain about Counsel and dismiss any Counsel that he feels is not pursuing his interests appropriately and this would apply to any Counsel assigned for the appeal which would create potential difficulty.
 - e. Granting the Applicant temporary approval would avoid the potential difficulties.
 - f. The Applicant is fully versed in the facts and legal issues for the appeal. He submits that this further reduces the administrative costs arising from the appointment of another Counsel.
7. The Secretary's response to the Application for Review makes the following points.
- a. That the client's confidence in the Applicant is not an overriding consideration that the Secretary must take into account in determining a 'need for services'

- b. The Client's confidence in the Applicant does not preclude other Counsel from being able to gain the Appellant's full confidence.
 - c. The Applicant's knowledge of the client and of the case does not outweigh the need for experienced counsel.
 - d. Given the number of experience Counsel who already hold approval there are no urgency requirements that would suggest that there is insufficient time to instruct new counsel.
 - e. Temporary approval is only granted to a lawyer where he has been granted legal aid or where there is an application for aid and temporary approval is granted subject to aid being granted. In this case the Appellant has been refused legal aid.
8. The Applicant has responded advising that the Appellant has sought a reconsideration of the decision not to grant him aid which is yet to be determined.
9. He contends also that the appeal is a relatively straightforward matter not requiring special experience, the more so because he has a firm grasp of the issues.

DISCUSSION

10. Section 77(5) of the Legal Services Act 2011 (the Act) governs the granting of temporary approval to a lawyer to provide legal aid services. That subsection states

The Secretary may give a person a temporary approval to provide 1 or more legal aid services or specified legal services if-

*(a) the person has applied for approval to provide those services;
and*

(b) the Secretary considers that giving the temporary approval is necessary to meet a need for those services

11. Subsection (5) stipulates two requirements that are prerequisites to the granting of temporary approval. They are;

- a. An application for approval to provide the services in question;
and

- b. That the giving of temporary approval is necessary to meet a need for those services.
12. The subsection contemplates the granting of temporary approval because of a need arising where the application for approval to provide legal services is being assessed and/or is pending decision by the Secretary.
13. In this matter, the Applicant has not applied for approval as a provider of legal aid services before the Court of Appeal and Supreme Court. He has not presented any information to allow consideration of such an application as required by Clause 13 of the Schedule to the Legal Services (Quality Assurance) Regulations 2011 as amended and reprinted as at 2 July 2012
14. I find, in any event, that the Applicant has not satisfied the requirement to show a necessity to meet the requirement of a need to provide the services for which he seeks temporary approval.

DECISION

15. Accordingly, I confirm the decision of the Secretary declining temporary approval.
16. I draw attention to the wording of the Secretary's Guideline for Temporary Approval Applications and the section titled 'Who can apply' ('the Policy'). I note that the Secretary's Policy states that an "application for temporary approval as a lead provider may be submitted by an approved provider, a new applicant who is in the process for applying for approval and a person who is not approved".

I consider that the Secretary's policy is stated more widely than section 77(5) of the Act. Under that subsection only those people who have submitted an application to provide legal services may also submit an application to provide temporary technical services. I direct the Secretary's attention to this misleading aspect of the Policy.

BJ Kendall
Review Authority