

**Applicant**

**GJ**

**Respondent**

**Secretary for Justice**

**Date of Decision:**

**25 February 2021**

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## **DECISION**

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### **INTRODUCTION**

[1] In a decision dated 9 December 2020, The Secretary for Justice (“the Secretary”) declined approval of the Applicant as a Lead Provider for Criminal PAL 3 and Court of Appeal and Supreme Court.

[2] The Secretary decided that the Applicant did not meet the criteria for approval under the Legal Services Act 2011 and the Legal Services (Quality Assurance) Regulations 2011 as a provider for the following reasons:

- [i] GJ did not have the relevant period of recent experience as specified in the Schedule to the Regulations;
- [ii] GJ did not satisfy that the requirement that experience be recent (in the last 5 years) should be waived under regulation 6A;
- [iii] GJ did not demonstrate substantial and active involvement in the number of trials, cases or proceedings as specified in the Schedule to the Regulations;

[iv] GJ had not demonstrated the appropriate level of knowledge and skill for approval as specified in regulation 6(2)(c).

[3] In reaching that decision, the Secretary adopted the recommendations of the Selection Committee that:

[i] GJ obtain further experience in Criminal PAL3 proceedings;

[ii] GJ obtain further appellate experience in Court of Appeal and Supreme Court matters;

[iii] GJ, in order to be approved as a criminal PAL3 and Court of Appeal and Supreme Court provider, should show an ability to confidently lead a proceeding from start to finish unassisted.

[4] The applicant seeks a review of the Secretary's decision.

## **BACKGROUND**

[5] The applicant has practised in the field of Criminal Law for 10 years. He was granted approval as a lead provider of Criminal PAL2 in October 2017. He is a Director of the legal firm [redacted]. He holds a PhD from Waikato University for his thesis [redacted].

## **THE APPLICATION**

[6] The applicant seeks a review of the Secretary's decision declining approval as a lead provider for Criminal Legal Aid PAL3 for the following reasons:

[a] That he has completed all of the requirements for PAL3 namely 3 years' experience at PAL3 together with experience in at least 4 x PAL3 or PALs. He has completed the Litigation Skills Course in 2020;

- [b] That 3 x trials submitted in support of his application were accepted for his PAL2 approval in 2017 and were PAL3 matters and thus satisfied the requirement for substantial and active involvement;
- [c] That a waiver should have been granted in relation to a trial experience more than 5 years previously (Regulation 6A) because it was a serious sexual jury trial which he vividly remembers as being his first serious matter in which he was actively and substantially involved;
- [d] He further submitted that the case should be taken into account in assessing his PAL3 experience;
- [e] That the trial of *R v [redacted]* should be accepted as supporting his application for approval as a PAL3 provider. That was a PAL2 matter but GJ's argument is that the likely imprisonment was greater than 10 years imprisonment cumulatively if the defendant was found guilty of all charges. GJ was lead counsel throughout the jury trial in respect of 6 charges of which the defendant was found not guilty. GJ submitted that this case shows clearly that he has displayed the skill and experience to lead a case from start to finish and which qualifies for PAL3 purposes;
- [f] GJ further submits that his PhD research is persuasive in establishing that he has the necessary skills and experience to be a PAL3 provider. He researched [redacted] having sat in on each of the trials, subsequently [redacted], studied advocacy skills and applied what he had learned to the success that he had in the [redacted] trial;
- [g] That the authority's decision in *AB v Secretary for Justice*, NZRA 001/2019, (2 September 2019) is authority which supports his application. His submission is that he has met all of the criteria for active and substantial involvement as set out in that decision. He argues that:

- [i] He has provided evidence of being involved in research, briefing witnesses, and drafting documents;
- [ii] Examined and cross-examined 7 witness in the trials provided in support of his application;
- [iii] He has taken plea instruction, attended case review and sentencing indication, attended a pretrial propensity hearing, trial call over and sentencing;
- [iv] He was lead counsel in the [redacted] case conducting all aspects of the trial;
- [v] He has had no complaints in respect of criminal matters in the 10 years of his criminal practice.

[7] The Secretary responded to the application for review on 22 January 2021 and advised that it was decided now to approve GJ for the Court of Appeal and the Supreme Court. That advice results in Authority having to review only the refusal by the Secretary to approve GJ as a PAL3 provider.

[8] The Secretary holds the view that GJ, while meeting the requirement of 36 months recent experience at PAL2, has not met the minimum requirement of substantial and active involvement provided for in clause 4(b) of the schedule and is not, when viewed overall, sufficiently experienced and competent to be approved at PAL3.

[9] The Secretary has analysed the case examples provided by GJ in support of his application for approval. In three of the examples GJ was junior counsel. His involvement across all the cases involved research and preparation of submissions, briefing evidence and cross examination of witnesses at trial.

[10] The first case submitted was *R v* [redacted] heard in 2014 in respect of which GJ provided the Secretary with brief notes of cross-examination of the investigating detective and research on propensity evidence. The Secretary

considered that both cross-examination and consideration of propensity to be relatively straightforward matters and not indicative of the competency required to handle the more difficult situations arising in PAL3 trials.

[11] The second case submitted was *R v [redacted]* involving a charge of aggravated burglary. GJ's involvement was limited to some preparation for trial, briefing a witness, cross-examination and leading a defence witness. The Secretary formed the same conclusion as expressed in respect of the above case.

[12] The third case submitted by GJ was *R v [redacted]*. That case involved charges of sexual violation by rape, indecent assault and supply of drugs to a minor. There was a hung jury on the sexual charges at the first trial and the defendant was retried. GJ's involvement on the two trials was the preparation of the defendant's brief of evidence, reviewing the juror list, preparing cross-examination, submissions on veracity of the evidence at the trial, submissions on the judge's question trail, and preparation of the closing address. In support, GJ provided the judges question trail and the brief of evidence that he prepared. The Secretary found it difficult to assess GJ's contribution and competency on the basis of the limited documentation provided.

[13] The fourth case submitted by GJ was *R v [redacted]*. The defendant in that case was charged with threatening to kill (maximum of 7 years imprisonment), multiple counts of assault with a weapon (maximum of 5 years imprisonment) and male assaults female (maximum of 2 years imprisonment). Given that the maximum penalties provided for each of the charges is less than 10 years imprisonment the case is classified as a PAL2 proceeding under clause 1 of the schedule.

[14] The defendant pleaded guilty to the charge of threatening to kill, a single charge of assault with a weapon and two charges of assaults a female for which he received a sentence of 23 months imprisonment. He pleaded not guilty to the remaining 6 charges being a charge of threatening to kill, four charges of assault with intent to injure and a further charge of male assaults female for which he was

acquitted following a jury trial in respect of which GJ was lead counsel. GJ's position is that this case qualifies under clause 4(b)(ii) of the schedule for the reason that the defendant was likely to face cumulative sentences of more than 10 years' imprisonment.

[15] The Secretary disputes this assertion. The submission is that in terms of clause 4 (b)(ii) of the Schedule the total sentence was never likely to be anywhere near 10 years imprisonment which is revealed by the sentence of 23 months imprisonment that was imposed from a starting point of three years.

[16] The Secretary submits that the reliance by GJ on the Authority's decision in *AB v Secretary for Justice*, RA 001/2019 is not applicable for the reason that AB conducted a PAL3 aggravated robbery alone. The point made by the Secretary is that the applicant must establish that he can competently run a PAL3 proceeding from start to finish unaided.

[17] GJ responded to the Secretary's submission in opposition by addressing the issues of "Substantial and Active" involvement in at least 4xPAL3 criminal trials and lack of sufficient experience and competence to be approved at PAL3 level.

[18] The submissions are prolix and re-assert his position that he has met the requirements of substantial and active involvement.

[19] The Secretary has further responded to GJ's submissions. The Secretary makes the point that the applicant's experience in PAL3 proceedings is important in that the Secretary needs to be satisfied that the applicant has the experience and competence to deal with the more complex matters that can arise in PAL3 proceedings and that the assessment of that experience and competence comes through the documentation that is provided. The Secretary found it difficult to make the assessment on the basis of the documentation that was provided.

[20] I have found it unnecessary to discuss the submissions made for the following reasons:

- The decision in [redacted] was made in 2014. As such it requires that there be a waiver from the requirement under regulation 6(2)(a) that the relevant experience be recent experience. The applicant was junior counsel. He provided the Secretary with brief notes of cross-examination of the investigating detective and research on propensity evidence. The Secretary considered that both cross-examination and consideration of propensity to be relatively straightforward matters and not indicative of the competency required to handle the more difficult situations arising in PAL3 trials.
- I agree with the Secretary's finding and determine that the case submitted should not be granted a waiver such that it cannot be considered as a case example in support of a PAL3 application.
- The case of [redacted] does not qualify as a PAL3 matter. It was a PAL2 trial. GJ's submission is that the case qualifies under cl 4(b) (ii) of the schedule in that the defendant was likely to face cumulative sentences of more than 10 years imprisonment. That argument must fail. The clause relates to a PAL3 matter. [Redacted] remained a PAL2 matter throughout. The likelihood of cumulative sentences of more than 10 years imprisonment does not raise the matter to PAL3. The requirement in any event is the **likelihood** that a defendant would face cumulative sentences of more than 10 years imprisonment. That is not the situation here. The notes show a sentence of 23 months was imposed.
- I agree with the Secretary's finding on this matter.

## DECISION

[21] It follows from my findings on these matters that GJ has not met the threshold test that he has appeared as counsel with substantial and active involvement in at least 4 approval level 3 or 4 criminal proceedings as required by cl 4 of the schedule. His application for review must accordingly fail.

[22] I therefore, pursuant to S86(1) of the Legal Services Act 2011, confirm the decision of the Secretary declining GJ's application for approval as a lead provider for PAL 3 matter.

BJ Kendall,  
Review Authority