Neutral Citation Number: [2014] EWCA Civ 1276

Case No: C1/2014/0417

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, DIVISIONAL COURT
SIR BRIAN LEVESON P, BEAN AND CRANSTON JJ
[2014] EWHC 28 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2014

Before:

MASTER OF THE ROLLS
LORD JUSTICE FULFORD
and
LADY JUSTICE SHARP

- -

Between:

THE QUEEN ON THE APPLICATION OF **(1) KATHERINE LUMSDON** **(2) RUFUS TAYLOR** **(3) DAVID HOWKER QC** **(4) CHRISTOPHER HEWERTSON**	**Appellants**
- and –	
LEGAL SERVICES BOARD	**Respondent**
- and –	
(1) GENERAL COUNCIL OF THE BAR **(acting by the BAR STANDARDS BOARD)** **(2) SOLICITORS REGULATION AUTHORITY** **(3) ILEX PROFESSIONAL STANDARDS** **(4) LAW SOCIETY OF ENGLAND AND WALES**	**Interested Parties**

- -
- -

Dinah Rose QC, Tom de la Mare QC. Mark Trafford, Tom Richards and Jana Sadler-Forster (instructed by **Baker & McKenzie LLP**) for the **Appellants.**
Nigel Giffin QC and Duncan Sinclair (instructed by **Field Fisher Waterhouse**) for the **Respondent.**

Timothy Dutton QC and Tetyana Nesterchuk (instructed by **Bevan Brittan LLP**) for the **First Interested Party (the BSB).**

Hearing date: 16, 17 & 18 July 2014

- -

Approved Judgment

Master of the Rolls: this is the judgment of the court.

1. The Legal Services Board ("LSB") was established pursuant to the Legal Services Act 2007 ("the Act"). One of its functions is to oversee the approved regulators of the legal profession and to ensure that they carry out their regulatory functions to the required standards. The approved regulators relevant for current purposes are the Bar Standards Board ("BSB"), the Solicitors Regulation Authority ("SRA"), the ILEX Professional Standards Board ("IPS") and others. These proceedings are concerned with the lawfulness of the decision of the LSB ("the Decision") to approve a joint application by the BSB, SRA and IPS to introduce the Quality Assurance Scheme for Advocates ("QASA"). The approved regulators established a joint body called "the Joint Advocacy Group" ("JAG"). QASA is a scheme for the assessment of the performance of criminal advocates in England and Wales by judges.

2. The claimants are barristers practising in criminal law. At the forefront of their case is an attack on the constitutional propriety of the judicial assessment for which QASA provides. They seek judicial review of the Decision on a number of grounds. These include that it undermines the independence of the advocate whose performance is assessed and the judge by whom the assessment is made. All their grounds of challenge were rejected by the Divisional Court (Sir Brian Leveson P, Bean and Cranston JJ), [2013] EWHC 28 (Admin). They appeal with the permission of Tomlinson and Briggs LJJ.

The Legal Services Act

3. The Act overhauled the framework for the provision of legal services in England and Wales. At its heart are the eight "regulatory objectives" set out in section 1—

> "(a) protecting and promoting the public interest;
>
> (b) supporting the constitutional principle of the rule of law;
>
> (c) improving access to justice;
>
> (d) protecting and promoting the interests of consumers;
>
> (e) promoting competition in the provision of services within subsection (2);
>
> (f) encouraging an independent, strong, diverse and effective legal profession;
>
> (g) increasing public understanding of the citizen's legal rights and duties;
>
> (h) promoting and maintaining adherence to the professional principles."

4. Section 1(3) provides that the "professional principles" are—

> "(a) that authorised persons should act with independence and integrity,

> (b) that authorised persons should maintain proper standards of work,
>
> (c) that authorised persons should act in the best interests of their clients,
>
> (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
>
> (e) that the affairs of clients should be kept confidential.
>
> (4) In this section "authorised persons" means authorised persons in relation to activities which are reserved legal activities [which are defined at s12(1) as including exercising rights of audience]."

5. Section 3 provides:

> "(1) In discharging its functions, the Board must comply with the requirements of this section.
>
> (2) The Board must, so far as is reasonably practicable, act in a way –
>
> (a) which is compatible with the regulatory objectives, and
>
> (b) which the Board considers most appropriate for the purpose of meeting those objectives.
>
> (3) The Board must have regard to –
>
> (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
>
> (b) any other principle appearing to it to represent the best regulatory practice."

6. Part 4 of the Act provides for the LSB to oversee the work of the "approved regulators". In relation to the Bar, this function is delegated by the Bar Council to the BSB; in relation to solicitors by the Law Society to the SRA; and in relation to Legal Executives by CILEX to its regulatory arm, the IPS.

7. Section 28(2) provides that:

> "The approved regulator must, so far as is reasonably practicable, act in a way—

> (a) which is compatible with the regulatory objectives, and
>
> (b) which the approved regulator considers most appropriate for the purpose of meeting those objectives."

8. If an approved regulator makes an application under paragraph 20 of Schedule 4 to approve an alteration or alterations of its regulatory arrangements, then the LSB must deal with such application in accordance with paragraphs 21-27 of that Schedule. Paragraph 25 provides:

> (1) After considering –
>
> (a) the application and any accompanying material,
>
> (b) any other information provided by the approved regulator,
>
> (c) any advice obtained under paragraph 22,
>
> (d) any representations duly made under paragraph 23, and
>
> (e) any other information which the Board considers relevant to the application,
>
> the Board must decide whether to grant the application.
>
> (2) The Board may grant the application in whole or in part.
>
> (3) The Board may refuse the application only if it is satisfied that –
>
> (a) granting the application would be prejudicial to the regulatory objectives,
>
> (b) granting the application would be contrary to any provision made by or by virtue of this Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator,
>
> (c) granting the application would be contrary to the public interest…

The history of QASA

9. This is set out in some detail at paras 16 to 38 of the judgment of the Divisional Court to which reference should be made. What emerges from the history is that (i) there was strong evidence of poor quality advocacy in the criminal courts; and (ii) there was general (but by no means universal) acceptance of the need for some form of quality assurance scheme policed by the judges.

10. From the LSB's perspective, the position is summarised in paras 2 to 33 of the first witness statement of Mr Kenny (its Chief Executive). He says that the key points were (i) the potential consequences of poor advocacy in the criminal justice system were extremely serious; (ii) there were significant concerns about poor quality advocacy; (iii) there were reasons to believe that, in the absence of appropriate action, such problems would increase over time; (iv) there was a lack of satisfactory evidence about standards, precisely because there was no scheme such as QASA in place (introducing QASA, with the commitment to a review of its operation after a relatively short period, will allow for any appropriate changes to be made in the light of better evidence); and (v) it was important for there to be a common approach to the regulation of standards in criminal advocacy (different standards for the three professions would undermine public confidence and would be inimical to competition and consumer choice).

The details of QASA

11. These are described in detail at paras 39 to 50 of the Divisional Court's judgment. We gratefully adopt its account. For convenience, we attach this part of its judgment as an Annex to our judgment.

The Decision

12. The LSB said that it was of the view that poor advocacy "risks having a detrimental impact on victims, witnesses, the accused and on public confidence in the rule of law and administration of justice" (para 25 of the decision). It considered that the proposed Scheme had "the potential to provide reliable and sustained evidence for approved regulators to measure and improve the quality of criminal advocacy over time" (para 28). It was assured by the commitment by the regulators to review the Scheme after two years (para 29). At paras 30 to 40, the LSB discussed "Issues raised about the Scheme". It noted that JAG had consulted four times on the details of the Scheme and aspects of it had been adjusted as a result of representations made during the consultations. It considered that "on balance, the applicants have responded to issues raised during the consultation and have adjusted the Scheme to make it proportionate and targeted without undermining its potential effectiveness" (para 30). It concluded that the Scheme was not an "authorisation scheme" within the meaning of the Provision of Services Regulations 2009 ("the POS Regulations"). We need to set out paras 35 and 36 in full, since they are central to the main challenges to the Decision that have been made in these proceedings:

> "35. The Board considered whether there was a significant risk of conflict between advocacy assessment and the needs of clients and concluded that there was not. Advocates have a duty to the Court to act with independence in the interests of justice. Equally, they are aware of their duties to their client under the regulations of their respective approved regulators. There is no evidence to suggest that by implementing the Scheme, advocates will start to act without appropriate independence.
>
> 36. The Board also considered whether the Scheme posed a challenge to judicial independence and concluded that this was a very low level risk. Our assessment is that there is a low risk

> that judicial independence would be challenged by the scheme arrangements. The independence of the judiciary is one of the core values of our justice system. Judicial independence is also governed by relevant legislation (such as the Constitutional Reform Act 2005) and will remain the subject to that legislation's provisions. Additional safeguards in place include the Guide to Judicial Conduct which was updated in March 2013 and this includes provisions relating to judicial independence and impartiality. The Board also took into consideration that the Scheme introduces transparent and consistent criteria for advocates to be judged against and that judges will receive training on how to apply these criteria. It could be argued that the Scheme will be more robust and transparent than what happens under current arrangements, where judges may provide feedback informally on the performance of advocates via the circuits to heads of chambers rather than via the approved regulator."

THE GROUNDS OF CHALLENGE

13. The grounds of challenge are that the Divisional Court erred (i) in its approach to the independence of (a) the advocate and (b) the judiciary (an error also made by the LSB); (ii) in misconstruing the appeal provisions of QASA; (iii) in finding that the standard of review required by domestic law was irrationality, rather than proportionality; (iv) in finding that QASA did not come within the scope of the POS Regulations; and (v) in finding that QASA was proportionate.

THE INDEPENDENCE OF THE ADVOCATE

14. The existence of the principle of the independence of advocates is not in doubt. It is a long-established common law principle and one of the cornerstones of a fair and effective system of justice and the rule of law. If clients are not represented by advocates who are independent of the state, the judge and their opponents, they cannot have a fair trial. The position was stated with great firmness and clarity by Lord Hobhouse in *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120 in these terms:

> "51 … It is fundamental to a just and fair judicial system that there be available to a litigant (criminal or civil), in substantial cases, competent and independent legal representation. The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes to his client but it is also in the public interest that the duty should be performed. The judicial system exists to administer justice and it is integral to such a system that it provide within a society a means by which rights, obligations and liabilities can be recognised and given effect to in accordance with the law and disputes be justly (and efficiently) resolved. The role of the independent professional

> advocate is central to achieving this outcome, particularly where the judicial system uses adversarial procedures.
>
> 52. It follows that the willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively. In England the professional rule that a barrister must be prepared to represent any client within his field of practice and competence and the principles of professional independence underwrite in a manner too often taken for granted this constitutional safeguard. Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the Executive, the Judiciary or by anyone else. Similarly, situations must be avoided where the advocate's conduct of a case is influenced not by his duty to his client but by concerns about his own self-interest."

15. Ms Rose QC draws particular attention to the statement in para 52 that the willingness of advocates to represent litigants should not be undermined by "exposing [them] to pressures which will tend to deter them from representing certain clients or from doing so effectively". In a nutshell, her case is that QASA exposes criminal advocates who know that their performance is being assessed by a judge precisely to such a pressure.

16. This common law principle is reflected in various parts of the Act. Thus, section 188(2) provides that an advocate has a duty to the court to act "with *independence* in the interests of justice". Section 3(2) provides that the LSB "must, so far as is reasonably practicable, act in a way (a) which is compatible with the regulatory objectives and (b) which it considers most appropriate for the purpose of meeting those objectives". Section 1(1) defines the "regulatory objectives" as including "(f) encouraging an *independent*...legal profession...; (h) promoting and maintaining adherence to the professional principles". Section 1(3) defines the "professional principles" as including "(a) that authorised persons should act with *independence*...; (d) that...authorised persons should comply with their duty to the court to act with *independence* in the interests of justice". The section 3(2) duty is imposed on the approved regulators by section 28(2) of the Act. Schedule 4 para 25(3) provides that the LSB may refuse an application by an approved regulator for approval of alterations of regulatory arrangements only if it is satisfied that "(a) granting the application would be prejudicial to the regulatory objectives....".

17. Ms Rose advances three principal submissions. The first is that QASA is unlawful in particular because the cumulative effect of ten particular elements of the scheme is to undermine the independence of advocates by exposing them to pressures which will tend to deter them from representing their clients effectively. The second is that the LSB failed properly to consider whether QASA would expose the advocate to such pressures. The third is that it misdirected itself in only considering whether QASA would *actually* undermine the independence of the advocate: it should also have considered whether it would give rise to a *perceived* threat to the independence of the advocate.

The cumulative effect of the ten elements

18. Ms Rose makes it clear that the vice in QASA is not in judicial evaluation per se, but in the cumulative effect of ten particular elements of the scheme. These elements are: (i) the scheme is to operate in the context of criminal trials, in which the importance of the independence of (particularly) the defence advocate from pressure applied by the judge is at its highest; (ii) if the advocate fails the assessment, he or she will be prohibited from practising criminal advocacy either at all or at the selected level; (iii) advocates are required to be assessed in the first two (or three) consecutive trials undertaken at their selected level; (iv) only two or, at most, three assessments are undertaken, giving very great significance to and increasing the pressure of each individual assessment; (v) assessments by a single judge may be sufficient to lead to a finding that the advocate is incompetent to practise; (vi) the assessment is conducted against very detailed performance indicators, many of which are highly subjective, and thereby increase the risk of inconsistent or unfair assessment; (vii) some of the matters against which the judge is required to assess the advocate depend on the judge's perception or inference of matters which are privileged or outside the knowledge of the judge; (viii) advocates are required to notify the judge of their requirement for assessment *before* the trial commences; (ix) advocates are not required to inform their client that they are being assessed, nor even that they have been assessed as incompetent in defending their client; and (x) non-disclosure of the assessment appears to be an essential feature of the scheme: if an advocate were required to inform his or her client of the assessment in advance, a significant number of clients, if properly advised, would be likely to object to being represented by that advocate.

19. Before we consider the ten elements on which Ms Rose relies, we should make some preliminary observations. First, assessing whether a scheme is compatible with the regulatory objectives and whether it is most appropriate for meeting those objectives calls for an exercise of judgment on the part of the LSB. This is not a hard-edged question. The regulatory objectives are not tightly defined. That is not surprising since, despite their fundamental importance, they are broad and to some extent aspirational objectives. That is evident from the language of section 1(1) viz "(a) *protecting and promoting* the public interest; (b) *supporting* the constitutional principle of the rule of law; (c) *improving* access to justice; (d) *protecting and promoting* the interests of the consumer; *promoting* competition...; (f) *encouraging* an independent...legal profession; (g) *increasing* public understanding of the citizen's legal rights and duties; (h) *promoting and maintaining* adherence to the professional principles" (emphasis added). Moreover, whether these aspirations are achieved by a scheme is a question for the LSB and not the court. Section 3(2)(b) requires the LSB to act in a way which *it* considers most appropriate for the purpose of meeting the regulatory objectives. Section 3(3)(a) requires it to have regard to the principles under which regulatory activities should be "transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed".

20. Secondly, the independence of the advocate is clearly an important relevant consideration. But it is not the only one. The "regulatory objectives" include "protecting and promoting the public interest", and promoting and maintaining adherence to professional principles, which include "that authorised persons should maintain proper standards of work". It is in the public interest that criminal advocates

should not only be independent, but also that they should be competent. Lord Hobhouse said in *Medcalf* that it was fundamental to a just and fair judicial system that there be available to a litigant "competent and independent legal representation". Competence is no less important than independence. The LSB is required to act in a way which is compatible with *all* of the regulatory objectives and which it considers most appropriate for the purpose of meeting *all* of the objectives. The very diverse character of the objectives may require a weighing exercise to be undertaken. As the Divisional Court said at para 56 of its judgment, the Act does not establish an order of priorities between the regulatory objectives, nor between the professional principles. For the most part they will be in harmony with each other, but where they are not, the regulators have to carry out a balancing exercise between them.

21. Thirdly, the principle of advocates' independence itself is not absolute. There is no legal requirement for the advocate to be shielded from any possible pressure to act otherwise than independently in the client's interest. Indeed, we did not understand Ms Rose to submit that there is. Otherwise, she would have submitted that any scheme involving judicial assessment of advocates would by definition be unlawful. During oral argument, she accepted that it was a question of degree. Thus, she said that, if QASA provided for blind assessments (i.e. assessments of which the advocate did not become aware until the end of the trial), it was likely that there would have been no challenge to the scheme. And yet in such a scheme the advocate would know that there was at least a possibility that the trial judge was assessing his or her performance.

22. We can now turn to the ten elements. In what follows, we largely adopt the submissions of Mr Giffin QC. Element (i) is true, but since there is no challenge to the principle of assessment by judges, there is nothing in this point. Element (ii) is substantially correct. It is true that, if the advocate fails the assessment, he will still be able to practise criminal advocacy at level 1. But as Ms Rose points out, the advocate will not be able to practise in the Crown Court and this means that, for practical purposes, barristers will not be able to practise at all, since practice in the Magistrates' Court is now for the most part undertaken by solicitors. The answer to element (ii), however, is that it is intrinsic to any such scheme that advocates who fail the assessment should be prohibited from practising. The whole point of an assessment scheme is to weed out incompetent practitioners. A separate question is whether the scheme is disproportionate or unreasonable.

23. Element (iii) amounts to a complaint that the advocate does not have an entirely free choice as to the trials in which his performance is assessed. But this is an unsurprising feature of an assessment scheme, and there is no reason why it should make a difference to whether the advocate is likely to behave independently in any particular case.

24. Element (iv) complains of the number of assessments on which the scheme is based. But a balance had to be struck between the need to have sufficient information and the need for advocates to be able to undertake sufficient trials at the desired level. Element (v) complains that adverse assessments by the same judge might lead to a failure to meet the competence standard. This is a feature which the approved regulators propose to remove from the scheme consequent upon suggestions made by the Divisional Court. But in circumstances where provision is to be made for training of judges, it is impossible to say that this feature would systematically undermine the

independence of the advocate. Element (vi) complains that the performance indicators on the assessment form are very detailed and subjective. But the fact that the form uses a number of specific questions, rather than a few broad-brush headings, is likely to increase rather than reduce objectivity and consistency. Nor are the required judgments any more subjective than is inevitable when assessing something which is not inherently susceptible to precise measurement.

25. Element (vii) is that the assessing judge will not know about matters which are privileged or otherwise outside his knowledge. This is a point which seems to have been relied on more strongly in the court below than before us. It was argued before the Divisional Court that apparently incompetent advocacy may be explicable on the grounds that the advocate had received a "late return" or that there had been a change of instructions by the client. It was submitted that the advocate may be prevented by legal professional privilege from putting forward to the judge or the regulator points which might explain or mitigate what appeared to be incompetent advocacy. The Divisional Court held at para 73 that, if such a situation arose, the advocate would be entitled to provide the gist of the privileged information to the regulator, which would in turn be bound not to use the information for any purpose other than determining the application for accreditation: see per Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563 at para 32. Ms Rose submits that the Divisional Court misunderstood Lord Hoffmann. We are inclined to agree with the Divisional Court. But we do not need to decide this point. It is an inevitable feature of any scheme based on assessment by trial judges that the judge may not have all the information about the nature and timing of a client's instructions. But as we have seen, the claimants do not object in principle to assessment by trial judges. Furthermore, as Mr Giffin points out, the appeals system and the provision for judicial training are important safeguards.

26. Element (viii) is the complaint that advocates are required to notify the judge before the trial. This was the preferred option of the Bar Council and the Criminal Bar Association during consultation. In any event, the question is whether and how far the advocate's independence will be affected by the knowledge that the judge is to assess his competence. That cannot depend on when the judge is told that assessment is required. We agree with the Divisional Court that, in a long trial, the judge might not have a sufficient recollection of the details of the advocate's performance under each of the nine standards. In other words, there are advantages in the judge having the assessment questions in mind whilst the trial is proceeding (para 77).

27. Elements (ix) and (x) both make the point that the advocate is not obliged to inform the client of the assessment. Ms Rose submits that the pressures on the advocate being assessed are so severe that the client must be told what is going on, and given the opportunity to withdraw his instructions and demand the services of another advocate. We do not see why the advocate is obliged to tell the client about the assessment. But even if he is obliged to do so, we do not accept that the possibility of the advocate's instructions being withdrawn impacts on his ability to conduct the trial independently. If there were anything in this point, it would render any form of assessment by judges objectionable in principle.

28. We conclude that the ten elements identified by Ms Rose do not individually or cumulatively undermine the independence of advocates by exposing them to

unacceptable pressures so as to interfere with their ability to represent their clients effectively.

29. Having considered the ten elements in detail, we remind ourselves that the common law does not insist that all possible pressures on the advocate to act improperly must be eliminated. It has for many years been the case that advocates may be affected by a judge's opinion of their performance. So far as we are aware, it has never been suggested that the provision of judicial references is unlawful on the grounds that they tend to undermine the independence of the subject advocates. Examples include judicial references for promotion of advocates to the Treasury panels, for appointment as Queen's Counsel and for full-time and part-time judicial office. Ms Rose submits that there are material differences between these schemes and QASA. For example, advocates who are subject to QASA have no choice as to which judges are to assess them, whereas advocates who choose their judicial referees do so after the event: they are not forced into the same relationship of dependency on the judge. Further, the pool of referees for QC and other appointments is much wider than under QASA. We accept that these differences exist. But they are differences of degree. They do not affect the principle.

30. Ultimately, it is a matter of judgment whether QASA will realistically tend to deter advocates from representing their clients effectively. There have already been formal constraints on the way in which advocates present their cases. "Independence" does not mean that advocates should be at liberty to promote their clients' interests at all costs. Barristers have professional duties which may sometimes conflict with their clients' interests: see *Hall v Simons* [2002] 1 AC 615, 686E per Lord Hoffmann. In our judgment, QASA does not pose a sufficient systemic threat to the independence of the advocate to be unlawful on that account. The fact that there may occasionally be an unfair judge who undermines the independence of a susceptible barrister is not a sufficient reason for holding that the scheme as a whole threatens the independence of the advocate. If it were necessary for us to decide whether QASA undermines the independence of the advocate, we would conclude that it does not do so.

31. But the issue is not whether QASA undermines the independence of the advocate, but whether the LSB acted in breach of its statutory duty in relation to the question of the independence of the advocate. This is an important distinction to which we have already drawn attention. The statutory obligation of the LSB is more nuanced and complex than merely to consider whether the scheme is likely to undermine the independence of the advocate. First, the obligation is not an unqualified obligation to safeguard or not to undermine the independence of the advocate. Rather, it is "so far as is reasonably practicable" to act in a way which is compatible with the regulatory objectives and which it considers most appropriate for the purpose of meeting those objectives. It has to be satisfied that granting the application will not be prejudicial to the regulatory objectives which include not only encouraging "an independent, strong, diverse and effective legal profession", but all the other objectives. These include protecting and promoting the public interest, supporting the constitutional principle of the rule of law, improving access to justice, protecting and promoting the interests of consumers as well as promoting and maintaining adherence to the "professional principles".

32. The role of the court is to review the lawfulness of the LSB's decision. We discuss the question of the standard of review at paras 78-86 below. We are satisfied that there is no basis for holding that the decision was unlawful.

Failure properly to consider whether QASA would expose advocates to pressures

33. A considerable amount of material has been placed before the court. The history of the consultations has been analysed in great detail. But for the purpose of considering this ground of challenge, it is necessary to focus on the way in which the issue of the advocate's independence was addressed by the LSB (to the extent that it was addressed at all).

34. The application for approval of QASA was granted by the LSB on 24 July 2013. Section E of the application is headed "Statement in respect of the LSA Regulatory Objectives". It purports to address each of the regulatory objectives described in section 1(1) of the Act and at para 23, under the sub-heading "encouraging an independent, strong, diverse and effective legal profession", the application states:

> "The SRA, BSB and IPS do not consider that the proposed regulatory changes will negatively impact on any of the protected characteristics. Each regulator has undertaken equality impact assessments, which are attached at Annex D. No human rights issues are expected from the regulatory changes or implementation of the scheme."

35. Ms Rose makes the point that there is no reference here to the independence issue: the reference to "the protected characteristics" is only relevant to the equality impact assessments that had been undertaken. There is then a sub-heading "promoting and maintaining adherence to the professional principles" described in section 1(3) of the Act. Para 25 merely states that the SRA, BSB and IPS "consider that the proposed regulatory changes will promote this objective". This is followed by the sub-heading "statement in respect of the Better Regulation Principles". Para 26 states that the SRA, BSB and IPS "consider that the detail of the Scheme fulfils our obligation to have regard to the Better Regulation Principles, under section 28 of the [Act]". In short, Ms Rose submits that there is nothing in the JAG application for approval of QASA which addresses the issue of the independence of the advocate. That is not, however, quite right. Annex D to the application contains a detailed analysis of the consultation responses and sets out JAG's response to the fourth (November 2012) QASA consultation. In relation to question 14 ("do you agree with the proposed approach to the assessment of competence?"), the response included: "Some respondents suggested that a conflict would arise between an advocate's ability to effectively represent their client and the need to obtain a positive assessment". JAG's comment did not specifically address this point. Instead, it stated that "a number of measures designed to limit the opportunities for personal bias within judicial evaluation will help ensure that QASA is fair, objective and does not disproportionately impact on any particular group or protected characteristic".

36. Mr Giffin emphasises the fact that Annex E to the application contains details of the contents of the proposed two year review of QASA. Para 13 of Annex E states that it is imperative to ensure that the scheme is working "consistently, fairly and

effectively". It suggests that the two year review should consider inter alia whether the advocate's behaviour changes during evaluation.

37. In our judgment, there is at best exiguous reference in the application to the issue of whether there was a risk that QASA would undermine the independence of the advocate.

38. Mr Kenny explains what happened next in his first witness statement. He says that on 31 May 2013, following an initial assessment of the application, the LSB provided the applicants with a table of various observations in relation to which it required clarification. Later the same day, the LSB received a letter before claim from Baker & McKenzie, solicitors acting on behalf of an individual barrister, Ms Katherine Jane Lumsdon (now a claimant in these proceedings). This was written "in the hope that the LSB can be persuaded not to grant approval or that the BSB withdraws its application for approval of [QASA]". This is a very detailed letter which foreshadows many of the submissions that have been made on behalf of the claimants in these proceedings. Paras 4.3 to 4.12 contain a closely argued case that QASA is unlawful because it is in breach of section 28(1) of the Act. It makes the point that the independence of the advocate is a fundamental regulatory objective of the Act and refers specifically to sections 1(1)(f) and 1(3)(a) and (d) as well as section 188(2). It states that this is not some arid technical point: independence of the advocate is a fundamental basis of the common law system of adversarial justice and a key component of the systemic guarantee of the rule of law. The letter sets out paras 51 and 52 of the speech of Lord Hobhouse in *Medcalf* (which we have set out at para 14 above). At para 4.5, the letter states that "against this backdrop" the claimants consider that QASA will "unlawfully breach or erode this requirement for independent advocacy". It creates "profound, unavoidable conflicts of interest between the advocate/barrister's private pecuniary interest for career advancement and the client's entitlement to fearless, independent advocacy". At para 4.8, the letter states:

> "The risk generated by QASA is that, in order to further their own career goals (and the authors of QASA extol its virtue in having created a career ladder), advocates will seek to curry favour or avoid confrontation with a Judge in a hearing of which they have conduct. In order to please or appease Judges (or simply avoid antagonising them) advocates will not advance (or do so with full vigour) arguments their clients may wish to advance that might prove unpopular.
>
> Such concerns are amplified by the fact that:
>
> (a) the process of approval/assessment starts *in advance* of a trial, by the advocate submitting the relevant forms to the judge/assessor. An advocate cannot seek a reference after trial (conflict having been avoided) at some remove from it (where an advocate's performance might be more objectively assessed);

> (b) the rules require immediate judicial evaluation for those wishing to conduct trials at Levels 2-4 in the first effective trials at the applicable level;
>
> (c) some advocates on some circuits inevitably find themselves appearing in front of the same Judges in the same trial centres, with the result that they have a very limited pool of potential referees and will thus know who their likely QASA judicial evaluators will be when their time for evaluation approaches; and
>
> (d) QASA is in no way optional."

39. Finally, the letter makes the point which is reflected in elements (ix) and (x) of the ten elements to which we have referred at para 18 above.

40. Mr Kenny says that the LSB continued to assess the application, including considering the points raised in the letter before claim. A "table of issues against LSB assessment of application" was prepared by the LSB as a "working document" which was updated throughout the assessment process by the LSB Rules Team. We were shown the version dated 18 June (although it seems from the evidence of Mr Kenny that the final version was dated 19 July). The table of issues has three headings, namely "issue", "refusal criteria in the Act against which the LSB has assessed issues" and "LSB assessment".

41. The following entries in the 18 June version are material. Issue 3 is: "Do the arrangements carry the risk of conflict of interest between an advocate's need to obtain a favourable assessment from the judge and representing the best interests of his client?" The table correctly refers to para 25(3)(a) of schedule 4 and the relevant regulatory objectives stated in section 1(1) of the Act. Under the heading "LSB assessment", the document states:

> "Our assessment is that there is not a significant risk of competing interests, namely between the advocate's duty to their client and striving to obtain a favourable judicial evaluation leading to a lack of independence on the part of the advocate.
>
> We have also taken into consideration that the scheme introduces transparent criteria for advocates to be judged against and that judges will receive training on how to apply these criteria. It could be argued that the scheme will be more robust and transparent than what happens under current arrangements, where judges may feedback informally on the performance of advocates via the circuits to heads of chambers rather than via the regulator.
>
> Advocates have a duty to the Court and to act with independence in the interests of justice. Equally, they are aware of their duties to the client. These are professional individuals and there is no evidence to suggest that by implementing

> QASA, they will start to act without appropriate independence. Furthermore, the regulatory arrangements of each AR stipulate that regulated persons must act in the interests of the client and with independence."

42. Mr Kenny says that the final version of the table of issues was produced on 19 July. There was a meeting of the LSB on 24 July. He says that the question of whether QASA would breach or erode the principle of the independence of the advocate was specifically discussed at the meeting. In his witness statement he says:

> "87. As is set out in the decision notice, the LSB was not, and still is not, aware of any actual evidence to support the assertion that the Scheme introduces a risk of eroding the independence of the advocate. Indeed, were an advocate to compromise his independence by failing to act in the best interests of his client, then this would be the type of conduct that QASA would be seeking to identify and curtail within the profession. The LSB works on the assumption that professional advocates will seek to conduct themselves in accordance with their duties and not seek to gain personally at the expense of the best interests of their client.
>
> 88. The Claimants' contention takes as its starting point the presumption that many advocates are of sufficiently poor quality and/or lack a sufficient degree of professionalism to be unable to act without their independence being undermined – either by creating tempting conflicts of interest or by exposing themselves to pressures which may deter them from representing a client at all or representing the best interests of that client (instead choosing to put self-interest first). Not only does this seem to be a totally unevidenced slur on many of their professional colleagues, but it seems to contradict the arguments advanced elsewhere that QASA is disproportionate as there is no evidence that a large number of advocates are of a poor quality and are providing a poor service to their clients. Both of these extreme positions strike me as untenable: the existence of a robust scheme should actually increase the likelihood of unethical conduct being *detected*, rather than *perpetrated*, whilst also giving a more strongly based assurance about the performance standards of the majority of advocates.
>
> 89. The suggestions that an advocate may be susceptible to having their independence compromised by an overriding desire to succeed with QASA accreditation is to my mind no different to a situation where an individual chooses one course of action over another, possibly due to a financial incentive – an example would be an advocate intentionally not advising his/her client to plead guilty and instead entering a not guilty plea, so as to ensure the case proceeds to a full trial from which the advocate will receive substantially more financial benefit. In these situations, we trust advocates to put their financial

> interests to one side and act ethically and professionally. It is ultimately a matter of choice for individual advocates, but I believe (as did the Board) that the majority of criminal advocates will choose to act professionally and in accordance with their code of conduct.
>
> 90. Linked to the claimants' concerns about an advocate's independence is the issue of whether a client should be informed that the advocate representing him/her is being assessed and/or whether the client's consent should be obtained. This was a decision to be made by JAG when designing the Scheme. As I have set out before, it was not the LSB's role to seek to determine the fine detail of the Scheme's operation in areas which were not likely to be determinative in our final decisions. We were content that the BSB had considered the issue and was satisfied that the issue of disclosing this information to a client and potentially obtaining client consent was not a problem.
>
> 91. My understanding is that the possibility of judges' views of the performance of advocates appearing before them having an impact upon those advocates is by no means new. For example, I understand that judges of the High Court originally had the power to discipline barristers, a function which they have, since 1986, resolved to exercise through the Council of the Inns of Court ("COIC"). Historically, following a hearing, judges have also made a head of chambers (or a senior partner of a firm in relation to solicitor advocates) aware about poor advocacy of those appearing before them.
>
> 92. Another example of a judge acting in an evaluation role is in relation to the Bar Quality Advisory Panel (BQAP) – the Bar Council's own quality assurance panel which relies on judicial references to alert the Bar Council to an advocate in need of some support for his/her advocacy. According to the Bar Council website, BQAP is a non-disciplinary body that will receive referrals about a member of the Bar's performance from judges, instructing solicitors and barristers on the same legal team. The panel will then be able to advise the member of the Bar concerned about his or her work, and how to improve things for the future. Judges also regularly provide references for those applying for Queen's Counsel ("QC") status or for other appointments, such as to the Treasury and CPS panels of counsel."

43. It may be said with some justification that in this passage Mr Kenny does not make it clear that all of the points that he sets out were discussed and taken into account by the LSB (including himself) at the time of its decision. Some of it has the appearance of legal argument in answer to the points made in these proceedings. But at least what he says at para 87 would seem to reflect the views of the LSB at the time of the decision.

44. In the light of all this material, can it be said that the LSB failed properly to consider whether QASA would expose advocates to unacceptable pressures not to act in the best interests of their clients? There can be no doubt that it was aware of the issue at the time it took its decision. The issue was placed before it in detailed and unequivocal terms by the letter before claim. The quotation from *Medcalf* was direct and telling. The evidence shows that the LSB considered the letter before claim in detail. It would have been extraordinary if a body such as the LSB had not done so, especially in the face of a letter which contended that QASA was unlawful inter alia because it would "unlawfully breach or erode this requirement for independent advocacy". The reference to "this requirement" was a reference to the requirement described by Lord Hobhouse in *Medcalf.* The considered view of the LSB was that there was no significant risk that the independence of advocates would be undermined. In reaching its conclusion it took into account the fact that there was no actual evidence that there was such a risk. Not only was there no such evidence (which might indeed have been difficult to obtain), but the LSB also took into account (as it was entitled to do) that professional advocates will seek to conduct themselves in accordance with their professional duties.

45. We have so far concentrated on the decision of the LSB, since this is the decision which is under challenge in these proceedings. But it is right to record that the BSB conducted its own consideration of the issue of the threat that might be posed by QASA to the independence of criminal barristers. It was obliged to do this in view of its own statutory obligations under section 28 of the Act. At its meeting on 23 February 2013, it decided that any perceived risk to the independence of barristers was "merely speculative rather than real": see para 205 of the first witness statement of Vanessa Louise Davies, Director of the BSB. She says that the lack of any basis for this perceived effect of QASA on the independence of the profession was supported by the feedback the BSB received on the pilot carried out in Canterbury, where none of the participants raised any concerns about the operation of QASA. Dr Davies says at para 207 that "the suggestion that barristers may be driven by QASA to act in breach of their professional duties is surprising and does not have any evidential support". She refers to rule 302 of the Code of Conduct (which was in force at the time when QASA was approved by the LSB) which provides that a barrister has "an overriding duty to the Court to act with independence in the interest of justice". Rule 303 provides that a barrister "must promote and protect fearlessly and by all proper means the lay client's best interests and do so without regard to his own interests". Pursuant to rule 307, a barrister must not "compromise his professional standards in order to please his client, the Court or a third party". These rules are retained in the new version of the Code of Conduct which came into force in January 2014.

46. It is clear, therefore, that the BSB considered and rejected the claim that QASA would expose advocates to pressures which would tend to deter them from representing their clients effectively. In our view, it was entitled to do so. Even if we are wrong about that, there is no basis for finding that the BSB's decision infected that of the LSB. The Decision was made by the LSB after the most careful independent consideration on its part. Its independence from the BSB is well illustrated by the way (as we describe later) it rejected the BSB's request in November 2012 for approval of a modified scheme.

Failure to consider whether QASA would give rise to a perceived threat to the independence of advocates

47. Ms Rose submits that the LSB proceeded on the erroneous basis that the principle of the independence of the advocate is concerned only with *actual* instances of lack of independence, and not with the perception of dependency. She submits that, even if it is unlikely that an advocate will *in fact* pull his punches for fear of offending the judge, the introduction of QASA creates the *perception* of a relationship of dependency between the advocate and the assessing judge and that the LSB failed to take this into account when reaching its decision. To illustrate this perception and to show that the possibility at least of subconscious influence is significant, Ms Rose relies on two Scottish cases concerning the independence of the judiciary. In *Starrs v Ruxton* [2000] JC 208, the High Court of Justiciary held that temporary sheriffs appointed by the Lord Advocate to sit for one year at a time were not an "independent and impartial tribunal" within the meaning of article 6(1) of the European Convention on Human Rights ("the Convention"). Lord Cullen, the Lord Justice-Clerk said:

> "There is no question whatever as to the integrity and fair-mindedness with which the Lord Advocate has acted. However, what I have to consider is whether the basis on which the temporary sheriff holds office is truly independent, that is independent of the executive, whether it presents an appearance of such independence, and whether and to what extent the lack of the former gives rise to the appearance of lack of impartiality."

48. Lord Reed made the same point in the passage quoted by the Divisional Court at para 63 of its judgment. He said that the system of short renewable appointments "creates a situation in which the temporary sheriff is liable to have hopes and fears in respect of his treatment by the executive when his appointment comes up for renewal: in short, a relationship of dependency". It could give rise to "a reasonable perception of dependence on the executive". These statements were cited with approval by the Privy Council in *Millar v Dickson* [2001] UKPC D4, [2002] 1 WLR 1615. Similar observations were made in *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004, [2000] QB 451 at para 3 where this court said:

> "Any judge (for convenience, we shall in this judgment use the term "judge" to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called "actual bias" are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because

> the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists".

49. As Lord Bingham said at para 18 in *Millar,* although these observations were directed to impartiality, they would apply equally to judicial independence. Ms Rose submits that the same approach should be adopted in relation to the independence of the advocate. The Divisional Court accepted this submission.

50. Mr Giffin submits that the principle of judicial independence, which covers perceived and actual independence, should not be conflated with the principle of an advocate's independence, which does not. He says that the advocate is not the tribunal and the two cannot be equated. The guarantee of the independence of the tribunal is a separate element within article 6 of the Convention. The policy reasons why the independence (and impartiality) of the judicial decision-maker call for special assurances (including that the judge is not only independent, but also seen to be independent) do not apply in the case of advocates. When it comes to questions of representation, the issue is whether the criminal trial is a fair one, and specifically whether it is necessarily rendered unfair if the performance of the defendant's advocate is to be assessed by the trial judge and that assessment may have consequences for the advocate.

51. We accept that a public perception of independence is an essential ingredient of a legitimate and effective criminal justice system. Advocates occupy a central and indispensable position in the criminal trial process. A perceived relationship of dependence between the judge and the advocate would cut across the principle that "justice should not only be done, but should manifestly and undoubtedly be seen to be done": *R v Sussex Justice, ex parte McCarthy* [1924] 1 KB 256. This position at common law is replicated under the Convention. In *Kyprianou v Cyprus* [2007] 44 EHRR 27, the Grand Chamber of the ECtHR said at para 175:

> "It is evident that lawyers, while defending their clients in court, particularly in the context of adversarial criminal trials, can find themselves in the delicate situation where they have to decide whether or not they should object to or complain about the conduct of the court, keeping in mind their client's best interests. The imposition of a custodial sentence, would inevitably, by its very nature, have a "chilling effect", not only on the particular lawyer concerned but on the profession of lawyers as a whole. They might for instance feel constrained in their choice of pleadings, procedural motions and the like during proceedings before the courts, possibly to the potential detriment of their client's case. For the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation. The imposition of a prison sentence on defence Counsel can in certain circumstances have implications not only for the lawyer's rights under Art.10 but also the fair trial rights of the client under Art.6 of the Convention. It

> follows that any "chilling effect" is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice."

52. It is, however, important to distinguish between (i) an ex post facto assessment of whether the independence of an individual advocate has been compromised or undermined by the behaviour of an individual judge and (ii) the risks to the independence of advocates posed by a regulatory scheme. The former might require a separate consideration of whether there has been an actual and a perceived compromise of the advocate's independence. We agree with Mr Giffin that the purpose of such a consideration would be to determine whether there has been a fair trial.

53. The assessment of the risks inherent in a scheme is quite different. The LSB's task is to make an assessment of a regulatory scheme. It is required, so far as is reasonably practicable, to act in a way which is compatible, inter alia, with encouraging an independent legal profession. The assessment involves making a judgment of the risk that the scheme poses to the independence of the advocate. This is a predictive, forward-looking assessment of future risk. For the purposes of making this judgment, it is unnecessary and unhelpful to distinguish between the actual risk and the perceived risk. They are one and the same. The only way in which the risk can be assessed is by asking whether the scheme could give rise to a reasonable perception of dependence on the judge. Another way of expressing the question is to apply the analogous test for apparent bias of "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 per Lord Hope at para 103. In other words, the test is whether the fair-minded and informed observer would conclude that there was a real possibility that the independence of the advocate would be undermined by judicial assessment of performance.

54. In our judgment, the applicable approach is captured by the dicta of Lord Hobhouse in *Medcalf*. If QASA exposes advocates to pressures which will tend to deter them from representing their clients effectively, the scheme is likely to give rise to a reasonable perception of dependence on the judge who assesses the advocates' performance.

55. The Divisional Court did not address the claimants' submission that the LSB had not considered whether QASA would give rise to a perception of dependency. Instead, the court explained why *it* considered that QASA represented neither an actual nor a perceived threat to the independence of the advocate. Thus at paras 65 to 67, it dealt with "hopes". It explained that judges have for many years been the main source of references for advancement at the Bar and more recently solicitor advocates. It said at para 66:

> "It has not so far been suggested that the clients of advocates who have applied or plan to apply for any of these appointments may be disadvantaged because the advocate is likely to "pull his punches" when appearing before a judge who is a potential consultee or referee; nor that a client could reasonably perceive that this is the case. On the contrary: any but the most unreasonable client, if made aware of this aspect

> of the working relationship between the advocate and the judge, would be more likely to think that the advocate would make a special effort to be on top of the case and impress the judge."

56. At paras 68 to 71, the court dealt with "fears". It noted that for centuries judges have had disciplinary powers over advocates and, although these powers are now largely vested in the front-line regulators, judges can and sometimes do make complaints about the conduct of advocates. It said that "it is a big leap from recognising that judges are occasionally unfair to saying that the Scheme is a threat, or could reasonably be perceived by the client as being a threat, to the independence of the advocate".

57. We can now address the question whether the LSB's decision is unlawful because it did not consider whether there was a perceived threat to the independence of advocates. We are satisfied that the LSB did consider this question. For the reasons that we have given, in the context of what the LSB had to do, there was no difference between actual and perceived risk to the independence of the advocate. Its task was to assess the risk. It concluded that there was no real risk that QASA would undermine the independence of the advocate. In reaching this decision, it had in mind and must be taken to have applied the guidance of Lord Hobhouse to which its attention had been drawn. We reject the submission that it did not direct itself correctly on the question of the nature of the risk.

DOES QASA UNDERMINE THE INDEPENDENCE OF THE JUDICIARY?

58. The claimants' argument here is that judicial independence is undermined by two features of QASA. The first is that a judge would be exposed to the risk of civil suit by a disgruntled advocate who received an adverse assessment. The second is that the judge's conclusions about the performance of the advocate would be communicated to the advocate (but not the other party) at a time when the proceedings might still be extant. Ms Rose also submits that the LSB erred in its approach to judicial independence by failing to recognise that the principle encompasses the requirement for a perception of independence, which is undermined by the existence of conflicts of interest and pressures towards acting otherwise than independently. Finally, Ms Rose advances a distinct argument that the LSB decided to approve QASA without taking into account the concerns expressed by the judges themselves. Mr Kenny was wrong to say that judges had not expressed concern about their independence.

59. The issue of judicial independence was raised directly in the letter before claim dated 31 May 2013. The letter contended that QASA violates the principle of judicial independence essentially for the reasons which are advanced on this appeal i.e. (i) private communications between the judge and one party are inimical to the administration of justice and (ii) a judge who makes adverse comments on an advocate in an assessment form would not enjoy immunity from suit. The suggested possible causes of action included defamation, negligence and discrimination under section 29 of the Equality Act 2010. In his witness statement, Mr Kenny says (para 98-103) that the LSB recognised the importance of judicial independence and concluded that the risk that QASA posed any threat to it was at a "very low level". He says that it was the view of the LSB that it was "wholly unpersuasive" to suggest that a judge's independence would be compromised by providing feedback on one of the advocates who appeared before them. He added: "if the scheme had been a real

cause for concern because of its impact on judicial independence, I feel sure that this concern would have been raised clearly by the judiciary during its development. This did not occur". In short, he said that the LSB did not share the claimants' concerns about judicial independence and considered that judges should be trusted to fulfil their proper role.

60. We should repeat what the LSB said at para 36 of its decision:

> "The Board also considered whether the Scheme posed a challenge to judicial independence and concluded that this was a very low level risk. Our assessment is that there is a low risk that judicial independence would be challenged by the scheme arrangements. The independence of the judiciary is one of the core values of our justice system. Judicial independence is also governed by relevant legislation (such as the Constitutional Reform Act 2005) and will remain the subject to that legislation's provisions. Additional safeguards in place include the Guide to Judicial Conduct which was updated in March 2013 and this includes provisions relating to judicial independence and impartiality. The Board also took into consideration that the Scheme introduces transparent and consistent criteria for advocates to be judged against and that judges will receive training on how to apply these criteria. It could be argued that the Scheme will be more robust and transparent than what happens under current arrangements, where judges may provide feedback informally on the performance of advocates via the circuits to heads of chambers rather than via the approved regulator."

61. The Divisional Court said at para 79 of its judgment:

> "Judges, and indeed all other consultees, who give references to the Judicial Appointments Commission are protected by the statutory duty of confidentiality laid down in section 139 of the Constitutional Reform Act 2005. In respect of all other references, and complaints by judges to regulators, the risk has always been there. We have not been aware of any case in which such a claim has been made. The risk appears to us very slight because of the defences available, such as qualified privilege in the case of defamation. It cannot be dismissed out of hand; but it is part of a judge's job. As to costs, we can predict with confidence that if any judge were to be sued in respect of his completion of a CAEF, and were left to fund his defence personally, the Scheme would come to an abrupt end. The perceived threat to judicial independence is so conjectural as not to be real."

62. Ms Rose submits that the conclusion of the Divisional Court that the risk of legal action against a judge is very slight is "unsustainable". She highlights in particular

the risk of an allegation that an evaluation has been tainted by direct or indirect discrimination. She also submits that the Divisional Court was too impressed by the fact that no claim has yet been made in respect of judges giving references: that is to ignore the fact that QASA is qualitatively and quantitatively different from any form of judicial evaluation that the legal profession has seen before. As she puts it, QASA is "in this respect a recipe for litigation against judges". Moreover, if QASA is construed (as the Divisional Court held) as allowing a right of appeal following a negative assessment, that would expose judicial evaluations to greater scrutiny, and potentially involve judges in defending their own evaluations even prior to any civil litigation.

63. We reject these submissions for the reasons advanced by Mr Giffin and Mr Dutton QC. Even if the possibility of a judge being sued for giving an unfavourable reference is a real one, this cannot impact on the independence of the judge in his conduct of the trial. Judicial independence is central to the right of litigants to a fair hearing. It refers to the way in which the judge conducts the proceedings over which he is presiding and makes rulings as between the parties to those proceedings. Even if a judge feared being sued by an advocate to whom he had given an unfavourable assessment, it is impossible to see how this would impact on the judge's conduct of the proceedings. It might cause the judge to refuse to fill in an assessment form at all. It might cause him to give a more favourable assessment than he would otherwise have done. In other words, it might impact on the way in which he deals with the assessment. But none of that would have any impact on the conduct of the proceedings.

64. As regards communications between the judge and the advocate, the disclosure of the completed assessment form infringes no principle of law, still less one which has anything to do with judicial independence. It is self-evident that a judge is not normally permitted to discuss the substance of the case with one party but not the other. But the content of the assessment form has nothing to do with the substance of the case, and it is communicated at a time when the judge has parted with the case. Judges must be astute not to comment in terms which might impact on the conduct of any pending appeal.

65. It is true that some concerns were expressed by judges during the consultation process. At para 78 of its judgment, the Divisional Court said that some judges said that they would be hesitant about being critical if a "not competent" marking were made known to the advocate "since this would affect the working relationships between the bench and the advocates". But that is quite different from a concern about the risk of judges being sued and the consequent risk of undermining judicial independence. In our judgment, the concern about damaging working relationships between advocates and local judges before whom they frequently appear has nothing to do with a concern about judicial independence.

66. The LSB dealt with the issue of the independence of the judiciary that was raised in the letter before claim in fairly summary terms. For the reasons that we have given, it was justified in doing so. We should also say that the complaint that the LSB failed to deal with the discrete perceived risk point has no merit either. There is no difference between actual and perceived risk when it comes to making predictions about the systemic risk posed by QASA to the independence of the judiciary. No fair-minded informed observer would consider that there was a real risk that (i) the possibility of

the judge being sued or (ii) the fact that the assessment would be communicated to the advocate would have any impact on the way in which the judge conducted the proceedings.

IS THERE AN EFFECTIVE RIGHT OF APPEAL?

67. The claimants contend that, in breach of article 6 of the European Convention on Human Rights and of EU law, the appeals procedure set out in the BSB QASA Rules and Appeals Policy provided no scope for an appeal against the content of an evaluation or any other scrutiny of the facts underlying a decision to refuse accreditation. They rely on the following. Rule 10 of the Rules provides that the BSB shall, on receipt of an application for accreditation, decide whether to grant or refuse it. Rule 11 provides that the BSB may appoint an independent assessor to conduct an assessment of the advocate's competence before reaching a decision on an application. Rule 12.4 provides that, in order to be accredited:

> "You must be assessed in your first effective criminal trials at your level and submit the prescribed number of completed criminal advocacy evaluation forms confirming that you are competent in accordance with the competence framework detailed in the QASA Handbook."

68. Rule 30 provides that an advocate may appeal to the BSB against any decision reached by the BSB under the rules, but that appeals "must be made in accordance with the published BSB QASA Appeals Policy". Para 2 of the BSB QASA Appeals Policy states:

> "You may not appeal against the content of an individual assessment conducted by a judge and recorded through a criminal advocacy evaluation form".

69. Para 5 states that an appeal may only be brought on the grounds that (i) the decision reached was unreasonable; and/or (ii) there was a procedural error in the assessment or decision-making process causing disadvantage which was sufficient to have materially affected the decision.

70. Ms Rose submits that the effect of these provisions is that, if an advocate has been evaluated as "Not Competent" in one or more of his evaluation forms (or in two forms if he has obtained a third evaluation), he cannot be accredited, and there is no scope for an appeal.

71. The obvious unfairness of the absence of any such right of appeal led the BSB to submit in the court below that the appeal rights were in fact more extensive than might have been apparent. The Divisional Court accepted this submission holding that:

> "85. Although BSB Rule 12.4 is not happily worded, we consider that it should be given a purposive rather than a literal construction. A *valid* submission requires CAEFs for the two out of the advocate's first three trials to be submitted to the approved regulator. If the BSB is satisfied that two of these

> have been properly completed, give no cause for concern and satisfy the requirements for assessing the advocate as Competent, the advocate will be granted full accreditation at the relevant Level. But it is open to a barrister to submit that, notwithstanding the failure to obtain two Competent evaluations, the BSB should nevertheless grant full accreditation outright (though this would no doubt be exceptional), or that, before reaching a decision on the application, the BSB should exercise its discretion under Rule 11 to appoint an independent assessor to conduct an assessment of the barrister's competence to conduct criminal advocacy at the appropriate level.
>
> 86. If the BSB decides to reject the application for full accreditation the advocate then has the right of appeal. We regard the wide powers given to the adjudicator as a real safeguard against the possibility of an injustice being done to the advocate by one or two maverick judges. For example, if the BSB has accepted the adverse evaluations at face value and declined to appoint an independent assessor, it would be open to the adjudicator in an appropriate case to remit the decision to the BSB on terms that they should appoint an independent assessor to review the advocate's competence and then reconsider the application in the light of the assessor's report. We are satisfied that the scheme has adequate appeal rights, and that these meet Article 6 of the European Convention of Human Rights, if (as to which we reach no concluded view) that article is engaged. "

72. Ms Rose submits that this construction strayed beyond any permissible principle of interpretation. She argues as follows. The true meaning of a policy document is a question of law: *R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72, [2008] QB 836, paras 118 to 123. It is legitimate to have regard to the purpose of the BSB QASA Rules and Appeal Policy in construing their provisions. But the court has no power to improve upon the documents which it is called upon to construe by introducing terms to make them fairer. By interpolating into the BSB QASA Rules and Appeal Policy an enhanced appeal right in the way adopted by the Divisional Court, the court went far beyond spelling out what the Scheme means. It trespassed into the forbidden territory of seeking to improve the Scheme in accordance with what the court would like it to mean. Accordingly, Ms Rose submits the court should have held that the Scheme as drafted by the BSB was unlawful for failure to provide for a fair right of appeal and quashed the decision. The BSB would in that event be required to reconsider, rewrite and resubmit the appeal provisions. That process might well not reach the same result as that "imposed by" the court, particularly since the appeal system as reinterpreted by the court would appear to involve far more substantive reconsideration and a greater role for independent assessors than originally envisaged.

73. The LSB and BSB support the Divisional Court's interpretation. They say that it is necessary to interpret the Scheme "in a common sense manner so as to give effect to

[its] obvious intent": see *R v Secretary of State for Social Services, ex p Stitt* (unreported, 21 February 1990) cited in *R (on the application of KR) v Secretary of State* [2008] EWHC 1881 at para 13. They say that here the intent is "to have a fair and proportionate appeal process".

74. It is clear that QASA unequivocally provides that there can be no appeal against the content of an individual assessment by a judge. But an appeal can be brought on grounds of unreasonableness or procedural error (para 5 of the Appeals Policy). The Divisional Court construed the Scheme expansively as giving the BSB on appeal "wide powers" to avoid injustice being done to the advocate "by one or two maverick judges" or "in an appropriate case to remit the decision to the BSB on terms that they should appoint an assessor to review the advocate's competence". The court said that rule 12.4 was not happily drafted. That may be true, but it seems to us that the only way that the court could have interpreted the Scheme in the way that it did was to give a wide construction to the words "on grounds of unreasonableness" in para 5 of the Appeals Policy.

75. Dr Davies has explained at para 238 of her witness statement how the BSB intends to operate the appeals process. She gives as examples of complaints which could be the subject of an appeal to the BSB cases where the barrister contends that the two judges whose assessments were not favourable had been biased or had acted unfairly. She says that this is a matter which the BSB would take into account on an appeal and that "what matters is that the appeal process should be fair". Mr Kenny says at para 125 of his statement that his understanding is that "there is the potential where necessary for an accreditation decision or an appeal against it to deal with a case in which the judicial evaluation recorded on the CAEF proves from some reason not to be reliable".

76. In our view, the appeal provisions are not clear and it is not certain how the BSB would apply them. They should be amended to clarify the limits of para 5 of the Appeals Policy and, in particular, to spell out what is encompassed by the word "unreasonable". In what circumstances (if any) is an advocate to be permitted to challenge the substance of the judge's individual assessment (i.e. for reasons other than procedural unfairness in all its forms)? In our view, the statement by Dr Davies that the BSB intends the appeal process to be fair does not sufficiently delineate the scope of the right of appeal.

77. But the basis for the challenge is not that the precise scope of the right of appeal that is conferred by Rule 30 of the BSB QASA Rules and the Appeals Policy is unclear. In any event, even if there is a flaw in the appeal provisions, that is not a sound or reasonable basis for striking down the LSB's decision. We have no doubt that the BSB will clarify its Appeals Policy taking account of what we have said in this judgment.

THE STANDARD OF REVIEW: THE DOMESTIC LAW DIMENSION

78. The Divisional Court held that the standard of review was to be found in the normal application of *Wednesbury* principles but that, in applying that standard in this case, the intensity of review was higher than in other cases: "Not only does the subject-matter fall within an area in which we as judges have an expertise but the claim also raises issues important to the administration of justice" (para 90). The court rejected

the submission that the standard of review was the more demanding one of proportionality, namely of determining whether (i) the objective of QASA was sufficiently important to justify the limitation of a fundamental right; (ii) it is rationally connected to the objective; (iii) a less intrusive measure could have been adopted; and (iv) having regard to such matters and the severity of the consequences, a fair balance has been struck between the rights at issue and the public interest.

79. Mr de la Mare QC submits that the proportionality standard of review applies at common law to any interference with fundamental constitutional principles: see *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26, [2001] 2 AC 532 at paras 21 and 23 per Lord Bingham. The effect of *Daly* is that proportionality now has "a life of its own in public law": *R (Quila) v Secreatry of State for the Home Department* [2010] EWCA Civ 1482, [2011] HRLR 11 at paras 34 to 36 per Sedley LJ.

80. A recent statement on the intensity of review at common law is that of Lord Mance in *Kennedy v Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808 at paras 51 to 55. It seems that the difference between a reasonableness review and a proportionality scrutiny may be more apparent than real. The intensity of a reasonableness review will vary according to its context. In the context of fundamental rights, Lord Mance said "it is a truism that the scrutiny is likely to be more intense than where other interests are involved". Conversely, a "proportionality review may itself be limited in context to examining whether the exercise of a power involved some manifest error or a clear excess of the bounds of discretion".

81. Mr de la Mare submits that the decisions of the LSB and BSB have the potential to impinge upon the independence of the advocate and the judiciary. This is a fundamental principle. Any such potential impingement requires as cogent a justification at common law as does an interference with fundamental rights.

82. He further submits that the proportionality ground of review should be applied in the present context as a matter of domestic law since proportionality is "built into" the legislation pursuant to which the power is exercised: *British Telecommunications plc v Ofcom* [2012] CAT 11 at para 129. In that case, the relevant statute provided that OFCOM should not set a condition unless the condition was "proportionate to what the condition or modification is intended to achieve". Here, the importance of holding the LSB and BSB to a proportionality standard has been recognised by Parliament in the Act itself. Thus section 3(3)(a) requires the LSB to have regard to the principles under which regulatory activities should, inter alia, be "accountable" (see also the corresponding obligation imposed on the BSB by section 28(3)(a)).

83. Mr de la Mare submits that the Divisional Court was wrong to conclude at para 93 that "[t]here is nothing in the legislation which gives any warrant for thinking that it is the court's task to decide for itself whether a scheme such as QASA is a proportionate scheme" because "the duties to ensure proportionality are very clearly placed on the regulators". He says that the application of no more than a *Wednesbury* standard defeats the legislative intention of imposing proportionality obligations on the regulators and ignores the court's own obligation to ensure that the regulators comply with their duties.

84. We do not accept that a proportionality test is required by domestic law for two reasons. First, such a test would be inconsistent with the Act. It is worth repeating that section 3(3)(a) of the Act requires the LSB to " *have regard to* ....the principles under which regulatory activities should be transparent, accountable, *proportionate,* consistent and targeted only at cases in which action is needed" (emphasis added). The corresponding obligation imposed on the BSB by section 28(3)(a) is in identical terms. As Mr Giffin points out, it follows that Parliament has made express provision for the way in which proportionality is to fit into the decision-making process, namely by being a matter which the LSB is to take into account. Parliament has not imposed an obligation on the LSB to promote regulatory activities which are proportionate. The obligation is no more than to have regard to the principles under which the regulatory activities should inter alia be proportionate. For the court itself to review the proportionality of a regulatory measure would therefore be inconsistent with the scheme of the legislation. We cannot, therefore, accept the submission of Mr de la Mare that the Divisional Court's approach defeats the legislative intention of imposing proportionality obligations on the regulators. This submission mischaracterises the nature of the regulators' obligations. The reference to "proportionality" in section 3(3)(a) must be read in its proper context. The proportionality principle appears alongside four other principles, namely "transparent, accountable.....consistent and targeted only at cases in which action is needed". If (contrary to our view) section 3(3)(a) is a free-standing source of judicial review, all five principles would have to be similarly enforceable by the court. This cannot be right. In truth, they are aspirational principles, not legally enforceable objectives which the LSB is obliged to achieve.

85. Secondly, QASA does not in any event involve any interference with fundamental rights or constitutional principles. For the reasons already given, it does not undermine the independence of the advocate or the judiciary. As Mr Giffin puts it: a scheme specifically designed to increase the quality of legal representation in criminal trials cannot be equated with (for example) the denial of access to a court. We do not understand the claimants to contend that proportionality is the correct standard of review even if we reject (as we have done) their arguments that QASA infringes the principles of the independence of the advocate and the judge. In any event, as we have already emphasised, the LSB was obliged, so far as reasonably practicable, to act in a way which was compatible with *all* of the eight regulatory objectives and to do no more than to have regard to *all* of the principles stated in section 3(3)(a).

86. That is not to say that, in reviewing the lawfulness of the LSB's decision, the court should only uphold a substantive challenge if it is satisfied that the decision is irrational. The Divisional Court was right to apply a "heightened" *Wednesbury* standard of review in this case. The court enjoys a high level of institutional competence and constitutional legitimacy when addressing challenges to the criminal justice process. This should be reflected in the applicable common law standard of substantive review.

IS QASA UNLAWFUL ACCORDING TO DOMESTIC LAW?

87. Once it is accepted that (i) the applicable standard of review is the *Wednesbury* standard (albeit heightened) and (ii) QASA does not undermine the principles of judicial and professional independence, there is no real basis for holding that QASA is unlawful in domestic law terms. Indeed, we did not understand Mr de la Mare to

contend otherwise. The thrust of his argument was that the Divisional Court was wrong to conclude that QASA is proportionate. We conclude that QASA is not unlawful according to our domestic law.

PROPORTIONALITY: THE EU LAW DIMENSION

Introduction

88. The claimants submit that proportionality is demanded because QASA is an "authorisation scheme" within the meaning of the POS Regulations. The POS Regulations implement the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ("the Services Directive"). The Divisional Court held that (i) QASA is not an "authorisation scheme" for the purposes of the Regulations and that in any event (ii) the Regulations and the relevant provisions of the Services Directive had no application in the instant case. Accordingly, it held that QASA did not fall within the scope of the Services Directive or the Regulations.

89. The effect of regulation 14 of the POS Regulations is that access to or the exercise of a service activity must not be made subject to an "authorisation scheme" unless "the need for an authorisation scheme is justified by an overriding reason relating to the public interest" and "the objective pursued cannot be obtained by means of a less restrictive measure, in particular because inspection after commencement of the service activity would take place too late to be genuinely effective": see regulation 14(2)(a) and (c). Regulation 4 defines an "authorisation scheme" as "...any arrangement which in effect requires the provider or recipient of a service to obtain the authorisation of, or to notify, a competent authority in order to have access to, or to exercise, a service activity". The Divisional Court held that QASA is not an "authorisation scheme" because it does not control "access to a service activity".

90. If QASA is an "authorisation scheme", then it must be proportionate. We heard elaborate submissions on the question of whether QASA is an "authorisation scheme". We are inclined to the view that this question is not acte clair and that, if it were necessary for the resolution of the proportionality issue to decide whether QASA is an "authorisation scheme", we should refer the question to the CJEU.

91. We are, however, able to resolve the issue by assuming (without deciding) that QASA is an "authorisation scheme" and that the Services Directive applies. It is right to record at the outset that the LSB concluded that QASA was not an "authorisation scheme" (para 33 of the Decision). It did not, therefore, apply the provisions of the POS Regulations. It did, however, note at para 30 that JAG had consulted four times on the details of QASA that aspects of it had been adjusted as a result of representations made during the consultations. It summarised some of the amendments and then said:

> "The Board considers that, on balance, the applicants have responded to issues raised during consultation and have adjusted the Scheme to make it proportionate and targeted without undermining its potential effectiveness".

92. The Divisional Court dealt with the proportionality issue in the following way:

"130. If we are wrong in any of this, and proportionality applies, the issue which arises is how the QASA scheme measures up to the test. In *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39; [2013] 3 WLR 179, Lord Reed (with whom Lord Sumption agreed on this point: [20]) said that the principle did not entitle a court simply to substitute its views for those of the decision maker, although the degree of respect accorded it would vary: [71]. Both Lords Sumption and Reed adopted the well known approach that the court would examine the case advanced in defence of a measure to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the objective; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community: [20], [70][76].

131. In our view the objective of competent advocacy is important and the scheme is justified by the evidence of sub-standard advocacy. There are obvious risks posed both to individuals and to the criminal justice system as evidenced from the time of the Ipsos MORI survey in 2006, through the CPS review in 2009 to the large scale survey reported by ORC International in 2012. None of these were as comprehensive and as complete as one would conduct in an ideal world, but they produced significant evidence of concerns about advocacy standards from a range of sources, including the views of the judiciary.

132. It was only to be expected that in the development of QASA scheme different, indeed sometimes radically different, views were taken about its desirability and design by the BSB, the SRA and other regulators, by advocates and their representative bodies, and by judges. None of that goes to the irrationality of the scheme as it relates to the objective of tackling incompetent advocacy. The ORC International report highlighted that matters such as public funding limits could make matters worse. As we explained earlier in the judgment, after the final consultation in 2012 the BSB considered whether a less intrusive scheme was still possible, focusing on low performers, rather than all barristers, but ultimately it decided that the QASA scheme was the best way forward. We also note in this regard that the cost to advocates of participating in QASA will be in relative terms very small, that judges will have to be trained before conducting assessments and that the scheme will be reviewed within a short period. It may well be that some advocates will not make the grade under the scheme

> and, as we have explained, will be confined to a lower level of work. But we cannot regard the balance struck in the light of all these factors as being in any way disproportionate."

The claimants' criticisms

93. Mr de la Mare submits that the Divisional Court failed to consider whether (i) there were features of QASA that could lead to adverse effects undermining or outweighing the aims to be pursued; (ii) there were less onerous or intrusive means by which the aims pursued by QASA could have been achieved; or (iii) the flaws in the scheme which it identified and sought to correct by "suggestions" at para 136 rendered QASA disproportionate. He also submits that the court failed to consider the unexplained failure of the BSB or LSB to conduct an analysis of the relative costs and benefits of QASA, or to compare its costs and benefits against alternative schemes. The suggestions made by the court were:

> "Having said that, however, we are prepared to trespass into the area that is for them to determine by making four suggestions which might have the benefit of improving the scheme and reducing the concerns that the Claimants have advanced (which we accept are entirely genuine): whether these ideas are adopted is, of course, for the LSB and the regulators. First, it would be sensible for the form to require the advocate to identify (a) when he or she was first instructed (which would not offend legal professional privilege) and (b) whether advice on evidence was provided: in both cases, that would inform the judge as to the background against which any assessment of competence is to be made. Secondly, the judge should be permitted to decline to complete the form if he or she believes, because of the circumstances, that it would not be fair to do so: in that event, the assessment would fall to be made in the next trial. Third, in the event of a third judicial assessment becoming necessary, it should be of the first trial conducted by the advocate in front of a judge other than either of the judges that conducted the first two assessments. Finally, during the course of this judgment, we have identified some areas of ambiguity in the written material. QASA goes to the heart of the practice development of criminal advocates and every step should be taken to ensure that the scheme is completely clear to all called upon to comply with it. "

94. Mr de la Mare also says that QASA is manifestly disproportionate inter alia because (i) no overriding need for it has been demonstrated; (ii) its implementation would have adverse effects on the achievement of the regulatory objectives; (iii) the results of three judicial evaluations can destroy an advocate's career, and yet the evaluation is subjective and incapable of proper appeal; (iv) it has not been shown that there is no less intrusive means of achieving the aims pursued; (v) QASA duplicates existing quality assurance schemes. He places particular reliance on the BSB's attempts in November 2012 to move from QASA to a less intrusive "enhanced quality monitoring scheme". He submits that this shows that the BSB itself thought that there were more suitable, less intrusive alternatives, which it abandoned for the (legally irrelevant)

reason that it thought that the LSB and its fellow regulators would reject such an approach.

The November 2012 proposal

95. The November 2012 proposal was prepared by the BSB as a result of responses that it had received to the fourth consultation paper. It proposed three changes which it believed "could result in a more effective and proportionate scheme". One of these was to require the regulators to collect evidence to assess advocates' competence and to enable the regulators to "take targeted and proportionate action where evidence in respect of a particular advocate indicates a need, instead of the blanket requirement for all advocates to prove competence at their level by numerous assessments". Under this proposal, all advocates would register for accreditation at one of four levels and continue to practise at their self-assessed level, unless a monitoring referral from the judge was received by a regulator. The benefits of the revised proposal were described by the BSB in these terms:

> "5.
>
> - It addresses the concerns raised in consultation but maintains all of the fundamental components of the full scheme…
>
> - All advocates will be subject to some proactive evaluation of competence. However, after the initial assessment, any further regulatory action is targeted at those whom the evidence identifies as posing the greatest risk, in that additional assessments and other requirements such as remedial training are targeted at those whose initial assessment is negative. This approach is proportionate and is consistent with the wider expectations of risk based on supervision and enforcement placed upon regulators by the LSB's Regulatory Standards Framework. It avoids placing a disproportionate burden on advocates or members of the judiciary, which a blanket requirement for multiple assessments on all advocates risks doing".

96. The BSB's suggested alternative was discussed at a meeting of LSB and the regulators on 5 November 2012. It became clear during the meeting that neither the LSB nor the other regulators was willing to support the proposed revisions to the scheme. As Dr Davies explains at para 175 of her statement, they did not consider the alternative monitoring scheme "to be credible and sufficient to deliver <u>proactive</u> accreditation". Mr Kenny said that it was difficult to make a scheme more targeted until more information had been obtained through the implementation of the scheme. It was the opinion of the LSB that the public interest would be served "by a broad scheme being introduced, with a thorough assessment after two years, which would enable any changes to the Scheme to be agreed with the benefit of data obtained from its practical operation." (para 228 of Mr Kenny's witness statement).

97. A note prepared by the LSB dated 12 November set out its thinking at the time. Para 5 of the note stated that it was the view of the LSB that none of the consultation

responses justified a departure from the principles previously agreed or fundamental changes to the previous version of the scheme. This view was shared by the SRA and IPS. Para 6 stated that the LSB did not consider that the BSB's preferred option of an "enhanced monitoring scheme" met these principles "because it does not mandate *comprehensive* judicial evaluation or any other form of independent assessment without which we consider any scheme is likely to prove ineffective". It added that the LSB would be concerned "if the resistance of the profession to QASA proposals carried such weight that it trumped the evidence of consumers, purchasers and the judiciary".

98. Proportionality was addressed in terms at paras 11 to 15. The note stated that the evidence supported the need for "concerted action to assess proper risk across the board and take firm action when it arises" (para 12). The scheme could not be said to be disproportionate on grounds of cost, since the estimated cost for a barrister would be approximately £55 per year (para 13). At para 14, the note stated:

> "No other specific issues of proportionality appear to have been raised but it is hard to see how the scheme could be considered disproportionate when considered against the risks to the regulatory objectives and in particular the public interest in securing confidence in the justice system and the delivery of the rule of law. From a very practical perspective, the time taken in approaching a judge to ensure that evaluation is undertaken and the necessary paperwork properly returned is not at all burdensome when set against the normal management of paperwork and documents in a case of any degree of complexity."

99. At para 15, the note continued:

> "It is also difficult to see how a scheme where the penalty of poor performance is to restrict an advocate to a level of work in which they would have been demonstrated as competent can be disproportionate in its impact on the individual. That an advocate who cannot demonstrate their competence across a set of agreed areas should be removed from practice at that level (provided that proper remedial action has been tried and failed) is the very essence of the public interest and the regulatory regime set up by the Legal Services Act 2007. The delivery of a quality assurance scheme must be balanced in favour of public interest rather than the professional interest alone. "

100. There was general support for the idea that there should be one scheme for all advocates and that it was not in the public interest to have one scheme for barristers and different schemes for other advocates. Mr Kenny explains the point in his witness statement:

> "30. Secondly, as more solicitor advocates undertake criminal work, there is a need to demonstrate in a consistent way that the two different routes to qualifying as an advocate with higher rights in criminal courts lead to identical standards of advocacy

> being pursued and common assessment of the standard of advocacy being in place. Inconsistency could undermine public confidence in the administration of justice or the rule of law.
>
> 31. Thirdly, common standards are required in order to promote effective competition, which is a regulatory objective in itself……."

Proportionality in the Decision itself

101. We have already mentioned (para 12 above) that at para 30 of its Decision the LSB stated that it had "adjusted the Scheme to make it proportionate and targeted without undermining its potential effectiveness". Mr Kenny (para 74) refers to the paper that was prepared for the LSB for its meeting on 24 July 2013. He says that, although the word "proportionality" was not used in the paper itself:

> "assessment of proportionality is a routine part of considering all rule change applications, through the assessment of proposed alterations against the better regulation principles. Proportionality was explicitly addressed in the draft decision notice which was provided to the Board as an annex to the main paper."

Discussion

102. It is not for the court to decide whether QASA is disproportionate. The court is not entitled simply to substitute its own views for those of the LSB: see *R (Sinclair-Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394, at paras 19-23 (per Laws LJ, dissenting), paras 115-155 (per Arden LJ) and paras 192-209 (per Lord Neuberger MR). We remind ourselves that we are *reviewing* the proportionality of the LSB's decision. Even under a proportionality test, the decision-maker retains a margin of discretion, which will vary according to the identity of the decision-maker, and the subject-matter of the decision, as well as the reasons for and effects of the decision. A decision does not become disproportionate merely because some other measure could have been adopted. We accept the submission of Mr Giffin that the decision-maker's view of whether some less intrusive option would be appropriate as an alternative is likewise not a question on which the court should substitute its own view, unless the decision-maker's judgment about the relative advantages and disadvantages is manifestly wrong.

103. The present case concerns a policy issue, in relation to a matter which is complex and of public importance and which is controversial as between different interest groups. It calls for judgment and an assessment of (i) what may happen to standards of advocacy without a scheme such as QASA and (ii) what the effects of introducing QASA are likely to be. LSB is the statutory regulator charged by Parliament with the task of making such assessments. Having regard to the identity of the decision-maker and the nature and subject-matter of the decision, we consider that the LSB is entitled to a substantial margin of discretion in relation to the question whether the Decision was proportionate.

104. We do not consider that it is helpful slavishly to apply the four-step analysis set out by Lord Sumption at para 20 of *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2013] 3 WLR 179 to which the Divisional Court referred at para 130 (see para 92 above). Lord Sumption was careful to say that he was summarising the effect of the authorities "for present purposes". That is why, for example, he described the first step as being to determine whether the objective is sufficiently important "to justify the limitation of a fundamental right". The summary of the four steps to be taken requires to be modified at least if meeting the objective does not involve a limitation of a fundamental right. For reasons that we have already explained, QASA does not involve a limitation of a fundamental right.

105. It is not in dispute that improving the standards of advocacy in criminal courts is the objective of QASA. Doubtless, there were many assessment schemes that could have been chosen to meet that objective. In deciding whether to approve QASA, the LSB had to be satisfied that granting approval would not be prejudicial to the various regulatory objectives. That required a difficult exercise of judgment.

106. We can now turn to the submissions of Mr de la Mare which we have summarised at paras 93 and 94 above. As regards (i), the need for a quality assurance scheme has been amply demonstrated by the evidence. As we have earlier pointed out, the claimants' challenge is not to the principle of judicial assessment of advocates. Rather, it is to the details of the scheme. The second submission seems to be a reference to the alleged impact on the independence of advocates and the judiciary. We have already given our reasons for rejecting these arguments. As regards (iii), it is true that the results of three adverse judicial evaluations can destroy an advocate's career. We have already dealt with the appeal point. It is not a flaw in QASA that it involves subjective evaluations. Any evaluation of an advocate's performance will, to some extent, be subjective. We repeat that there is no challenge to the principle of judicial evaluation.

107. As regards (iv), it is not the law that, unless the least intrusive measure is selected, the decision is necessarily disproportionate. Rather, "the question is whether a less intrusive measure could have been used without unacceptably compromising the objective": per Lord Sumption in *Bank Mellat* at para 20. This fourth submission is largely based on the rejection of the BSB's November 2012 proposal. In our judgment, the LSB was entitled to reject this proposal for the reasons that it gave. It was not "legally irrelevant" that the LSB considered that, for reasons of consistency and in order to promote competition, it was in the public interest to have one scheme for all advocates. That was not, however, the only reason why the LSB rejected the November alternative. It judged that it was in the public interest that there should be a *comprehensive* assessment scheme and that the evidence indicated that there was a need to make assessments *across the board.* This was a judgment that it reached after considering a massive amount of material on which it brought its expertise as a regulator to bear. In short, the LSB was of the view that a separate "enhanced quality monitoring" scheme for barristers could not be adopted without unacceptably compromising the objective (in the best interests of the public) of having a single accreditation scheme for all advocates.

108. As regards (v), the CPS grading system applies only to those advocates who wish to undertake prosecuting work. Nor is QASA a duplication of the QC appointment system.

109. We should also deal with the submission that the LSB did not conduct a cost benefit analysis of QASA or compare its costs and benefits with those of other schemes. The LSB did consider the question of cost and decided that the cost inherent in QASA for advocates would be insignificant. There has been no challenge to this conclusion. We do not think that the failure to compare the cost of QASA with the cost of a different judicial assessment scheme renders the LSB decision disproportionate. The LSB gave careful consideration to the question whether QASA would impose unreasonable burdens on advocates and judges. It concluded that it would not do so. In our judgment, the LSB was entitled so to conclude.

110. It is clear that the LSB would not have approved a scheme which it considered to be disproportionate. Proportionality is one of the leitmotifs that runs through the material that we have seen. We have already referred to paras 11 to 15 of the note dated 12 November 2012. There are other references to proportionality in the voluminous papers that have been placed before us. For example, the first issue in the Table of Issues (18 June 2013 version) to which we have referred at para 40 above is "Is the scheme a proportionate regulatory response and is there an evidence base for its need?" We have also referred to what Mr Kenny says at para 74 of his statement.

111. To summarise, we are satisfied that the LSB addressed the issue of proportionality and was entitled to conclude that QASA was proportionate. We are not persuaded by the submissions of Mr de la Mare (individually or cumulatively) to conclude otherwise.

OVERALL CONCLUSION

112. For the reasons that we have given, we reject all the claimants' challenges to the lawfulness of QASA. It is clear that this is a controversial scheme on which opinions are sharply divided. It is no part of the court's function to express any view about the merits of the scheme. We can only interfere with the Decision if it is unlawful. Those who oppose the scheme can at least take some comfort from the fact that the approved regulators intend to review it after two years. That is an important safeguard. We cannot end this judgment without paying tribute to the quality of the submissions that we have received. We especially wish to express our deep gratitude to Baker & McKenzie and to Ms Rose, Mr de la Mare and their juniors for undertaking this appeal pro bono. This has been no ordinary piece of litigation.

ANNEX

"*The details of the Scheme put forward by JAG in 2013*

39. The Scheme classifies criminal cases at four Levels. Level 1 comprises all Magistrates' Court and Youth Court work, together with appeals and committals for sentencing to the Crown Court, bail applications and preliminary hearings under Section 51 of the Crime and Disorder Act 1998. Level 2 is the first level in the Crown Court: it includes all offences triable either way where the magistrates accepted jurisdiction but the defendant elected to go for trial in the Crown Court, as well as "straightforward Crown Court cases" such as burglary, lesser offences of theft, and assaults contrary to Section 20 or Section 47 of the Offences Against the Person Act 1861. Level 3 includes more complex cases such as possession of drugs with intent to supply and more serious assaults. Level 4 is reserved for the most complex Crown Court cases. There are some entries where the classification of the case may be somewhat subjective: it is not easy, for example, to see the difference between "more serious sexual offences" under Level 3 and "serious sexual offences" under Level 4.

40. An advocate is permitted to undertake hearings short of conducting the trial, including guilty pleas, in cases at one level above his own accredited level provided that he believes he is competent to undertake them. In cases in which there is both a leading and a junior advocate, the starting point is that the junior should be no more than one level below the leader. There are special provisions at Level 2 for advocates to register for Crown Court work other than trials. We have already noted that these were the subject of a good deal of controversy between the professional bodies in the drafting stages of the Scheme, but we are not concerned with them in this case.

41. The QASA Handbook contains detailed provisions about registration at the start of the scheme and also for re-accreditation. In this case we are dealing only with the former. Advocates are entitled to register at level 1 of the Scheme by virtue of having completed the educational and training requirements to enter their respective professions. Advocates wishing to be graded at level 2 or higher will have to register for provisional accreditation at an appropriate level at the start of the scheme, the only exception being recently appointed QCs who will then register for full accreditation.

42. Registration at Level 1 is obtained simply by completion of the education and training requirements for entry into the relevant profession. At Level 2, the procedure both for barristers and for solicitors with higher rights of audience is to register and thus obtain provisional accreditation, valid for a maximum of two years. The advocate must then be assessed in a minimum of two and a maximum of three of his first three effective trials at Level 2. If the advocate is assessed as competent in two of these three trials the appropriate regulator will grant full accreditation at Level 2 valid for five years. There are similar provisions for initial registration at Level 3 and at Level 4.

43. The scheme also provides for advocates to progress upwards through the levels. An advocate wishing to move upwards after obtaining full accreditation at Level 2 must obtain a minimum of two and a maximum of three evaluations at Level 2 in consecutive effective trials over a 12 month period. These will have to show that the advocate is "Very Competent" at level 2 in order to obtain provisional accreditation at Level 3 which itself is valid for a maximum of 12 months. He must then obtain a minimum of two and a maximum of three evaluations of his first consecutive effective trials at Level 3, assessing him as "Competent" at Level 3 to obtain full accreditation at that level, again valid for five years. An identical system operates for progression from Level 3 to Level 4. The provisions for progression are not under attack in this claim.

44. There are nine Standards against which the Judge completing the form must assess the advocate as Competent or Not Competent (or, in the case of some Standards, may say that it is not possible for him to give an evaluation: for example, if the defendant is acquitted the advocate will not have to assist the judge on sentence). There are several pages of detailed performance indicators underlying the various Standards at each of the four levels, to assist the judge in deciding the issue of competence. The Standards are as follows:—

    (1) Has demonstrated the appropriate level of knowledge, experience and skill required for the Level;

    (2) Was properly prepared;

    (3) Presented clear and succinct written and oral submissions;

(4) Conducted focussed questioning;

(5) Was professional at all times and sensitive to equality and diversity principles;

(6) Provided a proper contribution to case management;

(7) Handled vulnerable, unco-operative and expert witnesses appropriately;

(8) Understood and assisted court on sentencing;

(9) Assisted client(s) in decision-making.

45. In order to obtain an overall mark of Competent at Levels 2 or 3, the advocate must be marked Competent in Standard 1 and in at least two of the "core standards" 2, 3 and 4; if assessed against Standard 5, he or she must be marked as Competent; and must only be marked as Not Competent in a maximum of two out of Standards 6 to 9. As to the two Competent evaluations the advocate must not be marked as Not Competent against the same Standard more than once.

46. It should also be observed that the Criminal Advocacy Evaluation Form ("CAEF") which the judge must complete has a page for comments headed with this rubric: "Please provide reasons for your evaluation, with reference to the specific Performance Indicators, particularly if you have selected either "Not Possible to Evaluate" or "Not Competent" for any of the competency standards identified on page 1". This reflects the fact that as a matter of both common sense and elementary fairness an adverse evaluation requires more detailed reasoning than one which states that the advocate is competent.

47. The decision to grant or refuse full accreditation at any of Levels 2, 3 or 4 is for the approved regulator, not for the judges conducting the assessment. If the decision is to refuse accreditation then (subject to any successful appeal) the advocate must "drop down" to the next level and seek to work his way up again by using the provisions for upward progression. The Scheme does not prescribe that a minimum time period must elapse before the advocate can attempt to progress back to the higher level.

48. That is not, however, to say that there is a lacuna in the scheme. As Ms Chloe Carpenter on behalf of the SRA pointed out, paragraph 2.22 of the QASA Handbook states that "advocates must reach a reasoned decision as to the level at which they register and be able to justify

their decision if asked to do so by their regulator". Thus, an advocate who had just failed to obtain full accreditation for Level 2 trial work would need to have a reasoned basis for immediately reapplying for Level 2 without gaining any more experience or training first. Rule 19 of the SRA Quality Assurance Scheme for Advocates (Crime) Regulations 2013 allows the SRA to require an advocate to take specific steps before the application is determined. If, for example, an advocate failed the Level 2 application because of weakness in cross-examination, it would be open to the SRA to require the advocate to undertake some training in cross-examination before re-applying for additional accreditation for Level 2 trial work.

49. Similarly, the BSB QASA Rules make provision for barristers whose application for full accreditation at Level 3 or Level 4 is rejected to be returned automatically to full accreditation at the next level down and then to be permitted to make an application to progress upwards again. There is, by an unintentional omission, no such explicit provision in respect of failure at Level 2, the consequent return or demotion of the barrister to Level 1 and a new application by the barrister for provisional accreditation at Level 2. But we accept the submission of Mr Timothy Dutton QC, for the BSB, that when the QASA Handbook and the BSB QASA rules are viewed together, they lead to the same result as that provided for in the SRA regulations. There is no minimum time which must elapse between a decision refusing full accreditation at Level 2 and a further application by the barrister for provisional accreditation at that level. But the barrister, like the solicitor in the same position, is required by paragraph 2.22 of the Handbook to reach a reasoned decision as to the level at which he registers and be able to justify that decision. The BSB retains the discretion to refuse provisional accreditation at Level 2 to barristers who have recently failed a Level 2 assessment unless they can justify the application by reference to additional training.

50. The effects of a refusal of full accreditation are most drastic at Level 2. At the higher levels they seem to us to reproduce the traditional approach of instructing solicitors and experienced barristers' clerks over many years. At that time, of course, a barrister could not appear in court without a solicitor (or solicitor's clerk or legal executive) to provide instructions and therefore provide feedback on his or her performance. Advocates who performed poorly in a serious or complex case were likely to be unofficially

downgraded to less demanding work (on the basis that neither solicitor nor barrister's clerk would want to undermine the ultimate progress of any barrister by providing work beyond their competence). Once that competence was demonstrated, work of increasing complexity would follow. This mechanism of quality control has now been undermined as public funding does not generally provide for the presence of 'an instructing solicitor'. Having said that, however, even at Level 2, we do not accept the characterisation by the Claimants of an adverse decision as one which brings the advocate's career to an end, although it would undoubtedly be a setback (as would a poor report from an instructing solicitor)."