REVIEW AUTHORITY
NEW ZEALAND

[2023] NZRA 003

Applicant:	**W**
Respondent:	**Secretary for Justice**
Date of Decision:	**5 May 2023**

DECISION

The Applicant

[1] The Applicant worked as a judge's clerk for approximately 10 months immediately before he was admitted as a barrister and solicitor of the High Court. He continued working as a judge's clerk for a further period of approximately 14 months after his admission. He then started work as an employed barrister, taking out a practising certificate as a barrister at about that time.

[2] For a little over 3 years since then, the Applicant has continued practising as a barrister.

Application for Approval as a Provider of Appellate Legal Aid Services

[3] Shortly after the fifth anniversary of his admission to the bar, the Applicant applied to the Secretary for Justice ("the Secretary") for approval to provide appellate legal aid services (as defined in clause 14 of the Schedule ("Schedule") to the Legal Services (Quality Assurance) Regulations 2011 – "the Regulations"), in the Court of Appeal and the Supreme Court.

[4] In a decision given on 14 December 2022 ("the Secretary's Decision"), the Secretary declined the application for approval as a provider of appellate legal aid services.

Relevant provisions of the Regulations

[5] Under the Schedule, an applicant wishing to provide legal aid services in the Court of Appeal or the Supreme Court is required to meet the following minimum standards:[1]

> **14 Court of Appeal and Supreme Court**
>
> …
>
> (a) have at least 5 years' recent experience in litigation work; and
>
> (b) have had substantial and active involvement in 5 appeal proceedings of various types (including, without limitation, pre-trial hearings, Solicitor-General's appeal, and appeal by way of case stated), all of which must have been held in the High Court or in another higher court.

[6] "Recent experience" is defined in Regulation 3 of the Regulations. In respect of an application by a lawyer, the expression means "experience gained in the five years immediately before the date of the application".

[7] In addition to those minimum requirements, the Regulations require the Secretary to take into account a clause 14 applicant's experience as a lawyer,[2] and to be satisfied that the applicant has the appropriate level of knowledge and skill to provide legal aid services in each area of law to which the application relates.[3] Overall, where the applicant is a lawyer and is applying for lead provider approval, he or she must be experienced and competent in each area of law in which he or she intended to provide legal aid services.[4]

[8] The Regulations contain certain other criteria for approval, including criteria dealing with professional entry requirements (Regulation 5), and service delivery systems (Regulation 9). An applicant must also be a "fit and proper person" (Regulation 9(c)). None of those criteria appear to be relevant to this application.

The Secretary's Decision

[9] In the Secretary's Decision, the Secretary advised that the Selection Committee was not satisfied that the Applicant met the minimum period of recent experience for Court of Appeal and Supreme Court approval, which is at least five years in litigation work. The Secretary stated that judges' clerks are barred from providing legal services, representing clients or providing legal advice. The

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[1] Legal Services (Quality Assurance) Regulations 2011, Schedule, clause 14.
[2] Regulation 6(2)(b) of the Regulations.
[3] Regulation 6(2)(c) of the Regulations.
[4] Regulation 6(1) of the Regulations.

Secretary did not regard the role performed by a judge's clerk as constituting "litigation work" for the purpose of clause 14(a) of the Schedule. Thus, time spent working as a judge's clerk would not qualify as "litigation experience", as outlined at page 9 of the Secretary's Provider Manual for lawyers applying for approval to provide legal aid services.[5]

[10] The Secretary invited the Applicant to consider re-applying when he could meet the necessary minimum period of recent experience for this area of law.

The Review Application

[11] In his review application, the Applicant contended that work as a judge's clerk does qualify as "experience in litigation work" for the purposes of clause 14(a). He contended that the work involved litigation, because it was substantive work on active proceedings before the courts. It captured all the essential skills required to conduct litigation work: researching the law, reviewing and analysing submissions, reviewing and synthesising evidence, advancing arguments towards one conclusion, and providing reasons to dismiss opposing arguments.

[12] The Applicant referred to a recent advertisement seeking expressions of interest for the position of a judge's clerk. The advertisement included the following:

> The role of Judges' Clerk is to undertake legal research at the direction of the judge or judges to whom the clerk is allocated. Clerks write legal opinions and collate authorities on particular points. They provide comments to judges on their draft judgments and check those judgments for error before delivery. They also write summaries of recent decisions of the courts and provide analysis of issues arising in particular appeals or first instance hearings undertaken by the judges of the courts in which they work. They may also assist with the preparation of speeches and undertake some administrative tasks for their judges.

[13] The Applicant then referred to the decision of the Review Authority in *AE v Secretary for Justice* where, in the context of a discussion on the meaning of "substantial and active involvement" (as that expression is used in clause 14(b) and elsewhere in the Schedule), the Authority considered that the expression "will encompass such steps as researching the law, interviewing witnesses, briefing of evidence, drafting documents …".[6]

[14] The Applicant said that, during his time as a judge's clerk, he worked on numerous appeals relating to bail, and against sentence, pre-trial decisions and

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[5] *Applying to be a Legal Aid Provider: Step-by-step Guide* (published by the Secretary in 2021).
[6] *AE v Secretary for Justice* [2012] NZRA 000005 at [17].

conviction. He provided the Secretary with three examples of work he performed assisting a senior court judge who was hearing appeals. He submitted that his five years of recent experience should be regarded as having accrued from the date of his admission to the bar. On that basis, the computation of his five years' recent experience would include approximately 14 months spent working as a judge's clerk.

[15] The Applicant submitted that it would be an error to exclude judge's clerking from clause 14. To do so would not be consistent with the plain wording of the Regulations. Indeed, including judicial clerkships would be consistent with the overarching requirement of Regulation 6(1) of the Regulations that an applicant "must be experienced and competent in each area of law in which he or she intends to provide legal aid services or specified legal services". The Applicant also submitted that his experience as a judge's clerk is relevant to the requirement in Regulation 6(2)(c), that the Secretary must be satisfied that the Applicant has "the appropriate level of knowledge and skill to provide legal aid services … in each area of law to which the application relates".

[16] The Applicant next submitted that the Secretary's interpretation of clause 14 is at odds with section 30 of the Lawyers and Conveyancers Act 2006 and rule 3 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008. Regulation 3 expands the scope of "legal work" to include legal work as an employee of any of the State services (as defined in section 5 of the Public Service Act 2020). The Applicant submitted that that wording clearly captures judges' clerks employed by the Ministry of Justice.

[17] The Applicant noted that, on the Secretary's interpretation, the only thing he would have to do to meet the clause 14 requirements would be to wait for another year. He could spend that year representing clients in the District Court, without having to conduct any further appeals, and that would satisfy the requirements of clause 14. The Applicant submitted that that result would defy common sense.

[18] Finally, the Applicant contended that, because it is accepted that he satisfies clause 14(b) of the Schedule, the interests of justice require a more generous approach to the interpretation of clause 14(a) (which would take into account the Applicant's experience as a judge's clerk).

The Secretary's Response

[19] In his submissions for the Secretary, Mr Hurd accepted that the central issue is one of interpretation, namely the meaning of "litigation work" in Regulation 14 of the Regulations.

[20] Mr Hurd referred to the fact that judges' clerks are barred from representing clients or providing legal services, and he submitted that providing services to clients is qualitatively different to providing assistance to decision-makers. The requirement for recent experience should be interpreted as meaning experience of a similar nature to that for which approval is sought, that is, providing services to clients.

[21] In the event of the Authority not accepting the Secretary's interpretation, Mr Hurd asked that the application be remitted so that a decision could be made afresh applying the correct interpretation of clause 14(a).

The Issue

[22] The Applicant contends that work as a judge's clerk qualifies as "litigation work" for the purposes of clause 14(a) of the Schedule. The Secretary contends that "litigation work" (as that expression is used in clause 14(a)) means litigation work *as a lawyer* (or at least work of a similar nature to that performed by a litigation lawyer), and that working as a judge's clerk does not qualify.

Discussion

[23] As I observed in *Z v Secretary for Justice*, the requirements of the Schedule set out minimum standards which an applicant for provider status in a particular area of law set out in the Schedule must meet.[7] The Secretary (and the Authority on review) have no discretion to grant an application if the applicant does not meet each of the relevant minimum standards: Regulation 6(2)(a) provides that the Secretary "must apply" the relevant experience and competence requirements set out in the Schedule.

[24] There is no definition of "litigation work" in the Regulations or in the Legal Services Act 2011 ("the Act"), so the meaning of clause 14(a) must be ascertained from its text and in the light of its purpose and its context.[8] The "text" of legislation

[7] *Z v Secretary for Justice* [2023] NZRA 000001 at [53].
[8] Legislation Act 2019, s 10(1).

includes any "indications" provided in the legislation. "Indications" will include any headings in the legislation.[9]

[25] In this case, the purpose of the Regulations is clear. To the extent they relate to lawyers wishing to provide services to clients on legal aid, the Regulations are concerned with setting particular quality standards that such lawyers must meet, for each area of law in which they wish to provide legal aid services. The quality standards are generally concerned with an applicant's experience, levels of skill and knowledge, and overall competence to provide services as a lawyer in the particular area of law applied for.

[26] The Schedule sets out 14 particular areas of law, with mandatory (minimum) "experience and competence" requirements for each area. Clause 14 of the Schedule is preceded by the heading *"Experience and competence requirements in relation to appeals (civil or criminal)"*. Of the two requirements referred to in that heading, clause 14(a) is concerned solely with experience in litigation work. It is not directly concerned with an applicant's particular levels of knowledge or skill, whether in appellate advocacy or in general litigation work.

[27] "Recent experience in litigation work", then, should be construed in accordance with the ordinary meaning of those words, used in the context of regulations made for the purpose of prescribing standards for lawyers who wish to provide legal services to clients on legal aid.

[28] The Oxford English Dictionary (current online edition) provides two alternative modern meanings for the word "litigation". The first is "the action or process of carrying on a suit in law or equity; legal proceedings." The second is "the practice of going to law".

[29] In clause 14(a), however, the word "litigation" is not used on its own – it is used as a descriptor of a particular kind of "work". The "recent experience" referred to in clause 14(a) must therefore be recent experience "in" a particular kind of work.

[30] In ordinary English usage, I do not believe the descriptor "litigation" would normally be applied to the work of a judge's clerk (for example, I doubt that many judges' clerks, asked what they did for a living, would reply: "I am in litigation work"). "Litigation" is a more apt descriptor of the work done by someone who represents parties in proceedings before the courts.

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[9] Legislation Act 2019, s 10(3) and (4).

I think that meaning is also the one that is most consistent with the broad purpose of the Regulations. The Secretary's ultimate task under Regulation 6 and the Schedule is to decide if a particular lawyer has the overall experience and competence to provide legal services to clients who have been granted legal aid, and the broad purpose of those provisions is to guide the Secretary in the performance of that ultimate task. Given that broad purpose, it makes sense that the "recent experience" requirement of clause 14(a) should be a requirement for recent experience in representing parties in proceedings before the courts.

[31] Neither a judge nor a judge's clerk represents parties in proceedings before the courts — the judge provides judicial services, and the judge's clerk assists the judge in the discharge of the judge's judicial function.

[32] I think that view on the interpretation issue is reinforced by the number of significant differences between the functions of someone representing a party in proceedings before the courts on the one hand, and the functions of a judge or judge's clerk on the other. The judge and judge's clerk are not concerned with such matters as taking instruction from the party represented, deciding what further investigations may be appropriate, preparing pleadings in a civil case (including making decisions on which causes of action or defence may be appropriate and which (if any) should be abandoned), or (again in a civil case) selecting and prosecuting appropriate interlocutory steps such as discovery, further particulars, or interrogatories. Judges and judges' clerks do not prepare affidavits or briefs of evidence, and nor do they draft written submissions or present oral arguments. They are not required to make tactical or strategic choices as to which matters should be argued and which should not. They do not plan and undertake the examination, cross-examination, and re-examination of witnesses, and they do not have to make decisions as to which witnesses should be called at trial, or the order in which they should be called. They have no responsibility to communicate appropriately with a client or other represented party, or to manage the relationship with that party throughout the process. Finally, a judge's clerk's experience will not include advising that party whether, and if so how, a civil case should be settled, or whether there should be a change of plea in a criminal case. In short, the functions of judge and judge's clerk are different in numerous significant respects from the functions of someone who represents a party in proceedings before the courts.

[33] I think that interpretation of "litigation work" (as the expression is used in clause 14(a)) is consistent with other parts of the Regulations. Regulation 9A

requires an applicant to provide work samples as proof of his or her recent experience in each area of law to which the application relates, and the regulation says that those work samples may include any of the following:[10]

(a) correspondence to or on behalf of a client;

(b) research notes;

(c) affidavits;

(d) opening and closing addresses; and

(e) examination notes.

[34] With the sole exception of "research notes", a judge's clerk would not be able to provide work samples demonstrating that, in the course of his or her clerkship, he or she performed any of the listed tasks.

[35] While it is not directly concerned with the interpretation of clause 14(a), I note also that Regulation 6(2)(b) is not inconsistent with the view to which I have come. It provides that the Secretary, in considering an application under the Regulations, must take into account the applicant's experience *as a lawyer*.

[36] The Applicant submitted that working as a judge's clerk "captures all the essential skills required to conduct litigation work". He relied primarily on his experience (as a judge's clerk) carrying out legal research, analysing facts and law, and preparing memoranda on those matters for the judge. Those tasks do form a subset of the full skill-set a litigation lawyer must have, but, having regard to the matters discussed at paragraphs [31] to [32] above, it is a relatively small subset. The tasks do not capture all of the essential skills required to conduct litigation work.

[37] Nor do I think it matters that the Applicant may meet the requirements of clause 14(b) of the Schedule, or that the Applicant might be able to carry out Court of Appeal and Supreme Court appellate work competently. Clause 14(a) sets a stand-alone minimum requirement for an applicant to have the prescribed period of recent experience in litigation work — the subclause does not require consideration of an applicant's levels of knowledge or skill in the conduct of appellate work, and it is not concerned with the more particular requirements prescribed by subclause 14(b).

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[10] Regulations, Regulation 9A(3).

[38] The Applicant emphasises that he only seeks to have his time as a judge's clerk recognised for clause 14(a) purposes from the time he was admitted as a barrister and solicitor. But I cannot see how that could assist him. I am not concerned here with his status (lawyer or not) during that period, but with his experience, and whether that experience qualifies as experience in litigation work. I am not persuaded that being admitted as a barrister and solicitor would have made such a significant difference to the nature of the work the Applicant was then doing, that his post-admission work could have qualified as "litigation work" within the meaning of clause 14(a).

[39] I do not think the decision of the Authority in *AE v Secretary for Justice*,[11] referred to by the Applicant, assists him. The Applicant referred in his submissions to the views expressed by the Authority in that case on the meaning of the expression (used in clause 14(b) and elsewhere in the Schedule) "substantial and active involvement" in a proceeding, noting that one of the numerous tasks typically carried out by a litigation lawyer will be researching the law. I accept that someone engaging in "litigation work" is likely to regularly undertake or commission legal research, to analyse the facts and the law, and to write summary memoranda on those matters. But I do not think it follows that everyone who undertakes those tasks is performing "litigation work" within the meaning of clause 14(a).

[40] The Applicant referred to the Secretary's *Step-by-step Guide*, which suggests that roles such as in-house legal work, law clerking, lecturing and working as a judge's research counsel or clerk, will not be regarded by the Secretary as "litigation work" for the purposes of clause 14(a). The Applicant submitted that that statement in the Guide was in error, and that judge's clerking should be treated differently from the other stated occupations.

[41] That submission can be dealt with shortly. I am not directly concerned in this decision with statements made in the Secretary's Guidelines. The governing consideration must be the correct interpretation of the Regulations, having regard to their purpose and the context in which the relevant words appear. On my consideration of the relevant parts of the Regulations, I have come to the view that the work of a judge's clerk, as performed and described by the Applicant, does not constitute "litigation work" within the meaning of clause 14(a).

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[11] *AE v Secretary for Justice*, above n.6.

[42] The Applicant also referred to section 30 of the Lawyers and Conveyancers Act 2006, and to Regulation 3 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008 ("the lawyers' practice regulations"). Regulation 3 of the lawyers' practice regulations defines "legal experience" as including legal work carried out by a lawyer as an employee of any of the State services (as defined in section 5 of the Public Service Act 2020). The Applicant submits that that definition of legal experience clearly captures judges' clerks employed by the Ministry of Justice. That may be so, but I am concerned here with a specific kind of "legal experience", or "legal work" - *litigation work* – and the lawyers' practice regulations do not assist with the interpretation of that expression. Furthermore, the lawyers' practice regulations have a quite different purpose from the Regulations. They are concerned with broad matters relating to legal practice generally, such as a lawyer's entitlement to a practising certificate or to practise on his or her own account. Any definitions within the lawyers' practice regulations are therefore unlikely to inform the interpretation of regulations made under a different statute having the quite different purpose of prescribing quality assurance requirements for lawyers who wish to undertake litigation work on legal aid.

[43] The Applicant submitted that, given that there appears to be no issue that he qualifies for approval for Court of Appeal and Supreme Court appellate work in all respects but (possible) non-compliance with clause 14(a), it would defy common sense to refuse the review application and effectively require him to wait one further year for approval. He submitted that in that scenario he could theoretically do nothing but District Court litigation for the next year, without doing any more appeals, and would then satisfy the clause 14(a) standard simply as a result of the passage of time during the one year waiting period.

[44] Again, I cannot accept that submission. Clause 14(a) is not solely concerned with appeals; it speaks of litigation work generally, and it would not in my view be contrary to common sense if the Regulations stipulated as a minimum requirement that someone seeking lead counsel approval for the most senior appellate work should have had a prescribed period of broad experience in litigation work (which for most applicants will include some trial work). But even if that were not the intention of the framers of the Regulations, clause 14(a) imposes a mandatory requirement which the Secretary (and the Authority on review) are obliged to apply.

[45] Finally, the Applicant submitted that, because of the overall quality of his application (excluding the question of compliance with clause 14(a)), the Authority

should adopt a “more generous approach”. That submission faces the same difficulty. Neither the Secretary nor the Authority has the discretion to adopt such an approach. If an applicant cannot satisfy the Schedule provisions, the application must fail.

[46] In the end, I conclude that “recent experience in litigation work” (as that expression is used in clause 14(a) of the Schedule) means recent work experience representing parties in proceedings before the courts. I accept Mr. Hurd’s submission that work as a judge’s clerk (as performed and described by the Applicant) is qualitatively different from the “litigation work” referred to in clause 14(a) of the Schedule, and accordingly cannot be taken into account for the purposes of meeting the “recent experience” requirement of the subclause.

Decision

[47] Pursuant to section 86(1) of the Legal Services Act 2011, the decision of the Secretary refusing the Applicant’s application for approval to provide legal aid services before the Court of Appeal or the Supreme Court, is confirmed.

[48] In accordance with the Authority’s practice in earlier cases, I consider it appropriate in this case that the Applicant’s name should not be published. There will accordingly be an order that any publication of this decision is to have the Applicant’s name anonymised to a single initial.

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W A Smith
Review Authority