

**Reference No. RA 001/2016**

**BETWEEN**

**D  
APPLICANT**

**AND**

**Secretary for Justice  
RESPONDENT**

**Date of Decision:**

**25 September 2016**

**Date Issued:**

**26 September 2016**

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**DECISION**

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**INTRODUCTION**

1. In a decision dated 1 July 2016, The Secretary for Justice (“the Secretary”) declined approval of the Applicant as a lead provider approval level 3 criminal proceedings under the Legal Services Act 2011.
2. The Secretary decided that the Applicant did meet the criteria for approval under the Legal Services Act 2011 and the Legal Services (Quality Assurance) Regulations 2011 as follows:
  - a. He met the Professional entry requirements.
  - b. He has service delivery systems that support him to provide and account for legal aid services in an effective, efficient and ethical manner.
  - c. He provided references that supported his experience and knowledge of the criminal law.

3. The Secretary was not satisfied, however, that the Applicant had demonstrated experience and competence in approval level 3 criminal proceedings for the following reasons:
  - a. He had not demonstrated 36 months' recent experience working on approval level 2 criminal proceedings, and
  - b. He had not demonstrated substantial and active involvement in at least 4 approval level 3 criminal proceedings.
  - c. That he did not have the appropriate level of knowledge and skill for approval for approval level 3 criminal proceedings because he had not run such a proceeding on his own.
4. The Secretary suggested that the Applicant would benefit from obtaining further experience in approval level 3 criminal proceedings as a junior, focusing on developing his skills in all areas of trial work.
5. The Applicant seeks a review of the Secretary's decision.

## **BACKGROUND**

6. The Applicant had been practicing criminal law for 5.5 years as at the date of his application for approval as a lead provider of approval level 3 criminal proceedings which was dated 18 April 2016.
7. He has been an approved lead provider of approval level 2 criminal proceedings since August 2013. Over that time and also prior to approval he has been engaged in excess of 40 such matters.
8. In respect of approval level 3 criminal proceedings, he has acted as junior counsel in 5 matters which have involved him in researching the law, briefing the evidence of defendant and witnesses, drafting documents, cross-examination of witnesses including police and experts, assisting with preparation for trial, an opening address, making submissions on the law during trial. Two of the matters involved his attendance at trial for 8 and 12 days respectively to assist lead counsel.

## THE APPLICATION

9. The Applicant advances two grounds in support of his application to review the Secretary's decision.
10. He submits that the Secretary was wrong to hold that he must have 36 months experience in approval level 2 criminal proceedings after the date of being approved as a lead provider for those matters. Secondly, he submits that the Secretary erred in determining that he did not meet the experience requirement of active and substantial involvement in at least four approval level 3 criminal proceedings.
11. As to the requirement to have 36 months' experience in approval level 2 criminal proceedings, the applicant submits that the regulations state that he must have 36 months recent experience working on approval level 2 criminal proceedings and not that he needed to have held approval as a legal aid provider for 36 months in respect of such proceedings.
12. In response to that submission, the Secretary relies on the Authority's decision in *AE v Secretary for Justice* (RA 005/12). That decision considered the requirements of clause 4 of the Schedule to the Legal Services (Quality Assurance) Regulations 2011 (the Schedule). The Secretary submits that paragraph 15 of the decision establishes a requirement that an applicant must have 36 months recent experience working as a provider of legal aid on approval level 2 criminal proceedings. The Applicant had been an approved provider of legal aid services since August 2013 in respect of such proceedings and so did not meet the requirement of 36 months recent experience as at the date of his application.
13. Clause 1 of the Schedule defines *approval level 2 criminal proceedings* as meaning any proceeding—
  - a. that is a Crown prosecution; and
  - b. where the person charged may be liable to a penalty of no more than 10 years' imprisonment
14. Clause 1 of the Schedule goes on to define *approval level 3 criminal proceedings* as meaning any proceeding—

- a. that is a Crown prosecution; and
- b. where the person charged may be liable to a penalty of more than 10 years' imprisonment; and
- c. that is not an approval level 4 criminal proceeding.

15. The Schedule sets out the experience and competence requirements for criminal matters. Clause 4 provides that an applicant for *approval level 3 criminal proceedings must—*

- a. have at least 36 months' recent experience working on approval level 2 criminal proceedings; and
- b. have appeared as counsel with substantial and active involvement in at least 4 approval level 3 or 4 criminal proceedings where—
  - i. at least 1 charge carries a maximum penalty of 10 years' imprisonment or more; or
  - ii. the person charged is likely to face cumulative sentences of more than 10 years' imprisonment.

16. The requirements of the schedule were discussed in *AE v Secretary for Justice (above)* at paragraphs 14 - 17.

*[14] There are thus 2 qualifying requirements that an applicant must satisfy to gain approval as a provider of Category 3 criminal proceedings. The first is at least 36 months' recent experience working on Category 2 criminal proceedings. The second requirement is to have appeared as counsel with substantial and active involvement in at least 4 category 3 or 4 criminal proceedings.*

*[15] The first requirement is expected to be satisfied by the applicant having appeared as counsel for defendants at trial thereby gaining practical experience in all facets of a criminal trial and that is by virtue of being approved as a provider for Category 2 criminal proceedings.*

*[16] The second requirement stipulates 2 matters that an applicant for approval as a provider of Category 3 criminal*

*proceedings must satisfy. First the applicant must have appeared as counsel and secondly must have had substantial and active involvement in the specified category of criminal proceeding which is in this case is Category 3. That requirement rules out an appearance as an observer of the proceedings.*

*[17] My view of the test for “substantial and active involvement” is that an applicant for approval is not required to show that he or she has conducted a Category 3 criminal proceeding alone. Substantial and active involvement will encompass such steps as researching the law, interviewing witness, cross-examination, making submissions, making opening/closing addresses, appearing at sentence, and appearances in support of or in response to an appeal.*

17. Clause 4 (a) of the Schedule is directed to experience working on approval level 2 criminal proceedings. It is silent as to whether or not that experience has to be gained after an applicant has been approved as a provider of legal aid services for those matters. Such experience can be gained from working on such matters before and after being approved as a provider of legal aid services. Such experience could also be gained by working independently on approval level 2 criminal proceedings for the requisite period of 36 months over a period of 5 years preceding the making of an application. I find support for my view when reference is made to clause 3 of the Schedule where an applicant for approval as a provider of approval level 2 criminal proceedings is required to have appeared as counsel with substantial and active involvement in at least 3 trials in proceedings that are Crown prosecutions. There is no reference to having to be an approved provider.

18. Paragraph [15] of the decision above recognises that an applicant for approval as a provider of approval level 3 criminal proceedings will in all likelihood have gained his or her experience as an approved provider of approval level 2 criminal proceedings. It does not exclude experience gained before approval.

19. I am satisfied that the Applicant has proved that he has the requisite recent experience to be approved as a provider of approval level 3

criminal proceedings and accordingly reverse the Secretary's decision on that matter.

20. The Applicant must next prove that he has had substantial and active involvement in at least 4 approval level 3 or 4 criminal proceedings. I note that the Secretary did consider an additional case example from a May trial involving 19 charges in which the Applicant was engaged as junior counsel. The trial took up 8 days of hearing time during which the applicant was present to assist senior counsel.

21. I have set out in paragraph 8 above the detail of the Applicant's involvement in 5 approval level 3 criminal proceedings.

22. The Secretary has submitted that three of the case examples only show involvement in pre-trial activities and cross-examination, while one shows no trial work. The Secretary has acknowledged that case examples do not need to show involvement in all steps of the proceedings. There nevertheless has to be substantial and active involvement shown in each of the case examples that have been submitted.

23. I find that the Secretary was correct to hold that the Applicant has not displayed substantial and active involvement in each of the case examples he has submitted. It is not necessary that the Applicant has conducted an approval category 3 criminal proceeding alone, but he must show from the case examples and work samples that he has an ability to undertake a trial from start to finish.

24. I agree with the Secretary's observation that the Applicant is close to meeting the requirements of clause 4 and would benefit from obtaining further experience in approval Category 3 criminal proceedings which will allow him to obtain skills in all areas of trial work.

25. I accordingly determine this application for review by confirming the decision of the Secretary under review.

A handwritten signature in black ink, appearing to read "BJ Kendall". The signature is written in a cursive style with a large initial "B" and "K".

BJ Kendall  
Review Authority