

**Applicant:** X

**Respondent:** Secretary for Justice

**Date of Decision:** 26 April 2023

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**DECISION**

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**Application for Approval as a Provider of Criminal Legal Aid Services**

[1] On 5 November 2022, the Applicant applied to the Secretary for Justice (“the Secretary”) for approval to provide criminal legal aid services at approval level 4 (as defined in the Schedule (“Schedule”) to the Legal Services (Quality Assurance) Regulations 2011 – “the Regulations”).

[2] Under the Schedule, an applicant for approval level 4 (“PAL 4”) is required to:<sup>1</sup>

- (a) have at least 24 months’ recent experience working on approval level 3 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 at least 1 of those proceedings is an approval level 4 criminal proceeding.

[3] An “approval level 4 criminal proceeding” is defined as follows in clause 1 of the Schedule:

**approval level 4 criminal proceedings** means any proceeding where the person charged—

- (a) is charged with—
  - (i) an offence listed in Schedule 1 of the Criminal Procedure Act 2011; or
  - (ii) any offence not listed in that schedule that is punishable by imprisonment for life; or

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<sup>1</sup> Legal Services (Quality Assurance) Regulations 2011, Schedule, clause 5.

(b) may be liable to a sentence of preventive detention.

[4] In addition to those minimum requirements, the Secretary is required to take into account the Applicant's experience as a lawyer,<sup>2</sup> 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.<sup>3</sup> Overall, where the Applicant is a lawyer, and is applying to be a lead provider, he or she must be experienced and competent in each area of law in which he or she intends to provide legal aid services.<sup>4</sup>

[5] 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 in issue in this application.

### **The Secretary's Decisions**

[6] On 28 November 2022, having considered the recommendation of a Selection Committee ("SC"), the Secretary declined the Applicant's application ("the November decision"). The Secretary gave the following reasons for the November decision:

- While the case examples provided by the Applicant did demonstrate significant in-trial involvement in two sexual violation trials and one multi-week murder trial, the SC was not satisfied that you had demonstrated substantial and active involvement in four criminal PAL 3/4 matters given that the fourth case example ["case P"] did not go to trial.
- The SC members found that only one case example ["case S"] was a PAL 4 case and were not satisfied that this demonstrated a sufficient range of experience in PAL 4 proceedings. It was noted that your covering letter referenced involvement in other PAL 4 trials which could have been included as case examples.
- The SC recommended that you provide an additional reference from PAL 4 counsel who can attest to your suitability for PAL 4 approval. The members noted that a reference from [referee "S"], while helpful, did not specifically speak to your suitability for PAL 4.
- You did not provide a copy of the substantive LCDT decision.<sup>5</sup> Question 20 of the application form asks you to include a copy of any LCDT decisions.

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<sup>2</sup> Regulation 6(2)(b) of the Regulations.

<sup>3</sup> Regulation 6(2)(c) of the Regulations.

<sup>4</sup> Regulation 6(1) of the Regulations.

<sup>5</sup> A reference to a complaint against the Applicant dealt with by the Lawyers and Conveyancers Disputes Tribunal.

[7] The Secretary recommended that the Applicant re-apply for criminal PAL 4 approval, with the following additional information:

- (a) Additional case examples demonstrating involvement in a variety of criminal PAL 4 trials.
- (b) An additional independent reference from senior counsel specifically attesting to your suitability for PAL 4 approval.
- (c) A copy of the LCDT decision of 13 September 2019.

[8] The November decision drew attention to the Applicant's entitlement to apply for an internal review of the November decision.

[9] The Applicant elected not to seek an internal review of the November decision. Instead, he filed a new application for criminal PAL 4 approval on 1 December 2022. With the new application, he provided everything originally filed, together with extra items to address the matters raised by the Secretary in the November decision. The additional material included references from two further PAL 4 criminal legal aid providers, a copy of the LCDT decision referred to, and an additional case sample from a PAL 4 trial in which the Applicant had been involved.

[10] The Secretary mistakenly treated the second application filed by the Applicant as an application for internal review of the November decision, and purported to decline the "internal review application" by letter dated 20 December 2022 ("the December decision"). It appears that the Secretary considered the recommendations of a further SC, before making the December decision.

[11] In the December decision, the Secretary offered the following reasons for declining the internal review:

- The SC was not satisfied that you had demonstrated sufficient experience in criminal PAL 4 matters for approval at that level.
- The SC members noted that you had only been involved in two criminal PAL 4 trials ... and, noting the significant jump in complexity and seriousness between PAL 3 and PAL 4, were not prepared to recommend approval without additional evidence of your involvement in PAL 4 trial work.
- The SC was not willing to rely heavily on the criminal PAL 3 trial examples provided. The members found that the cross-examination examples provided (particularly for ["case G"]) were not of the quality expected of a PAL 4 provider and did not show the level of knowledge and skill required for criminal PAL 4 approval.

- The SC sought additional examples of recent criminal PAL 4 trials where you had a substantial speaking role as well as additional cross-examination examples supported by Notes of Evidence.

[12] In the December decision, the Secretary invited the Applicant to re-apply for criminal PAL 4 approval when he was able to provide additional (recent) case examples demonstrating substantial and active involvement in criminal PAL 4 trials, including a substantial speaking role, and additional work samples showing the Applicant's cross-examination of witnesses in criminal PAL 4 trials.

[13] The December decision was said to be a final decision. The Secretary drew to the Applicant's attention his right to apply to the Review Authority under section 82 of the Legal Services Act 2011 ("the Act") for review, within 20 working days.

### **The Review Application**

[14] After receiving the December decision, the Applicant did not draw to the Secretary's attention the fact that the application filed by him on 1 December 2022 was a fresh application, and he did not ask for another internal review. Instead, he filed the present application for review with the Authority, asking that the December decision be reversed.

[15] In his review application, the Applicant said that he had been surprised when he received the December decision, referring as it did to an "internal review application". He expected his 1 December application to be treated as a new application, with an inherent right to seek an internal review if he was dissatisfied with the result. The Applicant then went on to say:

Nevertheless, it is submitted that, especially in a case such as this where the two applications were so closely connected, there was a legitimate expectation that the results of the first decision should inform the second decision: ie, that given the invitation to reapply, I was entitled to assume that any further application only had to address the matters set out in the original decision ...

[16] The Applicant submitted that at least two of the matters raised by the Secretary in the November decision appeared to have been sufficiently addressed by the time the Secretary made the December decision. First, it appeared that no issues remained over the (now dated) LCDT decision. Secondly, no issues appeared to remain over the four references the Applicant had (by then) provided. The only remaining issue appeared to the Applicant to relate to his case examples.

[17] Although the SC had noted that the Applicant had only been involved in two criminal PAL 4 trials, that should not have been a sufficient reason to refuse the application under the Secretary's own (2021) published Guidelines for people applying to be legal aid providers ("the Guidelines").<sup>6</sup> The Applicant's experience significantly surpassed the minimum requirements stated in the Guidelines, and only missed the indicative experience shown in the Guidelines by one PAL 4 trial.

[18] The Applicant next noted that the November decision made no criticism of "case G", or any other case in which the Applicant had been involved. The Applicant had provided a further PAL 4 case example ("case W"), and the December decision contained no explicit criticism of the Applicant's performance in "case W".

[19] The Applicant submitted that the SC's criticism of his cross-examination in "case G" was unfounded and wrong. "Case G" was a difficult multi-week trial, where the defendant's first language was not English, and the evidence against him seemed relatively strong. Notwithstanding those factors, at the end of a long and difficult trial, the jury found the defendant not guilty. The Applicant highlighted a number of features of the cross-examination transcript which he said likely assisted the jury in coming to the verdict it did.

[20] The Applicant noted that the SC never sought additional case examples from him.

[21] The Applicant emphasised the fact that he exceeded the minimum criteria set out in the Guidelines for PAL 4 approval, and he was close to achieving the indicative criteria for PAL 4 criminal approval. In those circumstances, the Secretary ought to have at least considered granting approval for PAL 4 criminal work subject to conditions.

### **The Secretary's Response**

[22] Mr Hurd filed submissions for the Secretary in response, on 24 February 2023. In his submissions, he expressly acknowledged that the Secretary had mistakenly progressed the application dated 1 December 2022 as an application for internal review of the November decision.

[23] Mr Hurd referred extensively to the Guidelines, including the table setting out minimum experience criteria for applicants under the Regulations. The first

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<sup>6</sup> *Applying to be a Legal Aid Provider: Step-by-step Guide*.

two columns in the extract produced by Mr Hurd set out the minimum statutory requirements for PAL 4 criminal providers that are prescribed by clause 5 of the Schedule. The third column set out the “Indicative” number of cases or proceedings (substantial and active involvement) the Secretary would look for in considering PAL 4 criminal applications. Under this third column, the text read:

Appeared as counsel with substantial and active involvement in 10 Criminal PAL 3 or 4 proceedings that progressed to at least the close of the Crown case where at least:

- 3 were Criminal PAL 4 proceedings, and
- 1 charge was for a sexual offence carrying a maximum penalty of 14 years’ imprisonment or more.

[24] The Guidelines make it clear that the third column (Indicative number of cases or proceedings) is intended to operate as a guideline only, and not as a substitute for the requirements of the Regulations.

[25] Turning to the specific features of the Applicant’s application, Mr Hurd noted that the Applicant has practised criminal law for approximately 19 years. He summarised the case examples provided by the Applicant, including three PAL 3 proceedings in which the Applicant had been lead counsel. In two of these cases, the Secretary acknowledged that the Applicant had undertaken all or most of the pre-trial work and trial work. In the third case, the Applicant undertook all the work, but the matter was resolved just before trial with a guilty plea to a lower charge.

[26] The fourth case example referred to by Mr Hurd was a murder trial (PAL 4) in which the Applicant had appeared as junior counsel. Mr Hurd acknowledged that the Applicant had cross-examined some Crown witnesses, had opened for the defendant, and had led the defendant’s evidence in chief. Mr Hurd also acknowledged the Applicant’s reference to five other PAL 3 cases and one PAL 4 case in which he had been involved in the period between 2018 and 2019.

[27] He further acknowledged the additional material provided by the Applicant after the November decision, including an additional PAL 4 case example (“case W”, involving a charge or charges of importing a class A drug, in which the Applicant appeared as junior counsel), two additional references from experienced PAL 4 providers, and the LCDT decision. The Applicant was involved in client discussions, research, and cross-examination of three Crown witnesses in “case W”.

[28] Mr Hurd submitted that PAL 4 proceedings are the most serious criminal proceedings, where indeterminate sentences of life imprisonment and preventive detention are available. He referred to the Guidelines in support of a submission that a typical applicant for PAL 4 approval will have appeared as counsel, with substantial and active involvement, in 10 PAL 3 or 4 proceedings that have progressed to at least the close of the Crown case. Those 10 cases will have included at least three proceedings which are PAL 4 criminal proceedings, and at least one proceeding involving a charge for a sexual offence carrying a maximum penalty of 14 years' imprisonment or more.

[29] Mr Hurd accepted that, at least by the time of the December decision, the Applicant had shown that he met the minimum requirements of both clause 5(a) and clause 5(b) of the Schedule. He submitted that the sole remaining issue is whether the Applicant is, overall, sufficiently experienced and competent to be approved at PAL 4. To meet that standard, the Secretary must be satisfied that an applicant can competently run a PAL 4 proceeding from start to finish, unaided.

[30] Mr. Hurd advised that the Secretary considers that the Applicant presently falls short of that standard. He has limited experience at the PAL 4 level, with only two examples provided. In addition, the Secretary has some unresolved concerns about the quality of the Applicant's representation at the PAL 3 level. One of the two SCs who considered the Applicant's applications was critical of his examples of cross-examination, particularly in "case G". In addition, Mr Hurd produced a copy of a decision of the Court of Appeal, in a case where the Applicant had appeared for the appellant at trial. The appellant's conviction at trial was quashed by the Court of Appeal, on the basis that his decision not to give evidence had not been sufficiently informed by appropriate advice from the Applicant, and that a miscarriage of justice had occurred as a result.

[31] Having regard to those considerations, Mr Hurd advised that the Secretary has reservations about whether the Applicant can competently run a trial at the highest level.

### **The Applicant's Reply**

[32] I invited the Applicant to make submissions in reply by 8 March 2023. He provided those submissions on 9 March 2023. Although those submissions were one day late, the delay is very small, and the Secretary is not prejudiced by it. I will receive and consider the reply submissions.

[33] The Applicant submitted that there had been procedural unfairness in the Secretary's processes, in that issues arising from the first SC's recommendations were addressed in the Applicant's second application, but the second SC then raised further issues in respect of matters arising from the *first* application, which had not previously been raised as an issue and should have been addressed in the November decision (this related to the second SC's criticism of the Applicant's cross-examination in "case G"). The Applicant also submitted that a further breach of natural justice occurred when counsel for the Secretary referred to the Court of Appeal decision in which the Applicant's performance at trial was criticised. Neither the November decision nor the December decision referred to the Court of Appeal decision, and that decision cannot now be relied upon by the Secretary.

[34] The Applicant submitted that the December decision was also substantively flawed. He first referred to the Guidelines, submitting that he only fell short on one aspect of the Indicative experience requirements set out there for PAL 4 criminal providers.

[35] Secondly, the Secretary should not have ignored his references, particularly as he submitted twice as many references from colleagues as were required. These PAL 4 providers were clearly of the view that he had the required skills, knowledge and experience to act as a PAL criminal provider.

[36] On the question of the Applicant's cross-examination in "case G", the Applicant noted that Mr Hurd's submissions did nothing to address the points made by the Applicant about that cross-examination in his application for review.

[37] In the event that I should allow the Secretary to refer to the Court of Appeal decision, the Applicant submitted that there were a number of mitigating factors. First, the error was made in June 2018, at a time when the Applicant was suffering from certain health issues from which the Applicant is now rehabilitated. There is nothing to suggest that this error has been repeated since the Applicant's period of rehabilitation (a period that exceeds the 24-month period seen as relevant in the Regulations). Thirdly, an "aged error" of this type should not make it impossible for an applicant to be granted PAL 4 approval. Many PAL 4 providers have made more fundamental (and even perhaps more recent) errors, but they have been granted and/or continued to hold a PAL 4 listing. The Applicant referred to one such case where the Court of Appeal found that the defendant's counsel had made more significant and egregious errors. That practitioner currently holds a PAL 4 listing.



[38] As an alternative to the foregoing submissions, the Applicant raised the possibility of approval at PAL 4 level subject to appropriate conditions. One such condition might include requiring that the Applicant be supervised by another PAL 4 lawyer in respect of his first jury trial at PAL 4 level.

## Discussion

### *Legal principles*

[39] I considered the provisions of Regulation 6, and the Schedule, at some length in my recent decisions in *Z v Secretary for Justice*<sup>7</sup> and *Y v Secretary for Justice*.<sup>8</sup> The latter case, in particular, addressed the application of the knowledge and skill requirements of Regulation 6(2)(c), and I think the approach I took in those cases on the knowledge and skill requirements and on the broad general competence requirements, are equally applicable in this case.

[40] One other broad principle falls to be considered in this case. In *AC v Secretary for Justice*, the Review Authority considered that the principles of natural justice apply to applications for approval made under the Regulations, including the principle that an applicant should have an opportunity to respond to any decision which the Secretary intends to make which is adverse to the applicant.<sup>9</sup>

[41] I agree with the Authority's view that the Secretary should apply the principles of natural justice to applications for approval, at least so far as they can be applied consistently with purposes of the Act and the Regulations. I agree too, with the view expressed by the Authority in *AC v Secretary for Justice* that review applications should proceed before the Authority as a consideration *de novo*, on the papers specified in regulation 27 of the Regulations.<sup>10</sup> The effect of that is that many procedural deficiencies that may have occurred in the procedures adopted by the Secretary, are likely to be capable of remedy by the Authority on review.

### *Procedural issues*

[42] I will address first the procedural issues raised by the Applicant.

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<sup>7</sup> *Z v Secretary for Justice* [2023] NZRA 001. Refer in particular to paragraphs [53] to [54], [64] to [65], [68] and [74] to [76].

<sup>8</sup> *Y v Secretary for Justice* [2023] NZRA 004 at [41] to [45].

<sup>9</sup> *AC v Secretary for Justice* [2012] NZRA 003 at [16] to [24].

<sup>10</sup> At [27].

[43] First, I do not consider that the filing of the new application on 1 December 2022, immediately after the November decision was given, could reasonably have given the Applicant any legitimate expectation that he would have an opportunity to call for an internal review of any decision given on the 1 December 2022 application. The Applicant clearly intended that his fresh application was to be dealt with as a repetition of the first application, supplemented by additional material furnished by the Applicant in response to the reasons and recommendations stated in the November decision. The Applicant does not appear to have had any statutory right to call for an internal review of the decision given on his application filed on 1 December 2022, and although the December decision did proceed on the incorrect basis that the Applicant had sought an internal review of the November decision (as opposed to having filed a new application), the giving of the December decision as a final decision has not cost the Applicant anything in terms of losing an opportunity to respond to the negative factors that led to the November decision.

[44] A further difficulty for the Applicant on this argument is that, taken to its logical extreme, an applicant would be able to ensure that he or she retained indefinite rights to seek an internal review, by adopting the expedient of repeatedly filing a fresh application, rather than seeking an internal review, after receiving each unfavourable decision. There could be no legitimate expectation of never-ending rights of internal review, and I think the better view is that, when the Applicant elected to file a fresh application three days after he received the November decision, repeating all that he had said in his earlier application and adding material designed to answer the concerns expressed in the November decision, he could not reasonably have had any legitimate expectation that, when the Secretary made a decision on the 1 December 2022 application, the Applicant would be afforded a further right to seek an internal review. Without at this stage commenting on the merits of the December decision, the Secretary was in my view entitled by 20 December 2022 to give a final decision on the Applicant's 1 December 2022 application, leaving the Applicant to apply to the Review Authority if he was dissatisfied with that final decision. The Applicant's first procedural argument is accordingly rejected.

[45] The second procedural issue arises out of the Applicant's submission that considerations of natural justice preclude me from examining the Secretary's concerns over the Applicant's cross-examination in "case G". I reject that submission. The Authority approaches the review on a *de novo* basis, and under Regulation 27(1)(c), it may consider any document or information that in its opinion

may assist it to deal effectively with the subject of the review, whether or not it would be admissible in a court of law. The Review Authority can look at the matter afresh, and any procedural deficiencies there may have been in the process followed on the approval application will usually be able to be “cured” on review, by allowing the parties to present such additional documents and / or submissions as the justice of the case may require.

[46] That is the position here. First, it was the Applicant who provided the Secretary with a copy of the transcript of the cross-examination in “case G”, and it would be a strange result if I were not able to consider the document and come to my own conclusions on it, assisted by submissions from the parties. Secondly, the Applicant has now addressed in his review application the Secretary’s criticism of his work in “case G”. Thirdly, I allowed the Applicant an opportunity to reply to the Secretary’s submissions filed in the review application. So to the extent there may have been an issue over the Secretary relying in part on “case G” in making the December decision, without giving the Applicant an opportunity to address any concerns over “case G”, I am of the view that that issue has now been sufficiently addressed. The Applicant’s position will be considered afresh, taking into account all documents submitted on the review application (including the transcript of the cross-examination in “case G”), and the parties’ submissions.

[47] The third procedural issue relates to the Court of Appeal decision referred to by Mr. Hurd in his submissions. The Applicant submitted that the Secretary should not be permitted to refer to this decision, in which the Court found that a miscarriage of justice had occurred as a result of the Applicant failing to provide his client with sufficient advice or information before the client elected to give no evidence at his trial.

[48] The Court of Appeal decision was not raised at all with the Applicant before the December decision was made, and the Applicant had no opportunity to respond to it. However, there may have been good reason the Court of Appeal decision was not put to the Applicant. I note that the Court of Appeal made orders prohibiting publication of the decision, and it appears that the Court of Appeal decision was not mentioned by the Applicant in his application for approval. It may be that the Secretary did not have access to the Court of Appeal decision at the time the December decision was made.

[49] In those circumstances, I think the justice of the case is best met by admitting the Court of Appeal decision (which on its face appears capable of going to the question of whether or not the Applicant is competent to run a PAL 4

criminal proceeding), but also considering the answer to the Court of Appeal criticisms which the Applicant has now provided in his submissions of 9 March 2023.

*Does the Applicant meet the requirements of clause 5 of the Schedule?*

[50] Turning to the substantive considerations on the application, I consider that Mr Hurd's concession that the Applicant meets the requirements of clause 5 of the Schedule, was properly made. The Applicant has demonstrated that he has had at least 24 months' recent experience working on approval level 3 criminal proceedings, and I am satisfied that he has demonstrated a substantial and active involvement as counsel in at least four PAL 3 or 4 criminal proceedings, at least one of which was a PAL 4 proceeding. The Applicant's involvement as counsel in "case W", involving as it did client discussions, research, and cross examination of three Crown witnesses, is probably sufficient to meet the "substantial and active involvement as counsel" requirement for the (required) one PAL 4 proceeding. If it is not, the one PAL 4 proceeding requirement is clearly met when one considers also the other PAL 4 case referred to by Mr Hurd in his submissions, in which the Applicant cross-examined some Crown witnesses, opened the case for the defendant, and led the defendant's evidence in chief. It is clear that the Applicant has had substantial and active involvement in well over three PAL 3 proceedings.

[51] So I agree with Mr Hurd that the Applicant meets the requirements of clause 5 of the Schedule.

*Skill, knowledge, and overall competence – my approach*

[52] The remaining issues, therefore, are the "skill and knowledge" issue under Regulation 6(2)(c), and the Applicant's overall competence and ability to run a PAL 4 criminal proceeding, unaided, from the beginning to the end of a trial (Regulation 6(1)).

[53] In *Y v Secretary for Justice*, I said<sup>11</sup>:

[44] Relying on *AD v Secretary for Justice*, the Applicant submits that the same broad skills are required in tasks such as opening, examination, cross-examination, and closing, irrespective of whether the case is a PAL 2, 3, or 4 case. That may be true to some extent, but some counsel will perform those tasks with a greater degree of skill or knowledge than others. ....So there still needs to be an

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<sup>11</sup> *Y v Secretary for Justice*, above n. 9, at [44] – [45], and [59].

examination of the skill and knowledge levels of the particular applicant, and whether those levels are appropriate for PAL 4 approval. In conducting that examination, the Secretary is entitled to exercise a degree of care that is proportionate to the more serious cases that are encountered at that level.

[45] Some evidence of an applicant's relevant knowledge and skill may be provided by proof of attendance at a litigation skills course, or some equivalent training course. The Secretary may also be assisted by the quality (or otherwise) of an applicant's work samples, and, in appropriate cases, draw inferences from successful outcomes achieved over a number of cases. But proof of attendance at a litigation skills course may say little about an applicant's readiness to progress from, say, PAL 2 to PAL 3, or PAL 3 to PAL 4, and an applicant's samples of work carried out at the level applied for may provide only a snapshot of how the applicant performed in a few specific fact situations. In the end, the best evidence of an applicant's skill and knowledge is likely to be in the form of such inferences as can be drawn from an applicant's demonstrated experience at or immediately below the level sought, supplemented by references provided by senior counsel (PAL 4 or equivalent) who have observed the applicant in court and can say that they believe he or she is ready to step up to the next PAL level.

[59].....In the end, I do not believe the Secretary erred in refusing the application. In coming to that view, I take into account the fact that the stakes are higher in PAL 4 proceedings than they are in criminal proceedings at lower levels, and it is appropriate in those circumstances that the Secretary should approach applications for PAL 4 approval with a degree of care that is proportionate to the kinds of case for which approval is sought.

*The effect of the LCDT decision and the Court of Appeal decision.*

[54] I do not consider that the LCDT decision requested by the Secretary in the November decision, or the Court of Appeal decision referred to by Mr. Hurd, can now count against the Applicant on the skill, knowledge, and competence issues. While the LCDT decision did make certain findings of unsatisfactory conduct against the Applicant, the Secretary made no mention of the LCDT decision in the December decision, and neither in the application for approval nor in the review proceedings did the Secretary rely on section 9C of the Regulations. (That Regulation requires the Secretary to be satisfied that any complaints upheld against an applicant under the Lawyers and Conveyancers Act 2006, when considered individually or together, would not "adversely affect the integrity of the legal services system", or "breach any practice standards".)

[55] I infer that the Secretary took the view that the matters that were the subject of the complaint heard by the LCDT occurred some years ago when the Applicant was going through personal health difficulties, and that they were not now considered capable of affecting the integrity of the legal services system (Regulation 9C(3)(c)(i)), or affecting the Applicant's competence to run a PAL 4 criminal proceeding through to the end of a trial. Those conclusions appear to me to have been appropriate.

[56] Turning to the Court of Appeal decision, it appears from the Applicant's reply submissions that the deficiencies that were the subject of criticism by the Court of Appeal in that case occurred within the same broad timeframe as the matters that were the subject of the LCDT decision. The Applicant said in his submissions that the error in question was a one-off failure that occurred in mid-2018, when he was still suffering from the personal health issues referred to in the LCDT decision. He said that there is nothing to suggest that the deficiencies that were the subject of the Court of Appeal decision have been repeated since he completed his period of rehabilitation from his personal health issues (now over two years ago).

[57] I accept the Applicant's assurances that the matter that was of concern in the Court of Appeal decision is now in the past, and that fundamental deficiencies of that sort are unlikely to recur. Approximately five years have passed since the events with which the Court of Appeal decision was concerned, and in that period the Applicant has completed a rehabilitation course to address his health concerns. No complaints against the Applicant alleging failure to discharge his duties as counsel appear to have been made since the 2018 events that were the subject of the Court of Appeal decision.

*Matters favouring the Applicant*

[58] First, the Applicant has been practising criminal law for approximately 19 years. He has been approved as a PAL 3 criminal provider for 10 years.

[59] Secondly, his references are particularly strong. As I said in *Y v Secretary for Justice*, an applicant's references will often provide the most helpful information on the applicant's knowledge, skill and overall competence levels. In this case, the application is strongly supported by four references, all provided by senior criminal law practitioners.

[60] One of the Applicant's referees stated that she had observed the Applicant undertaking work at criminal PAL 4 level within the last 11 years, including in a number of complex trial matters. She noted that the Applicant was always respectful in his communications with judges. She said that he has the skills necessary to undertake PAL 4 work.

[61] Another referee described the Applicant as having developed "excellent advocacy skills in both jury and judge alone trials". This referee said that he had observed the Applicant in a number of jury trials, where the Applicant had done "all of the major components". The Applicant was said to have good rapport with clients, and he presented his arguments with substance and flair to judges and juries. The referee said that the Applicant has the requisite skills and experience to be approved to take on PAL 4 work, and that he is "entirely suitable" for approval at that level.

[62] A third referee, who has known the Applicant and observed him conducting criminal proceedings over the last 7 years, spoke well of the Applicant's performance as counsel in a two separate criminal trials, where the Applicant and the referee acted for different parties. The Applicant was said to have represented his clients well in both trials. The referee observed the Applicant conducting cross-examinations of various witnesses called by the Crown in the second trial. This referee said he was currently involved in a PAL 4 proceeding in which the Applicant was appearing for another party. Again, he observed that the Applicant was representing his client well. The referee said that he regularly sees the Applicant in the courts, and he has noted the Applicant's good rapport with court staff and judges. The Applicant's submissions were said to be always well considered and delivered.

[63] The Applicant's fourth referee said that he has seen the Applicant appearing in criminal proceedings over the last 15 years. He said that the Applicant "has developed a broad knowledge and skills over 15+ years of criminal advocacy such that he is fully able to operate at PAL 4 level".

#### *The Secretary's concerns*

[64] Notwithstanding the apparent strength of the Applicant's references, the Secretary has reservations about the Applicant's ability to competently run a trial at the highest level. The Secretary is said to have unresolved concerns about the quality of the Applicant's representation at PAL 3 level, although no detail of those

concerns was provided beyond a specific reference to the Applicant's cross-examination in "case G".

[65] The trial in "case G" was a relatively recent trial, in which the trial judge made a number of interventions in the course of the Applicant's cross-examination of the complainant. I have read the notes of the cross-examination, and I think some criticism of the cross-examination may be warranted. For example, one of the judge's interventions was made when the Applicant was putting to the complainant certain evidence expected to be given by an expert witness. It appears from the judge's intervention and from the Applicant's subsequent questions, that the Applicant did not fully put the relevant part of the expert's brief to the complainant.<sup>12</sup> There was no suggestion that the Applicant intended to mislead or confuse the witness on this occasion – that would have been pointless, as the expert's position would have been made clear as soon as she was called. The issue appears to have been more one of the Applicant taking inadequate care with the wording of one question in what, in the result, turned out to be an effective cross-examination. Some more minor criticisms could be made of the cross-examination. For example, on several occasions the Applicant made statements of (apparent) fact to the witness, without apparently asking any question. And on another occasion the Applicant asked a "compound" question, that would have been better broken down into two or three separate questions.

[66] I think those criticisms can be made, but I do not believe that perfection can be expected of even experienced counsel conducting cross-examinations, at least not on every occasion. There is typically not much time to formulate "perfect" questions, and I note that on this occasion the cross-examination was attended by additional factors (video link, and the involvement of an interpreter) that would have placed some additional demands on counsel.

[67] Overall, it appears that the Applicant was on top of the relevant detail in "case G", and he was, as he submits, able to extract concessions and/or expose uncertainties in the complainant's account of the relevant events. The Applicant's notes for his closing address in "case G", copies of which were provided, tend to confirm the impression that he was well on top of the issues in the case, and was clearly capable of putting his client's case clearly and succinctly.

[68] One other example of a cross-examination by the Applicant was provided by him, namely his cross-examination of a law enforcement officer in "case W".

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<sup>12</sup> The Applicant's initial question is at p.42, line 19, of the transcript. The Applicant's subsequent questions appear from line 1 on p. 43.



This cross-examination does not appear to be the subject of any particular criticism by the Secretary, and it appeared unremarkable to me.

[69] I cannot make much of the Secretary's "unresolved concerns" about the Applicant's representation of clients in PAL 3 cases, without specific details of those concerns.

[70] In the end, the picture I am left with is one of an experienced criminal legal aid provider at PAL 3 level, who very nearly meets the Guidelines' indicative experience levels for PAL 4 providers, and who is considered by no fewer than four of his senior colleagues at the criminal bar to be ready to step up to PAL 4. His performance in one part of one case may have left some things to be desired, but in my view that should have been weighed against the strengths of his experience and his strong supporting references, and it is not clear that sufficient weight has been given to those strengths. In my view, any criticisms that might be made of the Applicant's performance in the "case G" cross-examination are insufficient to cause me to discard, or override, the views of his four senior colleagues that his skills, knowledge, and overall competence are at a level where he is ready to advance to PAL 4. There will accordingly be an order reversing the December decision.

## **Decision**

[71] 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 services in approval level 4 criminal proceedings (the December decision), is reversed.

[72] 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