Neutral Citation Number: [2013] EWHC 28 (Admin)

Case No: CO/12583/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2014

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MR JUSTICE BEAN
MR JUSTICE CRANSTON

BETWEEN

THE QUEEN

on the application of

(1) KATHERINE JANE LUMSDON
(2) RUFUS TAYLOR
(3) DAVID HOWKER QC
(4) CHRISTOPHER HEWERTSON

Claimants

- and -

LEGAL SERVICES BOARD

Defendant

- and -

(1) GENERAL COUNCIL OF THE BAR
(acting by the BAR STANDARDS BOARD)
(2) SOLICITORS REGULATION AUTHORITY
(3) ILEX PROFESSIONAL STANDARDS
(4) LAW SOCIETY

Interested Parties

Dinah Rose QC, Tom de la Mare QC, Mark Trafford, Charlotte Kilroy and Jana Sadler-Forster (instructed by **Baker & McKenzie**) for the **Claimants**
Nigel Giffin QC and Duncan Sinclair (instructed by **Field Fisher Waterhouse**) for the **Defendant (LSB)**
Timothy Dutton QC and Tetyana Nesterchuk (instructed by **Bevan Brittan)** for the **First Interested Party (BSB)**
Chloe Carpenter (instructed by **Kingsley Napley**) for the **Second Interested Party (SRA)**
Helen Mountfield QC and Chris Buttler (instructed by **Natalie Turner**) for the **Fourth Interested Party (Law Society)**
The Third Interested Party did not appear and was not represented

Hearing dates: 28-29 November and 2 December 2013

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Approved Judgment

The President of the Queen's Bench Division:

This is the judgment of the Court, to which we have all contributed.

Introduction

1. It is a critical test of the freedom inherent in our democratic society that those accused (usually by the State) of committing criminal offences can and should be represented by capable criminal advocates, independent in spirit who, subject to the rules of law and procedure which operate in our courts and to the dictates of professional propriety, are prepared to put the interests of their clients at the forefront and irrespective of personal disadvantage. Similarly, advocates instructed to prosecute crime must be impartial, balanced and fair. These are the values, to the great advantage of the rule of law in this country, that have long been embedded in the practice of advocates before our criminal courts. Those who have the responsibility for the regulation of advocates (whether barristers or solicitors) are imbued with the same sense of the centrality of independence and mindful both of the need to maintain standards and the critical importance of supporting professional independence.

2. The importance of these principles was underlined in our common law as recently as 1967 when the House of Lords, in *Rondel v Worsley* [1969] 1 AC 191, resoundingly reaffirmed the immunity of the advocate from liability for negligence: this immunity survived until its overthrow in 1978 in *Saif Ali v Mitchell* [1980] AC 198. Apart from potential liability at law, powers were also developed to deal with professional misconduct by barristers (through the judges of the High Court acting as Visitors to the Inns of Court) and solicitors (who, as officers of the court, are subject to its inherent jurisdiction as now reflected in s. 5)(2) of the Solicitors Act 1974).

3. A standing scheme dealing with inadequate professional standards has been developed even more recently. As for solicitors, powers in this area were given to the Solicitors' Disciplinary Tribunal (established by section 46 of the Solicitors Act 1974); they were also given to the Disciplinary Tribunals for the Bar (established by Paragraph 1(f) of the Constitution of the Council of the Inns of Court ("COIC"), following a Resolution of the Judges dated 26 November 1986). Both main branches of the profession had requirements for initial qualification and in due course for continuing education, but there were no checks on the performance of advocates once qualified and established in practice. It was simply assumed that market forces would prevail: poor quality solicitors would lose clients, and poor quality barristers would not be instructed by solicitors.

4. In 2003, a report of the Department for Constitutional Affairs ("DCA") described the legal regulatory framework as "outdated, inflexible, over-complex and insufficiently accountable or transparent". The then Lord Chancellor, Lord Falconer of Thoroton, commissioned a former Deputy Governor of the Bank of England, Sir David Clementi, to review arrangements and write a report on legal regulation.

5. The Clementi Review, published in December 2004, criticised the legal profession for, among other things, contributing to delay and cost in court proceedings, and for failing to provide a competitive market for customers.

6. The recommendations were bold, starting with a split between representative and regulatory functions of both the Bar Council and the Law Society, ultimately leading to the creation of the Bar Standards Board ("BSB") in 2006, and the Solicitors Regulation Authority ("SRA") in 2007. The creation of the Legal Services Board as an oversight regulator, with significant lay representation, was also recommended.

7. In parallel with these developments, concern was also expressed about legal aid. In 2006, the Legal Services Commission ("LSC"), then responsible for publicly funded legal services, published a report which had been commissioned from Lord Carter of Coles and which looked at legal aid procurement. Chapter 5 of the Carter Report considered *inter alia* proposals for improving the quality of legal service provision, and the need of lay clients to have externally accredited information about such quality. This related to legal advice, litigation and advocacy alike. The LSC, in conjunction with the Ministry of Justice ("MoJ"), took preliminary steps towards developing a scheme for the quality assurance of advocates ("QAA"). This project was overtaken by events.

8. In Autumn 2006, the BSB commissioned research by Ipsos MORI. It painted a positive picture of the quality of advocacy although the then chair of the BSB acknowledged that there were a number of pressing issues requiring attention. One such issue was that the research revealed that a significant number of respondents did not believe that the existing regulatory machinery was up to dealing with barristers who were not up to standard, incompetent or who behaved in an unethical fashion.

The Legal Services Act 2007

9. The Clementi Review was given legislative expression by the Legal Services Act 2007 ("the Act"); this overhauled the framework for the provision of legal services in England & Wales. At the heart of the Act are the eight regulatory objectives expressed in section 1:

> (1) In this Act a reference to "the regulatory objectives" is a reference to the objectives of—
>
> (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.

(2) The services within this subsection are services such as are provided by authorised persons (including services which do not involve the carrying on of activities which are reserved legal activities).

(3) 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].

10. Part 2 of the Act established the Legal Services Board ("LSB"), the Defendant in the present matter. Sections 3 and 4 provide:

3 (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.

4. The Board must assist in the maintenance and development of standards in relation to –

(a) the regulation by approved regulators of persons authorised by them to carry on activities which are reserved legal activities, and

(b) the education and training of persons so authorised.

11. Part 4 (sections 27-70 inclusive) of the Act concerns the role of the LSB in overseeing the work of the "approved regulators". In relation to the Bar, this function is delegated by the Bar Council to the BSB, for the Law Society it is the SRA and the regulatory arm of the Chartered Institute of Legal Executives ("CILEx") is ILEX Professional Standards ("IPS"). Other bodies are listed in paragraph 1 of Schedule 4 to the Act. In particular, by section 28 of the Act, the duties imposed on the LSB by section 3 are in turn imposed on the approved regulators.

12. Part 4 also gives the LSB enforcement powers to ensure the compliance of approved regulators with their duty under section 28. This can range from setting and monitoring targets up to and including the power to withdraw approved status from an approved regulator.

13. One of the enforcement powers of the LSB is the power (pursuant to section 32 of the Act) to make directions, if the Board is satisfied—

(a) that an act or omission of an approved regulator (or a series of such acts or omissions) has had, or is likely to have, an adverse impact on one or more of the regulatory objectives,

(b) that an approved regulator has failed to comply with any requirement imposed on it by or under this Act (including this section) or any other enactment, or

(c) that an approved regulator—

(i) has failed to ensure that the exercise of its regulatory functions is not prejudiced by any of its representative functions, or

> (ii) has failed to ensure that decisions relating to the exercise of its regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its representative functions.

14. 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. The Board is given a wide discretion, with a presumption that applications by the approved regulators are to be approved *unless* the LSB is satisfied of one or more matters. The scheme is set out in paragraph 25 in these terms (emphasis added):

> (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.……*

15. The present judicial review is a challenge by four barristers to a decision dated 26 July 2013, by which the LSB approved an application proposed by the BSB jointly with two other approved regulators, the SRA and IPS, to introduce the Quality Assurance Scheme for Advocates ("QASA").

The history of QASA

16. The LSB came into being on 1 January 2009. Shortly after its inception, the LSB indicated that it would take a role in driving forward the QAA scheme which had been started by the LSC and MoJ in response to the Carter Report. To that end, the approved regulators established the Joint Advocacy Group ("JAG") in October 2009. That group was assisted by an advisory body (the QAA Advisory group or QAG), which itself comprised of representatives from the BSB, the SRA and the IPS as well as from each of the professions and the CPS. QAG was chaired by Lord Justice Thomas who was then Vice President of the Queen's Bench Division and Deputy Head of Criminal Justice.

17. As part of the previous work to develop a QAA system, the LSC had commissioned Cardiff University to conduct research on the findings of the Carter Report in 2006. Cardiff University produced an Evaluation Report in 2009. It referred to the practical difficulties with judicial evaluation where advocates were given cases poorly prepared by others, or late in the day, and suggested "multiple performances" to mitigate the impact of external factors peculiar to individual cases. The authors concluded that at that stage they could not recommend judicial evaluation for the majority of advocates. A significant proportion of advocates in the Cardiff pilot failed the assessment, especially at Level 2 which was the entry level for the conduct of trials.

18. Also in 2009, the Crown Prosecution Service (CPS) conducted a review of the quality of prosecution advocacy. It covered both in-house advocates and advocates in private practice. While it found that two thirds of advocates were fully competent, it identified a quarter as lacklustre and almost eight percent as less than competent. There were no striking differences between in-house advocates and self-employed barristers, although, on the whole, the latter had higher skills levels, particularly in trial advocacy.

19. By letter of 26 November 2009, the LSB Chairman (David Edmonds) wrote to the regulators and representative bodies, as well as the LSC and CPS, to indicate that the LSB considered development of an advocacy scheme to be within its remit, and that it would "provide a project governance structure for all work going forward"; it referred to itself as the 'project sponsor'. The approved regulators did not share the LSB's view of its proposed role.

20. On 18 December 2009, the LSC circulated their 'QAA discussion paper', seeking comments by 11 January 2010. The BSB, SRA and IPS (acting together as JAG) also issued a formal consultation in December 2009, seeking responses by 1 April 2010 ("the First Consultation").

21. Meanwhile, by letter of 5 May 2010, the LSB set out seven core principles for JAG to consider in the development of any QAA scheme. These principles were:

> "(1) Independence - of the scheme and assessment process from those being assessed or their professional bodies;

> (2) Consistency - one scheme (with the possibility of multiple providers delivering it or parts of it);
>
> (3) Differentiation - multiple levels of assessment from entry level to the most senior level;
>
> (4) Tailored assessment - according to area of law and level;
>
> (5) Compulsory participation - any advocate wishing to practise in an area of work covered by the scheme would need at least the minimum level of accreditation for that area of work, but with clients choosing above that level the relevant level of advocate that suits their case, budget and personal preference subject only to limited restriction in place to protect the interests of justice;
>
> (6) Limited exceptions - passporting and exemption only where this is demonstrably in the consumer interest and supported by proper evidence;
>
> (7) Periodic reaccreditation."

22. JAG issued a second consultation ("the Second Consultation") in August 2010, which received seventy responses by the deadline of November 2010. A considerable number of respondents agreed that there was a need for steps to be taken in order to address incompetent advocacy. For the first time, the Second Consultation set out the details of a proposed scheme and proposed that accreditation would be a mandatory requirement in order for an advocate to practise. This is of particular importance given that it affects the duties set out in sections 176(1) and 188(2) of the Act which are in these terms:

> 176 (1) A person who is a regulated person in relation to an approved regulator has a duty to comply with the regulatory arrangements of the approved regulator as they apply to that person.
>
> s. 188 (1) This section applies to a person who—
>
> (a) exercises before any court a right of audience, or
>
> (b) conducts litigation in relation to proceedings in any court,
>
> by virtue of being an authorised person in relation to the activity in question.
>
> (2) A person to whom this section applies has a duty to the court in question to act with independence in the interests of justice.
>
> (3) That duty, and the duty to comply with relevant conduct rules imposed on the person by section 176(1), override any obligations which the person may have (otherwise than under the criminal law) if they are inconsistent with them.

23. The LSB was dissatisfied by the progress made by the JAG and by a paper dated 30 November 2010 (sent by letter dated 9 December 2010), threatened to use its powers under section 32 of the Act to issue a direction. It suggested that JAG members should resolve the matter without need for a direction and proposed that the LSB would commission independent research into assessment methodologies. At the same time, the LSB made it clear that the principles set out in the May 2010 letter were no longer put forward simply for JAG's consideration: they were described as 'seven key principles that a robust and credible scheme would need to follow'.

24. In consequence, the LSB commissioned a report from an HR consultancy, Human Assets Ltd, which was published by the LSB on 15 March 2011. In June and July 2011, pilots of the proposed assessment scheme were conducted in Canterbury (10 advocates evaluated in 5 trials, including a complex 4 day appeal), Durham (fewer than 10 trials), and Birmingham (33 advocates evaluated). The Birmingham pilot found a relatively high number of incorrectly completed forms and underlined the need for judicial training. No instances of poor advocacy were observed at Canterbury Crown Court.

25. In July 2011, the scheme was approved in principle by the Council of HM Circuit Judges. The same month, having modified the proposals better to fit the principles set down by the LSB, the barrister Claimants contend that JAG effectively submitted the scheme for LSB approval in principle. The LSB insists that this was a means only of giving feedback to JAG on whether the proposals met the principles agreed with the LSB earlier in the process. On 29 July 2011 the then Lord Chief Justice, Lord Judge wrote to the Chairman of the Bar, the President of the Law Society, the Chair or Chief Executive of the LSB and all the approved regulators as follows:-

> "Quality Assurance Scheme for Advocates
>
> With the support and effort of the different bodies each of you represents, important milestones have been reached in the development of the quality assurance scheme for advocates.
>
> I am pleased to say that, at a recent meeting, the Council of Her Majesty's Circuit Judges also approved the scheme in principle.
>
> I remain convinced that the scheme is necessary and that the current proposals set out our best chance of realising its introduction, which is both in the public interest and in the interest of the advocacy profession. I am very grateful to you."

26. In July 2011, a further consultation ("the Third Consultation") was launched to ascertain the regulatory changes required to bring the proposed scheme into existence, although the responses were more wide-ranging. A joint response from the Criminal Bar Association and the South Eastern Circuit stated that judicial evaluation must underpin any scheme.

27. At this stage, there remained a real concern over the concept of a 'plea only advocate' i.e. a solicitor with higher courts rights of audience who did not seek authorisation to conduct trials but wanted to be able to represent clients who were pleading guilty: it was not then settled whether the scheme would apply. Suffice to say that the concept was a point of significant conflict between the BSB and SRA, with agreement between them only brokered in March 2012.

28. In the meantime, informal meetings with the judiciary were conducted by the BSB in September to November 2011, adding to similar meetings which had been conducted in November-December 2010. At these meetings, concerns were expressed about the quality of advocacy and there was broad support for a scheme and for judicial involvement. That did not mean (and neither was it the case) that there was universal approval of the proposals.

29. In February 2012, the South Eastern Circuit's annual Ebsworth Lecture provided the platform for Lord Justice Moses to launch a coruscating and widely-reported attack on the proposed scheme for advocates. He said:-

> "The good advocate is a brave and happy advocate. Can anyone who has spent any time in court listening to advocacy really believe that a system of marking will encourage, influence or inspire, or will it deaden and crush in the pursuit of a bland and colourless uniformity?"

He suggested, as an alternative, that:-

> "Judges should be encouraged, with greater frequency, to report the incompetent, or worse to be retrained or struck off. But the need to be done with the poor or hopeless should not be allowed to damage the rest. There is a better way than marking."

Unsurprisingly the lecture was discussed by the BSB at a meeting the same month.

30. ORC International, research consultants who had been commissioned by the BSB, reported in late March 2012. They conducted an on-line survey of 762 criminal advocates, solicitors, legal executives, judges and magistrates, as well as a limited number of in-depth interviews. Over a half of all respondents felt that the existing levels of underperformance in criminal advocacy were having an impact on the fair and proper administration of justice, with some 30 percent rating the impact as very high. A quarter of all respondents felt that criminal advocates very frequently acted beyond their competence, with barristers and QCs being considerably more likely to report failing standards. Over three quarters of all respondents felt that advocacy standards had declined over the previous 5 years. Respondents thought that limits to public expenditure and, thus, to legal aid, would lead to a deterioration of the position.

31. In a speech on 1 July 2012, Max Hill Q.C. then the chairman of the Criminal Bar Association said:-

> "The Criminal Bar in England and Wales has taken an enlightened and positive stance on QASA. We say that QASA has a place, but only if it is introduced with sufficient rigour to preserve our workplace for those who do criminal casework best, and therefore to expel those who not belong. We have set out the essential tenets of a regulatory scheme. These tenets are:
>
> (1) Those who appear in our criminal courts must be fit for purpose. Criminal cases have the greatest impact upon the lives of those embroiled. If you are a criminal advocate, you must be capable of dealing with every aspect of the case in question.
>
> (2) If we are to be regulated, in addition to the existing lifelong training and development which all criminal barristers undertake, then those who appear in court must do so on a level playing field. In a modern world where advocates are not limited to barristers, but include solicitors and legal executives, we say that all three groups or professions must have a common regulatory code which applies to all. The Bar maintains its own high standards, because criminal cases demand nothing less. Others are welcome provided their regulators apply the same high standards.
>
> (3) Policing the standard must be done by someone, if we are to have a workable scheme at all. Because there is no substitute for appearing in court, if you do this job properly, we say the policing will have to be done by the judges, who are the daily observers of what we do. … after a battle, the principle of judicial evaluation of all courtroom advocacy has been won. Pause for a moment to consider what a concession this is for the independent barrister who fights fearlessly and without favour in every case. We do not lightly concede judicial evaluation when the hallmark of the Bar is independence from the judiciary. But the alternative is unthinkable, so we have to settle for judges marking advocacy, and all must do the same."

32. Later in the speech Mr Hill asked the question whether judicial evaluation would be rigorous enough. He continued:

> "Judges who evaluate must eliminate those who are not fit for purpose. That would include incompetent barristers, of course it would. I greatly fear that the evaluation system will not go far enough, and will amount to toothless grumbling about bad advocacy, and nothing more".

33. A final consultation ("the Fourth Consultation") was issued later in July 2012. The range of responses opposing fundamental features of the scheme caused the BSB to question whether or not the scheme should proceed. An alternative scheme for barristers, focussing attention on low performers rather than all barristers, was mooted. The LSB and the other approved regulators did not consider this acceptable.

The BSB abandoned its alternative proposal in November 2012 although changes to the scheme were discussed and agreed within JAG.

34. Between 15 October and 17 December 2012, City University ran a training session for judges who would be conducting judicial evaluations of advocacy. The judges, 93 in number, were invited from the Midland Circuit and the Western Circuit. Judges later said that they valued the training. A considerable number did not use the specified criteria although their evaluations tracked them. The report on the training suggested that it may have been for this reason that some judges thought a plea in mitigation to be competent when it had been designed not to be.

35. On 14 May 2013, the three approved regulators made a joint application to the LSB for the approval of QASA pursuant to paragraph 25 of Schedule 4 of the Act. On 5 June the LSB extended the initial decision period to 11 August 2013.

36. Pre-action correspondence from Baker & McKenzie (solicitors acting pro bono for the barrister Claimants) was sent on 31 May 2013, 17 June 2013 and 25 July 2013. By responses dated 10, 11 and 27 June 2013, both the LSB and BSB indicated that proceedings would be premature until the LSB had made its decision. That decision was made on 26 July and published on 29 July 2013.

37. Further correspondence from Baker & McKenzie was sent on 2 August 2013, repeating requests for disclosure. The BSB responded on 21 August 2013 and the LSB on 23 August 2013. The Claim was issued on 6 September 2013.

38. The claimants applied for an expedited hearing and for a protective costs order (PCO) as well as for permission for judicial review. On 4 October 2013 Ouseley J considered the case on the documents and granted permission, with the observation that "while [I am] not wholly persuaded of the arguability of all points, the simplest way to handling and resolution of the case is to grant permission on all issues". By a further decision sent out on 7 October he granted a PCO in a total sum of £150,000. A subsequent application by the Claimants to vary this figure was dismissed on 30 October 2013 by Bean J: see [2013] EWHC 3289 (Admin).

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).

The LSB's decision

51. It is appropriate extensively to set out the decision of the LSB (dated 26 July 2013). So far as is material, it was in these terms:

> **"***Assessment of the application*
>
> 15. Having considered the application and accompanying material, other information provided by the approved regulators during the application process, and other information the Board considered relevant to the application, the Board has decided to grant this application. In reaching its decision, the Board has taken the following into account.
>
> *The assessment process*
>
> 16. Under Schedule 4 paragraph 25(1) to the Act the Board can consider information supplied by the applicant and any other information it considers relevant to the application. The Board assessed the information contained in the application, conducted a review of the history and development of the Scheme and considered unsolicited representations made subsequent to the submission of the application.
>
> 17. While there is no formal public consultation requirement in the Board's assessment of applications in the initial decision period, the Board has considered the issues raised in the unsolicited correspondence it received after the application was made to the extent they were relevant to the decision.
>
> 18. In conducting an assessment of the application the Board wanted to better understand the problems the Scheme was trying to address and to assure itself that the regulatory arrangements proposed by the applicants were necessary, targeted and proportionate.
>
> 19. In the decision making process, the Board sought clarification from the applicants on a range of issues. These were mainly about how the Scheme will work in practice; consistency between the proposed rules of each applicant; and drafting points within the Scheme Handbook and individual rules of the applicants. The applicants made minor adjustments to the Scheme Handbook and to their respective proposed regulatory arrangements as a result of the Board's questions. The Board has not included details about these more minor matters in this decision notice but the more significant issues are covered and the changes are included in the versions of the documents included in the annexes to this notice.
>
> 20. The Board considered whether there were sufficient grounds for it to consider refusing the application and therefore whether to issue a warning notice under Schedule 4, Paragraph 21(1)(b) to the Act. For the reasons set out in the assessment,

the Board determined that there were not sufficient grounds on which to consider refusal. Additionally the Board did not consider, particularly in the context of the four consultations undertaken by JAG, that seeking further advice through the warning notice procedure would have provided new empirical evidence or further anecdotal evidence that would have added any further value to the Board's overall assessment.

The Board's assessment of the rationale for the Scheme

21. In developing the Scheme, the approved regulators have had to consider their duty under the Act to have regard to the regulatory objectives and Better Regulation Principles. The Board considered whether the applicants have acted in a way which is compatible with those regulatory objectives and principles.

22. As with all applications from approved regulators for alterations to regulatory arrangements, it is for the approved regulators themselves to undertake the policy development and drafting of the specific arrangements. It is also their responsibility to provide in the application any relevant material that supports it, including relevant evidence highlighting the necessity for regulatory arrangements. This includes an explanation of why the applicant wishes to make the alteration in question and the provision of any explanatory material which the applicant considers might be needed for the Board's assessment of the application.

23. Building on the Board's existing knowledge from its oversight engagement, the Board wanted to re-assure itself that there was a risk that needed to be addressed through a regulatory response and that there was a firm rationale for the introduction of the particular Scheme proposed. It is not the role of the Board to repeat the applicant's analysis of the issue in its decision making process. However, the Board did undertake a review of the history and development of the Scheme as part of its assessment of the application.

24. Concerns have been expressed over a long period of time about standards of criminal advocacy. For example, following the publication of the Carter Report in 2006 there appeared to be a consensus that quality assurance of advocacy is important. There is a range of evidence that points towards a risk and in some places a pattern of advocacy not being at the required standard. These include some senior judicial comment, though not all of this highlighted an increasing problem of poor advocacy in criminal courts. A pilot of a quality assurance scheme for criminal advocates undertaken by Cardiff University found that a significant proportion of advocates failed at least one part of the assessment. This was a self

selecting group of advocates but nonetheless provided an indicator. Her Majesty's Crown Prosecution Service Inspectorate has also highlighted problems of poor advocacy and that a quality assurance scheme can help improve quality.

25. The Board is 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, and hence on the regulatory objectives of protecting and promoting the public interest of and supporting the rule of law. It also took into account the potential for higher costs from poorer quality advocacy, in terms of immediate costs by extended trials and the need for defective decisions arising in whole or part from poor quality advocacy needing to be corrected at appeal.

26. The Board in making its decision has taken into account that there has been a broad range of opinions expressed about this matter including views opposing both the necessity of a scheme and the details of the particular Scheme proposed. Grounds for opposition have covered the evidence base, necessity, proportionality and targeting. Much of the disagreement about the extent of low standards of criminal advocacy and the risks that this poses stems from the lack of consistent and measurable evidence available under the current arrangements. The Board recognises that, without a quality assurance framework in place, it would be very difficult to find conclusive evidence of quality problems across criminal advocacy. It is important that those practising criminal advocacy are operating at least to a minimum imposed standard and that the risks associated with poor quality are addressed by means of a proportionate regulatory response.

27. The Board concluded that, while no single piece of evidence of systemically poor standards would suffice on its own to justify the Scheme, there is sufficient consistency of evidence and concern to warrant a scheme such as that proposed by the application. This is because the concerns and limited evidence suggest a real risk, and a pattern, of actual problems in standards across a wide range of criminal advocates and almost nothing by way of evidence that quality is consistent good enough.

28. The Board considers that the proposed Scheme has the potential to provide reliable and sustained evidence for approved regulators to measure and improve the quality of criminal advocacy over time. The Board further considers that it is important that where there is opportunity, through a proportionate and targeted mechanism of accreditation, for relevant approved regulators to measure and enhance the quality of criminal advocacy, they should do so. In that regard,

the Board concludes that the Scheme is proportionate because it addresses the risk in a structured way that allows the Scheme to be adjusted on the basis of evidence gained from its actual interpretation. This is consistent with the Better Regulation Principles enabling a consistent, proportionate and targeted approach to regulation.

29. The Board is further assured by the commitment from the applicants to review the Scheme after two years. The Board understands from the application that this review will "provide a comprehensive analysis of the Scheme including the assessment of the performance of key processes". The review will also assess whether the Scheme promotes the regulatory objectives and improves criminal advocacy standards. With the experience and lessons gained from the operation of the Scheme, the Board considers that it should be possible to further calibrate it so that there continues to be a proportionate regulatory response to the risk posed from poor criminal advocacy. The Board will actively engage with the review in its oversight role.

Issues raised about the Scheme

30. JAG consulted four times on the Scheme details and aspects of the Scheme were adjusted as a result of representations made in those consultations. For example, as a result of issues raised in the third consultation in 2011, JAG considered it necessary to amend the Scheme to ensure that it was more targeted and proportionate. This included: development of the Scheme to ensure that judicial evaluation was fair, consistent and avoided bias; provision of clarity on levels of case determination; and ensuring that the Scheme accreditation requirements did not unintentionally prevent competent advocates from practising. 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.

31. The Board considers monitoring of the scheme to be crucial and is reassured that continuing governance by JAG will enable there to be overall monitoring. It is important that ongoing monitoring of the Scheme includes some specific sources of evidence for supervision and enforcement, such as evidence from court records about which advocates carry on criminal advocacy, visits by approved regulator staff to court centres and spot checks to ensure that advocates have not registered at an unrealistic level. The Board was reassured that data on the competency of those practising criminal advocacy will be published. The Board considers it important that data is published frequently and is accessible so that consumers can find out about the competency of advocates.

32. The Board considered whether the Scheme was contrary to any provision made by virtue of the Act or any other enactment (the criteria under 25(3)(c) of Schedule 4, part 3 of the Act). Although the Scheme will be compulsory for those wishing to undertake criminal advocacy, this accreditation scheme remains separate to the overall authorisation process for being entitled to exercise a right of audience. Even without being signed up to the Scheme, those authorised to do so under the Act, will still be able to carry on other forms of advocacy.

33. The Board also considered whether the Scheme was contrary to any other legislation including that derived from the EU. The Board considered the Provision of Services Regulations 2009 ("POS Regulations") and, while it could be argued that accreditation could be perceived as a gateway to practising, the Board's conclusion was that the Scheme is not an "authorisation scheme" falling within the definition of the POS Regulations; it is an accreditation scheme and does not provide for authorisation to practise. Authorisation remains with the approved regulators under their respective authorisation rules.

34. In respect of the Scheme being targeted at criminal advocates rather than all advocates, the risks of poor advocacy are better evidenced in criminal work than elsewhere and the implications from poor advocacy are serious in that area. The four levels within the Scheme allows the process for accreditation and reaccreditation to be targeted; at the higher levels the more exacting standards will need to be demonstrated by judicial evaluation compared to the less intensive approach at Level 1 (mainly qualification as a lawyer with associated on-going Continuous Professional Development).

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 underpinned by the principle of separation of powers and judicial independence 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 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.

37. A narrow but important concern was raised about how judicial evaluation forms are returned to regulators. The concern was in respect of the proposed arrangement whereby if an assessment is requested by an advocate, the judge must return it to the advocate who will pass it to their regulator and that this risks tension between the assessing judge and the advocate, or the possibility of the advocate failing to return an adverse assessment to the regulator. The Board is satisfied with the arrangements for returning assessment forms and do not believe there is a significant risk of assessment forms not reaching the regulator or conflict between judge and advocate. Nonetheless, the plans to monitor compliance provide additional reassurance that the regulators will try to ensure that all Scheme provisions will be adhered to by the regulated community.

38. The Board considered whether the application had adequately dealt with the impact of the Scheme on diversity. Each applicant conducted an equality impact assessment (EIA) and has committed itself to monitoring and understanding the impact of the Scheme on their regulated communities. The Scheme tries to mitigate the risk from adverse impacts for lawyers who take a career break. The Scheme makes provision for advocates to apply for an extension of time to receive full accreditation and there is now a section on how approved regulators will deal with individuals returning from maternity leave. Following feedback on the fourth consultation on the number of trial opportunities (which would have been a more significant issue for those that work part time) the applicant's have reduced the minimum number of evaluations required.

39. The Board requested that the applicants provide further information on fee levels for accreditation and re-accreditation so that it could ascertain if there was consistency in approach. The Board is reassured that each approved regulator adopted a costs recovery approach and that fees will reflect the costs associated with the development and operation of the Scheme

for their specific regulated community. Each regulator has adopted an "online" approach to minimise staff involvement and therefore keep costs for advocates at a minimum. There was some variation in actual fee level between regulators. These variations were not significant except in the case of the BSB's fees for progression at levels 3 and 4. Each regulator will monitor operational performance and the proposed review will gather data on the impact of the Scheme fees on the criminal advocacy market.

40. In considering if the fees might raise costs of practice to the extent that they threatened or undermined competition, the Board considered what costs were associated with criminal advocacy beyond those for the Scheme. It identified considerably higher costs associated with legal education and qualification as a barrister, solicitor advocate and legal executive advocate. It also noted higher costs were likely in meeting Continuing Professional Development requirements and other training material. Overall, the Board concluded that the Scheme adds only a marginal cost to the practice of a criminal advocate.

Decision

Scope of decision

41. The decision relates to the Scheme Handbook and the individual sets of regulatory arrangements of the SRA, BSB and IPS in respect of the Scheme.

The Board's decision

42. On balance, considering the details in the application and other relevant information, the Board is satisfied there is legitimate and sufficient concern about the quality of criminal advocacy and that the Scheme proposed in the application is both proportionate and targeted. Furthermore the Scheme and implementation will now allow the approved regulator applicants to have consistent and reliable data on the quality of criminal advocacy. As the Scheme is implemented and embedded, the planned review will help to ensure it also remains proportionate and targeted.

43. The Board has considered the application against the criteria in paragraph 25(3) of Schedule 4 to the Act, and is satisfied that there is no reason to refuse this application; accordingly, the Board grants this application. The rules to introduce the Scheme are therefore approved."

Can quality assurance be left to market forces?

52. The first question that must be addressed is whether the long standing view that quality assurance can be left to market forces remains tenable. Some take the view that *any* form of quality assessment of a trial advocate is an excessive regulatory burden, since the market can be relied on to weed out the incompetent. That is not how the present claim is expressed (we will come later to the argument that the scheme is insufficiently targeted). In any event it is unsustainable. In its August 2010 consultation paper the JAG said:-

> "A key element of professional responsibility is the maintenance of appropriate standards. The changing face of the legal landscape coupled with competition and commercial imperatives are putting pressure on the sustained provision of good quality advocacy. The economic climate, both generally and in terms of legal aid funds, has created a concern that advocates may accept instructions outside their competence. It is arguable that the funding mechanisms adopted by the Legal Services Commission (LSC) and the rates of pay are failing to secure the quality of advocacy expected and a scheme of regulation of advocacy may bridge that market gap. The judiciary has responded to these matters through judicial pronouncement on advocacy competence and performance.
>
> Regulatory intervention into the advocacy market has long been argued as unnecessary as market forces should eliminate the under-performing advocate. However, whilst market forces can generally be relied upon to identify the competent advocate, it is not necessarily the case that the less competent will not be instructed. In addition, it is increasingly uncommon for an advocate to be observed by the selecting professional. It has become apparent therefore that natural selection through market forces is not the answer to assure the quality of all advocates. The public interest and consumer protection requires a more proactive approach to assuring advocacy competence.
>
> The comments of the judiciary and others, the fallibility of relying on market forces and the need for consumer confidence all lead to the need for systematic and consistent quality assurance of advocates."

53. In reaching their decision in July 2013, the LSB were entitled to accept this argument. Indeed, in the three years since the 2010 Consultation Paper was issued the substantial reduction in rates of remuneration for advocates in criminal legal aid cases, with the prospect of further reduction, has placed and will place increasing pressure on standards. When work is scarce and rates of pay are declining there must, for example, be a temptation for an advocate to accept work beyond his or her experience or competence. We recognise that, in the case of barristers, that is contrary to Rule 603 of the Code of Conduct for the Bar. For the BSB, Mr Dutton QC emphasised that his clients consider it their duty to maintain standards even in the face of such pressures. We agree: indeed, this must be the duty of all the approved regulators.

The independence of the advocate

54. It is common ground among all the parties to this litigation that an advocate owes a duty to his client and a duty to the court: the latter is now encapsulated in section 188(2) of the 2007 Act as a duty "to act with independence in the interests of justice". These twin duties apply to advocates for any party in any court or tribunal, but the Claimants are all members of the Criminal Bar; and the focus of the argument advanced by Ms Dinah Rose Q.C. on their behalf was naturally the duties of advocates acting for the defence in criminal cases.

55. The importance of the duty to the client and the need for the criminal defence advocate to act fearlessly in the discharge of that duty were expressed in famous terms by Thomas Erskine in 1792. Although traditionally cited as the basis of the Bar's "cab rank rule", what Erskine said is of wider application:-

> "I will forever, at all hazards, assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end."

56. Section 1 of the 2007 Act refers to independence in three places. By section 1(1)(f) the "regulatory objectives" include that of encouraging an independent, strong, diverse and effective legal profession. Section 1(1)(h) also lists among the regulatory objectives that of promoting and maintaining adherence to the "professional principles" listed in section 1(3): these include (a) that authorised persons should act with independence and integrity; and (d) that persons exercising a right of audience or right to conduct litigation in any court should comply with their duty to the court to act with independence in the interests of justice. Ms Rose expressly stated that the duty to the client to act with independence in his interests and the duty to the court to act independently in the interests of justice are not incompatible. We agree. However, the 2007 Act does not establish an order of priorities between the eight regulatory objectives listed in s 1(1), nor between the five professional principles listed in s 1(3). For the most part they will all be in harmony; but where they are not the regulators have to carry out a balancing exercise between them.

57. It is well established that on occasions the need to comply with the twin duties to the court and to the client may, in Mr Dutton's phrase, pull the advocate's loyalty in opposite directions. In *Hall v Simons* [2002] 1 AC 615 Lord Hoffmann said (at 686E):

> "Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice. They may not mislead the court or allow the judge to

> take what they know to be a bad point in their favour. They must cite all relevant law, whether for or against their case. They may not make imputations of dishonesty unless they have been given the information to support them. They should not waste time on irrelevancies even if the client thinks that they are important."

58. Ms Rose referred us to two cases which, although they are the leading authorities on wasted costs orders, contain useful analyses of these duties. In *Ridehalgh v Horsefield* [1994] Ch 205, Sir Thomas Bingham MR (as he then was) said (in the context of civil proceedings, but the words are applicable to criminal trials with only minor changes of terminology):-

> "Legal representatives will of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it. It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court… It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."

59. In *Medcalf v Mardell* [2003] 1 AC 120, Lord Hobhouse put the matter as follows:-

> "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.

53. … At times, the proper discharge by the advocate of his duties to his client will be liable to bring him into conflict with the court. This does not alter the duty of the advocate. It may require more courage to represent a client in the face of a hostile court but the advocate must still be prepared to act fearlessly. It is part of the duty of an advocate, where necessary, appropriately to protect his client from the court as well as from the opposing party. Similarly, the advocate acting in good faith is entitled to protection from outside pressures for what he does as an advocate. Thus, what the advocate says in the course of the legal proceedings is privileged and he cannot be sued for defamation. For similar reasons the others involved in the proceedings (eg the judge, the witness) have a similar immunity.

54. The professional advocate is in a privileged position. He is granted rights of audience. He enjoys certain immunities. In return he owes certain duties to the court and is bound by certain standards of professional conduct in accordance with the code of conduct of his profession…… The advocate must respect and uphold the authority of the court. He must not be a knowing party to an abuse of process or a deceit of the court. He must conduct himself with reasonable competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court's time. The codes of conduct of the advocate's profession spell out the detailed provisions to be derived from the general principles……. All this fits in well with an appropriate constitutional structure for a judicial system for the administration of justice.

55. … The advocate's duty to his own client is subject to his duty to the court: the advocate's proper discharge of his duty to his client should not cause him to be accused of being in breach of his duty to the court. (*Arthur Hall v Simons* [2000] 3 WLR

> 543) But the situation in which the advocate finds himself may not be so clear cut. Difficult tactical decisions may have to be made, maybe in difficult circumstances. Opinions can differ, particularly in the heated and stressed arena of litigation. ….[It] is the duty of the advocate to present his client's case even though he may think that it is hopeless and even though he may have advised his client that it is. (*Ridehalgh* pp.233-4) So it is not enough that the court considers that the advocate has been arguing a hopeless case. The litigant is entitled to be heard; to penalise the advocate for presenting his client's case to the court would be contrary to the constitutional principles to which I have referred. The position is different if the court concludes that there has been improper time-wasting by the advocate or the advocate has knowingly lent himself to an abuse of process."

60. It should be noted that the Council of Bars and Law Societies of Europe (the CCBE), stated in 2006 in its Charter of Core Principles of the European Legal Profession that the core principles include "the independence of the lawyer and the freedom of the lawyer to pursue the client's case" as well as "the lawyer's professional competence". The Charter goes on to state:

> "The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties, or the court indeed. Without this independence from the client there can be no guarantee of the lawyer's work."

61. In *R v Farooqi* [2013] EWCA Crim 1649, Lord Judge CJ underlined the principle in this way:

> "Something of a myth about the meaning of the client's "instructions" has developed. As we have said, the client does not conduct the case. The advocate is not the client's mouthpiece, obliged to conduct the case in accordance with whatever the client, or when the advocate is a barrister, the solicitor "instructs" him. In short, the advocate is bound to advance the defendant's case on the basis that what his client tells him is the truth, but save for well-established principles, like the personal responsibility of the defendant to enter his own plea, and to make his own decision whether to give evidence, and perhaps whether a witness who appears to be able to give relevant admissible evidence favourable to the defendant should or should not be called, the advocate, and the advocate alone remains responsible for the forensic decisions and strategy. That is the foundation for the right to appear as an advocate, with the privileges and responsibilities of advocates and as an advocate, burdened with twin responsibilities, both to the client and to the court.

> In the trial process the advocate is subject to some elementary rules. They apply whether the advocate in question is a barrister or solicitor, and to the extent that the rules of professional conduct of either profession are not consistent, they should be made so. In the forensic process the decision and judgment of this court bind the professions, and if there is a difference, the rules must conform with the decisions of the court. By way of emphasis, in the course of any trial, like everyone else, the advocate is ultimately bound to abide by the rulings of the court. If a remedy is needed, the rulings are open to criticism in this court, and if they are wrong, their impact on the trial and the safety of any conviction can be fully examined. Although the judge is ultimately responsible for the conduct of the proceedings, the judge personally, and the administration of justice as a whole, are advantaged by the presence, assistance and professionalism of high quality advocates on both sides. *Neither the judge nor the administration of justice is advantaged if the advocates are pusillanimous. Professional integrity, if nothing else, sometimes requires submissions to be made to the judge that he is mistaken, or even, as sometimes occurs, that he is departing from contemporary standards of fairness. When difficult submissions of this kind have to be made, the advocate is simultaneously performing his responsibilities to his client and to the administration of justice.* The judge, too, must respect the reality that a very wide discretion is vested in the judgment of the advocate about how best to conduct the trial, recognising that different advocates will conduct their cases in different ways, and that the advocate will be party to confidential instructions from his client from which the judge must be excluded. In general terms, the administration of criminal justice is best served when the relationship between the judge and the advocates on all sides is marked by mutual respect, each of them fully attuned to their respective responsibilities. This indeed is at the heart of our forensic processes." [emphasis added]

Hopes and fears

62. An important strand of Ms Rose's argument was that even if it is unlikely that an advocate will in fact "pull his punches" for fear of offending the judge and irrespective of that possibility, nevertheless the introduction of QASA creates at least the *perception* of a relationship of dependence between the advocate and the judge who is to assess him for QASA purposes. To illustrate that perception and that the possibility of at least subconscious influence are significant, Ms Rose relied on two cases concerning the independence of the judiciary, in particular temporary sheriffs appointed by the Lord Advocate to sit in the criminal courts in Scotland for one year at a time. In *Starrs v Ruxton* [2000] JC 208, the High Court of Justiciary held that such temporary sheriffs were not an "independent and impartial tribunal" within the meaning of Article 6(1) of the ECHR. 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."

63. Lord Reed said:-

> "Given that temporary sheriffs are very often persons hoping for graduation to a permanent appointment, and at the least for the renewal of their temporary appointment, 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. This is, in my opinion, a fact pointing strongly away from "independence" within the meaning of article 6. … Even if I were mistaken in my conclusion that the necessary objective guarantees of independence were lacking it seems to me that the need for the temporary Sheriff's appointment to be renewed annually at the discretion of the executive, and his lack of security of tenure are in any event factors which could give rise to a reasonable perception of dependence on the executive. The necessary appearance of independence is therefore in my opinion absent.
>
> … I wish to make it plain that I am not suggesting that any temporary sheriff has ever allowed his judicial conduct to be influenced by any consideration of how he must best advance his prospects of obtaining the renewal of his appointment, or his promotion to a permanent appointment. Nor am I suggesting that any official or minister has ever sought to interfere with the judicial conduct of a temporary sheriff or would ever be likely to do so. There is, however, no objective guarantee that something of that kind could never happen; and that is why these appeals must succeed."

64. These observations were cited with approval by the Privy Council in *Millar v Dickson* [2002] 1 WLR 1615. The ratio of the Committee was that a "reasonable perception of [the judge's] dependence on the executive" was enough to vitiate the proceedings. There was no onus on the defendant to show actual dependence. The Claimants submit that the QASA scheme creates a reasonable perception that the advocate is dependent on the favour of the judge. Ms Rose emphasised Lord Reed's striking phrase about a sheriff's "hopes and fears in respect of his treatment by the executive".

65. We begin with "hopes". Judges have for many years been the main source of references for advancement at the Bar and more recently among solicitor advocates. References are given for applicants for appointment as Queen's Counsel; for appointment to the "Treasury panels" of advocates acting for Government departments in civil cases, or for prosecuting in serious criminal trials; for conducting work on behalf of the Crown Prosecution Service, where a grading scheme (the CPS Advocate Panel scheme) similar in some respects to QASA was introduced in 2011; and for part-time and full-time judicial appointments. In relation to the latter, the role of senior judges as consultees was expressly recognised in section 88 of the Constitutional Reform Act 2005 (now replaced by Regulation 28 of the Judicial Appointments Regulations 2013 made pursuant to the Crime and Courts Act 2013).

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.

67. Ms Rose submitted 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 sack the advocate and demand the services of another (potentially with the risk of a consequent adjournment, re-listing of the trial and considerable public expense). The BSB and SRA take the view that while the advocate *may* tell the client of the assessment, there is no duty to do so. We agree. In particular we note that there is no suggestion that advocates must inform the client in the case of the other judicial assessments we have mentioned even where it is very likely that they anticipate either that they will later have to request a reference from that judge or that the judge may be approached as part of the process of statutory consultation (in relation to appointment to judicial office).

68. Turning to the advocate's "fears", it is beyond argument 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: Sometimes the complaints are warranted, sometimes not. A good example of the threat of judicial complaint is to be found in the approach to poorly prepared applications to prevent removal or deportation (see *Regina (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin) and the cases that have followed that decision). We do not think that fear of an unjustified marking of Not Competent is different in kind from fear of an unjustified complaint.

69. We recognise that judges are not always right and are not invariably fair, whether to advocates or anyone else. Ms Rose cited to us a number of reported cases in which trial judges have been found by the Court of Appeal to have behaved in an

unacceptable manner: one quite recent example, by no means unique, is *R v Sullivan and Hare* [2004] EWCA Crim 3324. It is our experience that cases of judicial misbehaviour are less common now than once they were (although we recognise that this may be the self-perception of every generation of judges).

70. But 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. The matter can be tested by reference to the four core Standards in which the advocate must be assessed to constitute a valid evaluation: (1) "has demonstrated the appropriate level of knowledge, experience and skill required for the Level [applied for]; (2) was properly prepared; (3) presented clear and succinct written and/or oral submissions; (4) conducted focussed questioning". As to the first of these, we have already referred to the professional obligation of the advocate not to take on a case beyond his competence. As to the others, no advocate is fulfilling his duty either to the client or to the court if he is not properly prepared, or presents obscure and rambling submissions, or conducts unfocussed questioning. If and insofar as a client seeks to persuade the advocate that he should attempt by prolonged and irrelevant questioning of witnesses to divert the jury from the real issues in the case, the advocate's duty is to refuse.

71. Any judge who gave an advocate an unwarranted "Not Competent" marking out of dislike for the defendant's case or (for example) out of disapproval of a robust-but-focussed challenge to the truthfulness of police evidence would be false to his judicial oath. The judge could be subject to complaint. Any advocate who failed to put his client's case properly out of a desire to curry favour with the judge would similarly be failing both in his duty to his client and his duty to the court, in the words of section 188(2), to act independently in the interests of justice. The advocate, too, could be subject to complaint.

72. Ms Rose submitted that one of the defects in the Scheme is that the advocate may be prevented by legal professional privilege from putting forward to the regulator points which might explain or mitigate what had been perceived by the judge to be incompetent advocacy. The example of mitigating circumstances most commonly mentioned in argument was the "late return" so familiar to members of the Criminal Bar; but there is no reason that the judge should not be made aware of this, and certainly no reason to keep it from the regulator. Another oft cited example is a change of instructions by the client during the trial. Again, this generally comes to the judge's attention: if the advocate is asked why he did not put a particular point to a prosecution witness who has already given evidence (having regard to the potential inference of recent invention), he is entitled and perhaps bound to tell the judge, if indeed it is the case, that the failure to put a particular proposition was not as a consequence of recent instructions and, thus, should not be held against the defendant. In that case, there is no breach of privilege.

73. In any event, the problem of privilege has long existed, at least in theory, in relation to allegations of misconduct or inadequate professional services, but we were given no evidence that it has proved a problem in practice. If a situation does arise in which

there is some privileged information which excuses what might be perceived as poor performance and which could not be revealed to the trial judge, the advocate would in our view be entitled to provide the gist of it 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, [32].

Did the regulators fail to take the independence of the advocate into account?

74. The Claimants argue that the concerns expressed by a number of judges and some of the representative bodies of barristers and solicitors about the impact of the Scheme on the independence of the advocate were simply ignored by JAG and then by the LSB. It is true that the application submitted by JAG to the LSB did not expressly deal with this issue (though the LSB's decision did: see paragraphs 35-36 of the decision, cited above). There had been no less than four rounds of consultation with the professions; and the independence issue, although mentioned by some consultees, occupied nothing like as prominent a position at that stage as it has in the argument before us. JAG and its advisory body, all of whose members (except the judicial members of QAG) were representatives of the regulators or the practising profession, were well aware of the differing schools of thought on the subject: although not, of course, decisive, it is not irrelevant that the Bar initially insisted on judicial appraisal.

75. In any event, it was not necessary to the lawfulness of the application that it should have recited the points in issue one by one followed by the answer to each point: still less could their failure to mention independence impugn the lawfulness of the decision by the LSB when the latter document does deal with it. Further, since in our view the argument when analysed is not a sound one, we do not accept that even if there had been a failure to have regard to it this would have vitiated the Scheme.

Should the trial judge be the assessor?

76. The JAG concluded, and the LSB accepted, that the Scheme required trial judges to conduct the evaluations (as, indeed, the Bar had initially strongly contended). They were plainly entitled to do so: indeed, if we were revisiting that conclusion on the merits (which is not our task), we would unhesitatingly agree with them. The judge sees the whole trial and sees the papers. To have an assessor sit through the whole trial would be expensive, and the assessor would not have access to the prosecution papers (still less to the advocate's instructions). If the assessor was a retired judge or advocate, their approach to law and procedure would not necessarily be up to date; a lay person would not necessarily have an appropriate understanding of the issues advocates face. Further, unless the assessor was anonymous, the alleged risk of the advocate conditioning his behaviour to create a pleasing impression (which the Claimants advance but we do not accept) would be much the same.

Should the judge be told about the assessment at the start of the trial?

77. The Claimants argue that the risk of infringing the advocate's independence would be mitigated if the judge was not told until the end of the case that he would be asked to complete a CAEF. The difficulty with this is that, in a long trial or a case with more than one defendant, the judge might not have a sufficiently detailed recollection of the details of the advocate's performance under each of the nine Standards; he or she would certainly not be focussing on the criteria as the case proceeded. The approved regulators were entitled to design the Scheme, and the LSB to approve it, in the form in which they did.

The independence of the judiciary

78. The designers of the Scheme visited numerous Crown Courts to obtain the views of Resident Judges and other members of the Circuit Bench. Some expressed concern that judges would be over-hesitant about being critical if the Not Competent marking were to be made known to the advocate, since this would affect the working relationship between the Bench and the advocates. This is not an objection raised to the Scheme by the Claimants. Rather Ms Rose points to a somewhat different concern mentioned by some consultees, namely the possibility of being sued (or made the subject of a complaint to the Office of Judicial Complaints). The possible causes of action put forward on behalf of the Claimants included defamation, negligence (see *Spring v Guardian Assurance* [1995] 2 AC 296), or discrimination under section 29 of the Equality Act 2010.

79. 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.

Is there any effective right of appeal?

80. Advocacy in the criminal courts is a "reserved legal activity" under the 2007 Act, and it is for the appropriate approved regulator (the BSB, SRA or IPS) to decide whether or not to authorise an individual to exercise such rights. So it is common ground that the decision to grant or refuse full accreditation to any of the Claimants at Level 2, 3 or 4 will be one for the BSB, not the judges.

81. The BSB appeals policy document states that a barrister may appeal to the BSB against "any decision reached by it" to refuse an application for accreditation, re-accreditation or progression, or to revoke accreditation at the barrister's current level,

but paragraph 2 tells the reader that "you may not appeal against the content of an individual assessment conducted by a judge and recorded through a criminal advocacy evaluation form". Paragraph 5 provides that an appeal may only be brought on the grounds that the decision reached was unreasonable, or that there was a procedural error in the assessment or decision-making process and that the appellant suffered disadvantage as a result which was sufficient to have materially affected the decision.

82. The appeal is by way of a re-hearing (paragraph 10); the adjudicator may admit any evidence which he considers fair and relevant to the appeal, whether or not admissible in a court of law (paragraph 9); and may dismiss the appeal, allow it in whole or in part, substitute any decision which the BSB could have made on the application (which includes the appointment of an independent assessor to observe and evaluate the advocate), or remit the case to the BSB for reconsideration. Part 6 of the SRA's Regulations are headed 'Re-accreditation, special circumstances and appeals' and contain provisions allowing for extensions of time (Regulation 18), alternative independent assessment in place of judicial CAEF (Regulation 19 headed 'Additional Measures') and the ability to appeal the SRA decision but not the assessment by an independent assessor or a judge (Regulation 20).

83. Ms Rose for the Claimants and Ms Helen Mountfield Q.C. for the Law Society submitted that the rule preventing an appeal against the content of an individual judge's assessment renders the right of appeal futile, and thus makes the Scheme unfair both at common law and under ECHR Article 6, since in the absence of two favourable assessments no valid application can be made. They argue that this is clear from the wording of the BSB Rules. Rule 12.4 (dealing with applications for full accreditation at Levels 2, 3 or 4) states that "you must be assessed in your first effective criminal trials at your level and submit the prescribed number of completed criminal advocacy evaluations *confirming that you are competent* in accordance with the competence framework detailed in the QASA Handbook" [emphasis added]. Similarly paragraph 4.3 of the QASA Handbook, under the heading of "Competent evaluations", states that "the advocate must submit two evaluations with an overall mark of "Competent"; although we note that paragraph 4.2, headed "Valid submission", provides that "[t]he submission must be valid, which means judicial evaluation in a minimum of two and a maximum of three of the advocate's first three consecutive effective trials following provisional accreditation at level 2 or 3."

84. We accept that the appeal provisions would be entirely futile if the two "Not Competent" evaluations were conclusive: indeed, the statutory requirement that the decision must be that of the approved regulator would be infringed if it required two Competent evaluations even to bring the case before the Board, let alone to mount an appeal thereafter. Neither of the approved regulators represented before us nor the LSB supported this "Catch-22" interpretation of the Scheme.

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.

Excess of powers by the LSB

87. The Grounds of Claim and the skeleton argument for the Claimants complain that the LSB exceeded its statutory powers by being involved too closely in the design of the Scheme which it then approved; and that at one point the JAG took the "unorthodox and extra-statutory step" of submitting the proposed scheme to the LSB for approval in principle. Ms Rose did not place this at the forefront of her arguments. In our judgment, she was correct not to do so because it has no merit.

88. At least in the context of the regulation of the professions, where body A needs approval for a change in its rules from body B there is no reason why discussions between the two should not take place with a view to producing an agreed draft before the formal resolution is passed by A and sent to B for approval. In the present context there was the added reason that the LSB's powers and duties as oversight regulator applied to each of the approved regulators, and it was plainly desirable that any scheme should apply consistently to all advocates practising in the criminal courts, whether barristers, solicitors or legal executives.

89. It is worth adding that the regulators challenged the LSB as to the extent of its intervention, whereupon the LSB referred to its duties under sections 3 and 4 of the Act and its responsibilities under sections 31-41 and 162 of the Act. In our judgment, it was entirely appropriate (and a legitimate interpretation of its statutory remit) that the LSB should take steps to ensure that the regulators (in the form of the BSB, the SRA and IPS) were aware of its interpretation of the way in which the regulatory

objectives set out in s.1 of the Act should operate (which included the encouragement of an independent, strong, diverse and effective legal profession while promoting and maintaining adherence to the professional principles); after all, an application can be refused if the LSB is satisfied that it is prejudicial to those objectives. Further, s.4 of the Act required the LSB (by using the word 'must') to assist in the development of standards in relation to the regulation by the regulators of persons authorised to carry on legal activities.

The standard of review

90. Although the subject of submission, in our judgment it is beyond argument that the standard of review in this case is to be found in the normal application of the *Wednesbury* principles. Thus, we are confined to such matters as legality, rationality and whether the LSB and BSB took all relevant considerations into account. In applying that standard in this case, however, the reality is that the intensity of review is 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. But that heightened scrutiny derives not from the law but from the nature of the claim. It is a burden these regulators must bear.

91. The Claimants submitted that the standard of review was not *Wednesbury* but the more d**e**manding one of proportionality. Thus, they contended that we had to conduct an exacting analysis of the factual case advanced in defence of QASA, in order to determine whether its objective is sufficiently important to justify the limitation of a fundamental right, whether it is rationally connected to the objective, whether a less intrusive measure could have been used, and whether, having regard to such matters and to the severity of the consequences, a fair balance has been struck between the rights at issue and the public interest. The claimants derived the proportionality standard from the statute itself and from European and human rights law. We deal with the issue of proportionality below; suffice it to say, at this stage, that we conclude that both the *Wednesbury* and proportionality standards are met.

92. Ms Rose submitted that the special character of the Legal Services Act 2007, in its concern with matters of constitutional significance and the administration of justice, meant a higher standard of review was demanded than ordinary *Wednesbury* unreasonableness. By contrast with other regulatory legislation, she submitted that the Act requires both the LSB and the BSB, so far as is reasonably practicable, to act in a way which is compatible with the regulatory objectives, and which they consider is the most appropriate for the purpose of meeting those objectives. Under the Act regard must also be had to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed: sections 3 and 28 of the Act. Moreover, the LSB must act in accordance with its section 3 duties when performing its functions under Schedule 4, and under paragraph 25(3)(a) of Part 3 of that Schedule the grounds on which it may refuse an application by the BSB, the SRA and IPSA in relation to regulatory arrangements include that granting it would be prejudicial to the regulatory objectives and contrary to any legislative provision and the public interest. Read together, in Ms

Rose's submission, these statutory provisions require the LSB and the BSB to act proportionately.

93. There is no doubt that proportionality is a standard incorporated in the statute. But under section 3 and paragraph 25(3) of Schedule 4, it is the LSB which must have regard to proportionality and to the need to ensure that regulatory activities should be targeted only at cases in which action is needed. Under the legislation the LSB's judgment about proportionality follows the judgment of proportionality made by the regulator which makes the application to it, pursuant to its own obligations under section 28(3)(a). There 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. The statutory language is against that: the duties to ensure proportionality are very clearly directly placed on the regulators. We deal with the European dimensions of this case below but, as a matter purely of domestic law, we cannot see how any other approach can be implied into what Parliament has said, however significant the issues at stake in the claim.

EU law: the Provision of Services Regulations and the Services Directive

94. Next, the Claimants submit that proportionality is demanded because the scheme is an authorisation scheme under the Provision of Services Regulations 2009, SI 2009 No 2999 ("POS Regulations"). These implement in the United Kingdom Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market ("the Services Directive"). Thus the test of proportionality is introduced for authorisation schemes as a matter of European law. Giving effect to Article 9 of the Services Directive, regulation 14(2)(c) of the POS Regulations provides that a competent authority cannot make access to, or the exercise of, a service activity subject to an authorisation scheme unless, under regulation 14(3)(b), its need is justified by an overriding reason relating to the public interest; and the objective pursued cannot be attained 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: regulation 14(3)(c). A measure of proportionality is also contained in regulation 15(2)(b)(c), reflecting Article 10 of the Services Directive.

95. A separate, but closely related issue, arises in this context. In its Decision the LSB expressly stated that the QASA scheme did not fall within the POS Regulations: it was an accreditation, not an authorisation, scheme and authorisation to practise remained with the approved regulators. On the Claimants' case (Ground 3) the LSB committed an error of law in coming to that conclusion.

96. The first issue to be considered is whether the claimants fall within the scope of the POS Regulations: to put it another way, do the POS Regulations apply to a 'purely internal situation'? For the BSB, Mr Dutton submitted that, properly interpreted, the POS Regulations and the Services Directive apply only to those providers of services who exercise their EU law rights under Articles 49 and 56 of the Treaty on the

Functioning of the European Union ("TFEU") and are therefore not engaged in this claim. None of the Claimants are nationals of another Member State wishing to provide criminal advocacy in England and Wales in the exercise of their EU law rights of freedom of establishment or the provision of services. To meet this point, we were provided with a late witness statement by Iain Morley QC, a dual English/Irish qualified barrister, who has practised largely in the international criminal tribunals in The Hague in recent times. Mr Morley asserts that he would not have been able to obtain accreditation, had the scheme been in operation, because of the nature of his practice.

97. Since the POS Regulations must be interpreted so as to give effect to the Services Directive, Mr Dutton's written submissions took us to a number of its provisions. That included its recitals, since in EU instruments the recitals play an important role in interpretation. Thus Recital 5 provides:

> "It is therefore necessary to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States *and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of those two fundamental freedoms of the Treaty.* Since the barriers in the internal market for services affect operators who wish to become established in other Member States as well as those who provide a service in another Member State without being established there, it is necessary to enable providers to develop their service activities within the internal market either by becoming established in a Member State or by making use of the free movement of services." (emphasis added)

98. Recital 18 provides that the Services Directive's aim is "creating a legal framework to ensure the freedom of establishment and the free movement of services between Member States". Chapter III of the Services Directive is entitled "Freedom of establishment for providers", and the concept of "provider" in Recital 5 "should cover any natural person who is a national of a Member State or any legal person engaged in a service activity in a Member State, *in exercise either of the freedom of establishment or of the free movement of services*" (Recital 36) (emphasis added). All of this demonstrated, in Mr Dutton's submission, that the Services Directive does not aim to regulate the freedom of establishment or provision of services within the territory of one Member State, what he described as 'purely internal situations':

99. As to the POS Regulations, Mr Dutton's written submissions pointed to regulation 13, which deals with the application of Part 3 relating to authorisation schemes. Regulation 13 provides:

> "(1) The provisions of this Part have effect in relation to the provision of a service in the United Kingdom, except as specified in paragraph (2).

> (2) The provisions of this Part do not have effect for the purposes of, or in connection with, the exercise of the freedom of the provider of a service who is established in another EEA state to provide the service in the United Kingdom from that state (see Part 4)."

100. Accordingly, Mr Dutton argued that Part 3 of the POS Regulations explicitly does not apply to advocates established in another Member State who wish to conduct occasional criminal trials here: see Regulation 13(2). He contended that Regulation 13(1) must be interpreted in the light of the Services Directive, which it gives effect to, and so Part III of the Services Directive applies only to the cross-border situations, namely where a provider wishes to become established in another Member State. Accordingly, Regulation 13(1) must be read as applying the provisions of Part 3 of the POS Regulations to the provision of services in the UK by a provider engaged in a service activity in exercise of the freedom of establishment. Thus Part 3 of the POS Regulations does not extend to the provision of services here by advocates who are not exercising their EU rights.

101. In our judgment Regulation 13(1) provides the complete answer to Mr Dutton's submission. Under it, Part 3 of the POS Regulations regarding authorisation schemes applies to "the provision of a service in the United Kingdom". In other words, whether or not Mr Dutton is right in his submissions as to the ambit of the Services Directive, the United Kingdom legislator has chosen to apply the POS Regulations to internal UK situations. Regulation 13(1) cannot be read down in the way he suggested. That this was the intention is made clear in the Explanatory Memorandum to the Regulations, para 3.5. Applying EU instruments in this way is possible under the regulation-making power in section 2(2) of the European Communities Act 1972, which empowers the making of regulations not only to implement an EU obligation but for the purpose of "dealing with matters arising out of or related to any such obligation or rights": see *Oakley Inc v Animal Ltd* [2006] Ch 337, [20]-[33].

102. Since the POS Regulations apply to internal situations, the second issue we must consider is whether the QASA scheme is caught as an authorisation scheme as defined. Mr Nigel Giffin Q.C. for the LSB contended that it is not. Regulation 4 of the POS Regulations defines authorisation scheme as "any arrangement which in effect requires the provider or recipient of a service to obtain the authorization of, or to notify, a competent authority in order to have access to, or to exercise, a service activity". The comparable definition in the Services Directive is in Article 4(6). There an authorisation scheme is defined as "any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof."

103. For the Claimants, Mr Tom de la Mare Q.C. submitted that advocates are obviously service providers within these definitions and the scheme is caught by the wide definition of authorisation scheme in Regulation 4 because, even if it is not an authorisation scheme *per se*, it is an arrangement which in effect requires authorisation. The still wider terms of the definition of an authorisation scheme in

Article 4(6) of the Services Directive put the matter beyond argument. That makes clear that the types of arrangement or procedures caught are those governing both access to a service activity (e.g. prior approval) and the continued exercise of that activity (monitoring). Mr de la Mare made reference to Articles of the Services Directive such as 6(1) and 14(7), which draw the access/exercise distinction, to the wide definition of (prohibited) "requirements" in Article 4(7) and to the need in Article 10(6) for reasons and appeal rights in relation to authorization to cover both its refusal and withdrawal. He added that European Union law concerns itself with substance not form, and thus a focus on initial access only would rob the POS Regulations of much practical utility and allow their easy circumvention. There was a need for a purposive interpretation of the POS Regulations in the light of the Services Directive and the jurisprudence.

104. We accept these latter submissions about the need to focus on substance and purpose as basic to the interpretative exercise as regards an EU derived law such as the POS Regulations. We also acknowledge the difficulties in interpreting the Services Directive, explained by its well known history, and perceptively analysed in Professor Catherine Barnard's article at (2008) 45 CMLR 323, to which Mr de la Mare directed our attention. But we cannot accept Mr de la Mare's contention that the QASA scheme is an authorisation scheme caught by the Services Directive and the POS Regulations. In considering the meaning of an authorisation scheme Professor Barnard refers readers to Recital 39 of the Directive and to the European Commission's *Handbook on the Implementation of the Services Directive 2007* (even though there must be doubts as to the status of the latter before a court). Recital 39 reads as follows:

> "The concept of 'authorisation scheme' should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be able to exercise the activity, to be registered as a member of the profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession."

105. Regarding the identification and evaluation of authorization schemes, the Handbook explains:

> "When Member States review their legislation to identify their existing authorisation schemes, the key element to look for is whether the legislation in question requires a decision from a competent authority, be it explicit or implicit, before the service provider can lawfully exercise the activity. The notion of authorisation scheme includes, for example, procedures by which a service provider needs to make a declaration to a competent authority and can only exercise the activity upon expiry of a certain time period if the competent authority has not reacted. It also includes cases in which declarations have to be made by the service provider, which then have to be acknowledged by the competent authority, insofar as this acknowledgement is necessary in

> order to commence the activity in question or for the latter to be lawful."

106. These passages confirm, to our mind, that the concept of an authorisation scheme concerns the requirements for someone to operate as a member of a particular profession and not all the rules and standards that person must meet in its practice. The "inter alia" in the Recital does not detract from that. This reading is confirmed by the overall purpose of the Directive, set out in the early recitals, which is the creation of a competitive internal market for services within the EU, the removal of barriers to freedom of establishment in Member States, and the free movement of services between them. That is a completely different level of regulation to that imposed by QASA, with its certification scheme for competence.

107. This reading is also confirmed by the substantive provisions of the Directive in section 1 of Chapter III, relating to authorisation schemes. (We note that, apart from Article 10(6), the articles Mr de la Mare cited do not fall within this section of the Directive.) Thus Article 10(4) describes the effect of an authorisation as enabling the provider to have access to the service activity, or to exercise that activity, "including by means of setting up agencies, subsidiaries, branches or offices...." Article 10(6) on reasons and appeals for both refusals and withdrawals of authorisations must be read in that context: withdrawal covers the complete shutting down of an activity. Thus also Article 11, which provides that authorisations must normally be for an unlimited period. There is also the term "service activity" employed in the definition of authorisation scheme. That language is not redolent of the provision of a service on a particular occasion. These articles point towards the concept of an authorisation scheme being limited to the basic rules about who can enter and carry on a particular service activity and not extending to rules which ensure competence once the provider is engaged in the activity. The terms of the POS Regulations cast the concept of an authorisation scheme in exactly the same light.

108. Even if QASA is an authorisation scheme, a third issue is whether it falls within the scope of the Services Directive or the POS Regulations. This is because of Regulation 14(3) of the Regulations, which gives effect to Article 9(3) of the Services Directive. Regulation 14(3)(a) provides that regulations 14 to 20 (which includes section 1, Chapter III on authorisations) do not apply to authorisation schemes to the extent that they are governed, directly or indirectly, by provisions implementing a previous Community obligation. Article 9(3) of the Services Directive reads that Articles 9-13 shall not apply "to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments." There is another, previous, authorisation scheme, contained in Directive 2005/36/EC ("the Qualifications Directive"), implemented in the United Kingdom by the European Communities (Recognition of Professional Qualifications) Regulations 2007, SI 2007 No 2781.

109. In Mr Giffin's submission the Qualifications Directive draws the distinction between, on the one hand, qualification requirements which are to be subject to the rules of mutual recognition laid down and, on the other hand, specific rules for the practice of the profession in the Member State concerned and justified in the public interest.

Under the Qualifications Directive a Member State is not prevented from imposing rules for a profession concerning competence and the level of practice. Mr de la Mare accepted that the Qualifications Directive may come into play but only if there is a conflict between the Directives. He refers to Article 3 of the Services Directive, which stipulates that provisions of other EU acts governing specific aspects of access to or exercise of a service activity (expressly including the Qualifications Directive) prevail where they conflict with the provisions of the Services Directive. In this case, he submitted, there is no conflict between the Qualifications and Services Directives.

110. Resolving the issue is not easy, and one is reminded of Professor Barnard's point that the considerable number of contradictions in the drafting of the Services Directive can be attributed to its origins. Having said that, however, we see merit in the view advanced by Mr Giffin. Article 3 refers to the Qualifications Directive only taking precedence when there is a conflict with the Services Directive, but that is a general article to address the relationship of the whole directive with other EU instruments. When one turns to the provisions specifically for authorisation schemes, Article 9(3) (and Regulation 14 (3)(a)), there is no requirement for a conflict: existing authorisation schemes prevail. Thus it seems to us that Section 1 of Chapter III of the Services Directive on authorisation schemes have no application to professions in which authorisation to practise is governed by the Qualifications Directive.

111. Even if the POS Regulations do not apply, the Claimants' case is that Article 49 (freedom of establishment) and Article 56 (freedom to provide services) TFEU do, and proportionality analysis is applicable under the jurisprudence of the Court of Justice: e.g., Case C-55/94 *Gebhard* [1995] ECR I-4165 at [34]-[37]. The QASA scheme breaches those articles in interfering with the free movement rights of criminal advocates within the European Union. The problem facing dual-qualified lawyers, who practise here only part of the time, is underlined. They cite in support the witness statement of Iain Morley Q.C.

112. We have held that the POS Regulations apply to internal situations as well as to those with a cross-border element. It would seem that this specific measure, based as it is on the Services Directive, should displace the general EU law principles covering the same ground. In any event, the Director of the BSB, Dr Vanessa Davies, has explained in a witness statement how cross-border criminal advocates, including Mr Morley, can demonstrate competence and how, if there is an issue about the opportunity for the advocate to demonstrate competence in the requisite number of trials, that could be addressed by allowing more time or the use of other means of assessment. We note that the court in *Gebhard* was concerned with a situation where the Italian measures were "liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty". That is not the QASA scheme.

Article 1, Protocol 1 ECHR

113. Ms Mountfield argues that there is a third basis for requiring the Court to analyse the issue from the perspective of its proportionality. This is through Article 1, Protocol 1 ("A1P1") of the European Convention on Human Rights. It reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

114. The Law Society accepts that it is not a "victim" under section 7(7) of the Human Rights Act 1998. However, the Claimants adopted the Law Society's arguments on A1P1. Thus we are saved the task of deciding on the correctness and applicability of the *obiter* remarks of Foskett J in *Children's Rights Alliance v Secretary of State for Justice* [2012] EWHC 8 (Admin), [213] where, despite the express words of section 7(1)(b) (a person must be a victim to rely on Convention rights in any proceedings), the judge said that an interested party may advance Convention arguments endorsed by the claimants when there are victims before the Court.

115. In summary, Ms Mountfield contended that an advocate has an asset in the form of a possession in an established practice and clientele. Thus the article is engaged. The QASA scheme constitutes interference with that possession. To be justified under A1P1 the scheme must be proportionate and it must also be procedurally fair. In the Law Society's submission, it is neither.

116. To make good the submission that advocates have a possession in their practice and clientele we were taken to three Strasbourg cases. *Van Marle v Netherlands* (1986) 8 EHRR 438 was a challenge to legislation regulating the use of the title "accountant" to those who had reached certain standards of professional competence, verified by a supervising machinery. The applicants were refused registration under certain transitional provisions because they did not reach those standards. The court held that the right they relied on might be likened to the right of property in A1P1: by dint of their own work they had built up a clientele: [41]. The refusal to register them as certified accountants "radically affected" the conditions of their professional practice, the scope of their activities was reduced, their income fell as did the value of their clientele and business. There was an interference with their right: [42]. However, the legislation was justified as providing the public with a guarantee of the competence of accountants and so there was no violation of A1P1: [43]-[44].

117. In *Olbertz v Germany* [1999] ECHR 37592/97 the applicant's appointment as a tax consultant was revoked under the Tax Consultants Act 1992. The court stated that there was an interference with his right to peaceful enjoyment of his possessions since he had to close down his tax consultancy and that indisputably led to a loss of

goodwill and income. However, the applicant had not passed the necessary examinations and had not acquired the requisite experience. The court had little hesitation in finding that the application was inadmissible as manifestly ill-founded.

118. *Wendenburg v Germany*, application 71630/01, 2003, was another decision when the court held that the application was inadmissible as manifestly ill-founded. The applicants were advocates, enjoying under the relevant German statute exclusive rights of audience in German courts of appeal. Conversely, they could not appear in the lower courts and advocates with exclusive rights of audience in the lower courts could not appear in the courts of appeal. The applicants complained that A1P1 was engaged when the German Federal Constitutional Court declared the statute to be unconstitutional. The advocates contended that they were deprived of their means of existence as a result of the judgment. Consistently with its case law the Strasbourg court held that, while the loss of future income did not fall within A1P1, that article did extend to their law practices and clientele, since these were entities of a certain worth, in many respects like a private right, even if they were attributable to the protection of the law. The applicants had not submitted evidence of the impact but assuming that there was an interference the court held that the decision of the Federal Constitutional Court was justified and proportionate.

119. In our view none of these decisions support the contention that the QASA scheme constitutes an interference with the Claimants' property rights. In *Van Marle* and *Olbertz* the applicants lost their right respectively to practise as accountants and tax consultants. As we have explained, that is not the effect of the QASA scheme in this case in requiring criminal advocates to seek accreditation. *Wendenburg* is closer to the present case, but there the advocates had monopoly rights in certain courts, so that the decision of the Federal Constitutional Court could have had a considerable impact on their practices.

120. In any event, we are bound by the Court of Appeal's decision in *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265, and that gives no support for the submission that the claimants have a possession falling within A1P1. Dr Malik was a medical practitioner who was suspended from the performers' list entitling him to practise within the NHS. The Court of Appeal invoked the distinction between on the one hand a client base and goodwill, which can be a possession, and on the other hand an expectation of future income or profits, which is not. In the course of the judgments there is reference to *Van Marle*, *Wendenburg* and other Strasbourg jurisprudence.

121. The Court of Appeal gave support to the concept of a possession in A1P1 as a marketable asset having a monetary value, derived from the decision of *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792; [2007] 1 WLR 2067, [71]-[73]. In that case Kenneth Parker J (as he now is) referred specifically to barristers who, since they cannot capitalise future income flows of their practice, cannot be said to fall within A1P1. In *Malik* there was a statutory prohibition on selling the goodwill in a doctor's practice. Thus it had no economic value. The court concluded that the

personal right of the doctor to practise through inclusion on the performers' list was not a possession: [29], [40], [65], [73], [86].

122. The Court of Appeal decision in *Malik*, and the analysis in *R (Nicholds) v Security Industry Authority*, obtained the support of Lord Bingham in *R (Countryside Alliance) v Attorney General* [2007] UKHL 52; [2008] 1 AC 719, [21].

123. Ms Mountfield sought to blunt the impact of *Malik* in the Court of Appeal by pointing to how the Strasbourg court handled the case when it subsequently went there: *Malik v United Kingdom* [2012] ECHR 23780/08. *Malik* in the Court of Appeal must be confined, she submitted, to cases where there was statutory intervention, as with the legal restriction in that case on the sale of a GP's practice.

124. In *Malik*, the Strasbourg court reviewed its own jurisprudence, the judgments of the Court of Appeal and what Lord Bingham had said in *Countryside Alliance*. The court said that in cases involving professional practices it had taken the view that restrictions on an applicants' rights to practise their profession was an interference where the restriction had significantly affected the conditions of their professional activities and reduced their scope and where, as a consequence of the restriction, an applicant's income and the value of his clientele and business had fallen (citing *Van Marle*): [90]. The court recalled that goodwill may be an element in the valuation of a professional practice but that income, on the other hand, is only a "possession" once it has been earned, or an enforceable claim to it exists: [93]. The court then said:

> "[96] In view of its review of the case-law, the Court does not consider that the applicant's inclusion in the Performers List in England constituted a 'possession' for the purposes of art 1 of Protocol No. 1. In order for that Article to apply, it must be established that there was an underlying professional practice of a certain worth that had, in many respects, the nature of a private right and thus constituted an asset and therefore a 'possession' within the meaning of the first sentence of art 1..."

125. Having decided that whether there was a possession was inevitably linked to whether there was an interference, the case was admissible (as not being manifestly ill-founded) and the court turned to the merits. It reiterated its jurisprudence that, in cases involving professional practices, restrictions on an applicant's right to practise the profession concerned were viewed as an interference where the restriction significantly affected the conditions of professional activities and reduced their scope and where, as a consequence of the restriction, the applicant's income and the value of his clientele and business fell: [105]. It accepted that a reduction in patient numbers could have an impact on the value of the goodwill in a medical practice, but observed that the issue did not arise given that Dr Malik was prevented from selling the goodwill in his practice and that any decrease in its marketable value was therefore of no consequence to him: [109]. The court decided that since Dr Malik had failed to show evidence that he had been affected by his suspension from the Performers' List, there had been no interference with his right to peaceful enjoyment of his possessions.

It was not necessary to determine whether Dr Malik had a possession within the meaning of A1P1: [110].

126. In our view, given that the Strasbourg court in *Malik* was simply restating its previous jurisprudence, and given the inconclusive nature of the analysis and outcome, we cannot accept Ms Mountfield's submission that it somehow undermines the Court of Appeal's decision in that case, even were we not bound to apply the latter.

127. Applying *Malik* in the Court of Appeal, we cannot conceive how the decision to establish the scheme engages A1P1. So, too, we cannot see how the requirement of the QASA scheme that criminal advocates obtain accreditation can be said to be an interference with possessions under A1P1. Criminal advocates do not have an established practice and clientele comparable to a GP's patient list. They may have defendants who regularly use their services; they may be regularly briefed by the CPS; or they may have employment with a law firm. In none of these cases does the advocate have a client base and goodwill in the sense used in *Malik*, let alone something which is marketable. Rather the criminal advocate has something much more in the nature of an expectation of future income, which under *Malik* does not fall within the A1P1. There may be an underlying professional practice of a certain worth (which is the term used at [96] in the Strasbourg judgment) but it is not, as that passage continues, in the nature of a private right, a private right being something which is enforceable. The strongest case would seem to be the advocate employee, but it is the firm, not the advocate, which has any marketable goodwill. None of the Claimants fall into that category.

128. Even if we are wrong and the practices of criminal advocates are a possession within A1P1, we are entirely unpersuaded that a refusal of accreditation at a particular level would amount to an interference with the peaceful enjoyment of that possession. In *Malik* the Strasbourg court said that evidence of interference, and a significant interference with professional activities, were both required. That reflects the court's earlier jurisprudence. The requirements of evidence and significant interference have also featured in domestic case law: *R (on the application of New London College) v Secretary of State for the Home Department* [2012] EWCA Civ 51, [96]: *Phillips v Director of Public Prosecutions* [2002] EWHC 2093 (Admin); [2003] RTR 8, [17].

129. There is no evidence before us, as far as these Claimants are concerned, of any adverse impact of the introduction or operation of the scheme. Indeed, it is difficult to see how, until the scheme is up and running and these Claimants have been refused the accreditation for which they applied, there could be any evidence of interference before a court. Quite apart from the issue of evidence we fail to see how the QASA scheme could result in a significant interference with a criminal advocate's possessions. The criminal advocate who fails to obtain the requisite accreditation at a particular level will still be able to act for clients. There may be particular things he or she cannot do for them through the failure to obtain accreditation at the next level, but that will only result in a loss of income, which is not in the nature of a possession under A1P1. For the same reason it can hardly be said that if an employed advocate

does not obtain accreditation, the goodwill and client base of the law firm, or its marketability, will be adversely affected.

Proportionality in practice

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.

Conclusion

133. We recognise that those who fulfil the vital public service of criminal advocacy feel under very considerable pressure at the present time. First, the professions are facing real concerns regarding criminal legal aid based upon the levels of remuneration that the Ministry of Justice is proposing across the board and, in particular, in relation to the most challenging cases.

134. Secondly, the Lord Chancellor has appointed Sir Bill Jeffery to conduct a review into the provision of independent criminal advocacy. This review is due to report in March 2014 and is intended to cover the experience, capabilities and skills needed for such services; arrangements for training, having regard to the recommendations of the Legal Education and Training Review; the standards needed to maintain and improve the quality of advocacy; and the future structure of the profession providing advocacy services. To no small extent, these terms of reference impact directly on the issues which have been the subject of these proceedings and, for our part, we see enormous force in the suggestion that both the development of QASA and the review should be informed by the other. That, of course, is a matter for the LSB and the regulators on the one hand and Sir Bill on the other.

135. For the reasons that we have given, however, we reject each of the challenges to the QASA scheme advanced by the Claimants. In our judgment, the scheme is lawful, does not contravene European law and falls well within the legitimate exercise of the powers of the LSB and the three regulators that submitted it to the LSB for approval.

136. 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.

137. It only remains for us to thank both counsel and the parties for the enormous amount of work which they put into preparing the papers and advancing the arguments in this case. In particular, we wish to record our gratitude to the solicitors and counsel for the Claimants for acting *pro bono*, and with their customary skill and determination, in the best traditions of the legal profession.