

BRIEFING TO CBA MEMBERS

The Administrative Court handed down its judgment in the QASA judicial review on Monday morning. We understand that the Claimants are currently considering whether they will seek permission to appeal.

In the meantime, we thought it would be helpful to set out, for the benefit of CBA members, the effect of the QASA scheme as interpreted by the Court in its judgment.

Informing the client

1. Barristers may inform their clients that a QASA judicial evaluation (or Criminal Advocacy Evaluation Form ("CAEF")) shall be completed by the Judge during the trial (paragraph 67 of the Judgment). It will then be for the clients to decide whether they wish to retain the services of another barrister.
2. The Court considers that it would be sensible to require barristers to identify when they were first instructed, and whether advice on evidence was provided (paragraphs 72 and 136 of the judgment). However, barristers will need to be mindful not to disclose information which is covered by legal privilege. In relation to privileged information: *"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"* (paragraph 73 of the judgment).

Your options if you fail to obtain two competent assessments

3. Unless and until the QASA Handbook is rewritten, it is important to understand that both the ability to make an application for accreditation, and the appeal rights available in relation to any decision to refuse it, have been substantially altered as a result of the challenge and the judgment.
4. First, a barrister will be entitled to see the CAEF completed by the Judge (see §2.81 bullet 3 of the QASA Handbook). As to what one can expect to see in the CAEF, the Court has highlighted that *"an adverse evaluation requires more detailed reasoning than one which states that the advocate is competent"* (paragraph 46 of the judgment).
5. Secondly, notwithstanding the express statements to the contrary in the Handbook (see e.g. §2.83), if a barrister fails to obtain two competent judicial assessments he/she may request the BSB:

- (a) nevertheless to grant full accreditation outright despite the absence of competent evaluations; or
 - (b) to appoint an independent assessor to conduct an assessment of the barrister's competence to conduct criminal advocacy at the appropriate level (paragraph 85 of the judgment)¹.
6. Taking either of these steps will open up the judicial evaluation in the CAEF to scrutiny by the BSB and / or adjudicator.
7. Thirdly, if the BSB rejects your application for accreditation, you may appeal if:
- (c) the decision reached by the BSB was unreasonable; or
 - (d) there was a procedural error in the assessment or decision-making process, and the barrister suffered a disadvantage as a result, which disadvantage was sufficient to have materially affected the decision (paragraph 81 of the Judgment).
8. The appeal will be considered by an adjudicator, and will be by way of a re-hearing. The adjudicator may admit any evidence which he considers fair and relevant to the appeal, whether or not admissible in a court of appeal. The adjudicator may dismiss the appeal, allow it in whole or in part, substitute any decision which the BSB could have made on the application, or remit the case to the BSB for reconsideration (paragraph 82 of the judgment).
9. Fourth, in relation to the BSB's decision as to whether to appoint an independent assessor:
- (e) *" 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"* (paragraph 86 of the judgment); and
 - (f) the adjudicator may substitute any decision which the BSB could have made on the application for accreditation, including *"the appointment of an independent assessor to observe and evaluate the advocate"* (paragraph 82 of the judgment).
10. Fifth, if a barrister is not successful in obtaining accreditation, it is not clear how long he/she must wait before reapplying for provisional accreditation: *"the Scheme does not prescribe that*

¹ *"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."* (paragraph 85 of the judgment)

a minimum time period must elapse before the advocate can attempt to progress back to the higher level". According to the Court, a barrister must reach a "reasoned decision" as to the level at which he/she registers, for example, by reference to additional training since the previous evaluations (paragraphs 47 to 48 of the judgment).

Possible actions if you consider that a Judge has improperly conducted your evaluation

Discrimination questionnaire

11. If you are concerned that a Judge has directly or indirectly discriminated against you during your evaluation because of a protected characteristic (age, disability, gender, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief), you may consider sending the judge a discrimination questionnaire under section 138 Equality Act 2010. The Judge is not obliged to respond to the questionnaire, but their failure to do so is admissible in evidence in any subsequent proceedings.

Possible causes of action

12. If a Judge improperly conducts your evaluation, a barrister may have a cause of action against them, for example: for discrimination under section 29 of the Equality Act 2010; or negligent misstatement for a negligent reference.
13. It would appear that a Judge may need personally to fund their defence to any claim, completion of the forms being outside the scope of the judicial function. Judges participating in the scheme may need to consider insurance.

Judicial complaints

14. Alternatively, a barrister may wish to make a complaint to the Office of Judicial Complaints: *"any judge who [gives] 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"* (paragraph 71 of the judgment).

Ambiguity in the Scheme

15. The Court has recognised that there are *"some areas of ambiguity"* in the QASA material, and that *"every step should be taken to ensure that the scheme is completely clear to all called upon to comply with it"*. We shall update you if the BSB or LSB make any announcement regarding an update to the QASA material in this respect.

CBA briefing - 22 January 2013

