Judiciary of England and Wales

The Grant of Rights of Audience by the BPC in Leeds to solicitors who do not have higher rights of audience

On a number of recent occasions the Leeds BPC have been faced with the issue of whether or not to grant rights of audience in proceedings in the High Court to solicitors who do not have higher rights of audience. In any case, any application has to be considered, and will be considered, by the relevant judge on the merits. However, it may be helpful to outline the relevant law and some of the relevant principles. This note will not bind any Judge on any relevant application made to them.

1. The Legal Services Act 2007 (the "2007 Act") is the governing statute. Section 12 defines "reserved legal activities" which includes exercising a right of audience. s 13 provides (in part):

> **"13 Entitlement to carry on a reserved legal activity**
> *(1) The question whether a person is entitled to carry on an activity which is a reserved legal activity is to be determined solely in accordance with the provisions of this Act.*
> *(2) A person is entitled to carry on an activity ("the relevant activity") which is a reserved legal activity where–*
> *(a) the person is an authorised person in relation to the relevant activity, or*
> *(b) the person is an exempt person in relation to that activity……..."*

2. Section 19 and Schedule 3 define an "exempt person". For the purposes of rights of audience, paragraph 1(2) provides:

> *(2) The person is exempt if the person–*
> *(a) is not an authorised person in relation to that activity, but*
> *(b) has a right of audience granted by that court in relation to those proceedings.*
>
> Paragraph 1(7) also confers rights of audience with regard to matters conducted in chambers.

3. The discretion conferred in the court to grant rights of audience is one that is to be exercised only in "exceptional circumstances".[1]
   (1) It is not a matter for the parties to consent to but for the court to determine.

[1] See e.g. *Graham v Eltham Conservative and Unionist Club* [2013] EWHC 979 (QB) and cases referred to in that judgment. See also paragraphs 18 to 26 of the Practice Guidance issued most recently in 2010 jointly by the Master of the Rolls and the President of the Family Division (Practice Guidance (McKenzie Friends: Civil and Family Courts) ([2010] I WLR 1881) ("the Practice Guidance").

(2) The stringent requirements laid down by the Act should not easily be bypassed. It undermines the protections of the Act if permission is granted too easily or repeatedly. Those protections include proper training, the advocate being under professional discipline (including an obligation to insure against liability for negligence) and the advocate being subject to the overriding duty to the court. It cannot be fair to those who have gone to the trouble to qualify to obtain higher rights of audience if others who have not met those requirements are routinely granted rights of audience.
(3) The court should pause long before granting rights of audience to persons who make a practice of seeking to represent otherwise unrepresented litigants.
(4) The Court should be alive to the possibility that, in considering each application individually, as regards an individual applicant for repeated rights of audience, the collective effect is to permit that individual to by-pass the provisions of the 1990 Act.
(5) Any grant of rights should be made only where there is a good reason to do so, taking account all the relevant circumstances of the case. Rights should not be granted automatically, without due consideration or for mere convenience.

4. In *D v S* Lord Woolf said the following:

"[The Courts and Legal Services Act 1990][2] does give a court a discretion. In my view, it is quite clear from the terms in which the Act as a whole is written that it is giving a discretion which is to be exercised only in exceptional circumstances. When you consider Dr. Pelling's background, he is conducting, on behalf of those who wish him to do so, assistance in the litigation process which is totally out of accord with the spirit of the Act. I consider that, on any application which Dr. Pelling makes in the future, careful consideration should be given by the court as to whether it should exercise its discretion by allowing him to have advocacy rights. This is not a matter for the consent of the parties. I refer to one case where in the Family Division Principal Registry he was given advocacy rights by consent. This should not happen. This is the responsibility of the courts who have been given that responsibility by Parliament. Those who have rights of audience are subject to very stringent requirements. It cannot be right that Dr. Pelling can bypass these stringent requirements, albeit that no doubt those who he has helped are very grateful for his assistance.

The law must be administered fairly. If the position was otherwise than I have indicated, others can do exactly the same as Dr. Pelling and that would be monstrously inappropriate having regard to the requirements that are placed upon those who have normal rights of audience.

[2] Predecessor to the 2007 Act.

I would therefore give this guidance to courts for the future when exercising their discretion. When they have applications by Dr. Pelling, or others in a similar position, to consider, they should pause long before granting rights of audience. This is because otherwise by considering each case individually, the collective effect of what they are doing is allowing Dr. Pelling to bypass the provisions of the Act. That is clearly not what Parliament intended. In saying this I am very conscious that Dr. Pelling's assistance could be very useful to some litigants. I also appreciate that judges up and down the country who have the difficult task of coping with litigants in person would often be grateful for his assistance, as no doubt was the judge in the court below in this case. However, we cannot allow the fact that our personal inclination would be that we should receive help from Dr. Pelling to enable him to bypass the law in the way I have indicated."

5. In *Graham v Eltham Conservative and Unionist Club* [2013] EWHC 979 (QB), Hickinbottom J (as he then was) said:

> *[31] In exercising the discretion to grant a lay person the right of audience, the authorities stress the need for the courts to respect the will of Parliament, which is that, ordinarily, leaving aside litigants in person who have a right to represent themselves, advocates will be restricted to those who are subject to the statutory scheme of regulation (Clarkson v Gilbert [2000] 2 FLR 839, D v S especially at page 728F per Lord Woolf MR, and Paragon Finance plc v Noueri (Practice Note) [2001] EWCA Civ 1402; (2001) I WLR 2357 at [53] and following per Brooke J). The intention of Parliament is firm and clear. Section I (1) of the 2007 Act sets out a series of "statutory objectives" which includes ensuring that those conducting advocacy adhere to various "professional principles", maintained by the rigours of the regulatory scheme for which the Act provides, and without which it is considered lay individuals should not ordinarily be allowed to be advocates for others, a point also emphasised by the Practice Guidance (at paragraph 19). The strength of this interest and will is enforced by (i) specific legislative provisions allowing lay representation in types of claim in which such representation is considered appropriate, e. g. in small claims in the county court (section 11 of the 1990 Act which is unaffected by the 2007 Act, and the Lay Representatives (Rights of Audience) Order 1999 (SI 1999 No 1225), and (ii) the fact that to do any act in purported exercise of a right of audience when none has been conferred is both a contempt of court and a criminal offence (see sections 14-17 of the 2007 Act).*
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> *[32] Consequently, it has been said by the higher courts that "the discretion to grant rights of audience to individuals who did not meet the stringent requirements of the Act should only be exercised in exceptional circumstances", and, in particular, "the courts should pause long before granting rights to individuals who [make] a practice of seeking to represent otherwise unrepresented litigants" (Paragon Finance at (54] per Brooke LJ, paraphrasing comments of Lord Woolf in D v S). In D v S, Lord Woolf indicated (at page 728F) that it would be "monstrously inappropriate" and totally out of accord with the spirit of the legislation habitually to*

allow lay advocates. The Practice Guidance,[3] in more measured terms, at paragraph 19, states that:

> *"Courts should be slow to grant an application from a litigant for a right of audience... to any lay person.... Any application ... should ... be considered very carefully.... Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience."*

6. Circumstances can vary widely:

> "*There is a spectrum of different circumstances which may arise so that it is difficult to lay down precise guidelines. Cases will vary greatly. For example, in a case where the proposed advocate is holding himself out as providing advocacy services, whether for reward or not, the court will only make an order under section 17(2)(c) in exceptional circumstances: D v. S[4]... On the other hand, where the proposed advocate is a member of the litigant's family, the position is likely to be very different, although, as this case shows, even in such cases the circumstances may vary widely*"[5]
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> "*In each case, a common sense approach must be taken, allowing exceptions to the general rule where this will be of genuine assistance to the court and to the course of justice: Gregory v. Turner[6] at para.[53] referring to a decision of Neuberger J. in Izzo v. Philip Ross & Co. (a firm) [2002] BPIR 310 at 313 - 314.*"[7]

7. Any application for the grant of rights of advocacy should be made at the earliest possible time. As regards the material required:

> *"[37] ….to put the court in a position to make an informed decision, the court will wish to provided with information as to (i) the relationship, if any, between the litigant in person and the proposed advocate, including whether the relationship is a commercial one; (ii) the reasons why the litigant wishes the proposed advocate to speak on his behalf, including any particular difficulties the litigant in person might have in presenting his own case; (iii) the experience, if any, the proposed advocate has had in presenting cases to a court; and (iv) any court orders that might be relevant to the appropriateness of the proposed advocate (e.g. orders made against him or her acting in person or as an advocate in previous proceedings, including any orders restraining him or her from conducting litigation or from acting as an advocate). Given the importance of the role of advocate, there is a duty of frankness on both the litigant in person and the proposed advocate in relation to these issues. Often it will be appropriate to deal with such enquiries quite informally, and they will usually take only a short time; but they are essential to ensure that proper respect is given to the*

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[3] The Practice Guidance.

[4] *D v. S* [1997] 1 FLR 724

[5] *Clarkson v. Gilbert* (|Court of Appeal), 14th June 2000, unreported, per Clarke LJ

[6] [2003] 21 EWCA Civ.183, [2003] 2 All.E.R. 1114

[7] Munslow at para [39].

principle that, ordinarily, advocates should be restricted to regulated advocates and litigants in person."

HHJ Malcolm Davis-White KC
HHJ Jonathan Klein
HHJ Siobhan Kelly
HHJ Claire Jackson
March 2023