Does the proposed Quality Assurance Scheme for Advocates contravene the EU rules on freedom to provide services?

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Litigation: Does the proposed QASA scheme contravene the EU rules on freedom to provide services? Shelley Dell, Solicitor-Advocate specialising in criminal law at Owen White & Catlin LLP in London comments on the submissions made to the Supreme Court of the United Kingdom on 16 March 2015.

Original news

R (on the application of Katherine Lumsdon, Rufus Taylor, David Howker QC and Christopher Hewertson) v. Legal Services Board
The Bar Standards Board, SRA, ILEX and Law Society intervening. UKSC 2014/0272

On 14 May 2013 the BSB, SRA and ILEX Professional Standards proposed a QASA scheme, whereby criminal advocates wishing to exercise rights of audience at a higher level would be obliged to apply for accreditation. Accreditation would be dependent on assessments carried out by trial judges during trials conducted by the advocate seeking accreditation. If refused accreditation, advocates would no longer be permitted to practice at a higher level. Four criminal barristers sought judicial review of the decision to approve the proposed introduction of QASA.

Judicial review of QASA was refused by a 3 judge Divisional Court of the High Court (Leveson LJ, Bean and Cranston JJ) on 20 January 2014 [2014] EWHC 28 (Admin). The Court of Appeal (Lord Dyson MR, Fulford and Sharp LJJ) on 7 October 2014 dismissed an appeal [2014] EWCA Civ 1276 on every ground. An application for permission for a final appeal was made to the Supreme Court on 2 grounds.

On 12 February 2015 a panel of 3 Supreme Court justices granted permission to appeal in relation to whether the Court of Appeal erred in law by failing to appreciate the effect of Regulation 14 of the Provision of Services Regulations 2009 SI 2009 No. 2999. In refusing permission on the other ground, the Supreme Court however stated that it was prepared to hear argument as to the correctness of the assumptions made by the Court of Appeal that the EU Services Directive is applicable and that QASA is an "authorisation scheme". It also said it expected to hear argument as to the proper disposal of the appeal if the Court of Appeal's approach to its role was too narrow.

This appeal was expedited and heard by the Supreme Court on 16 March 2015. The panel hearing the appeal was the President (Lord Neuberger), Deputy President (Lady Hale), Lord Clarke, Lord Reed and Lord Toulson.

What is the significance of this case?

At the moment, barristers who have completed pupillage or solicitors who have higher rights of audience are entitled to appear as an advocate in any court. The QASA scheme (www.qasa.org.uk) proposes to change this. Initially, QASA will only apply to criminal advocacy but the stated intention of the LSB is that it will be extended to civil and family work as well in due course.

QASA proposes 4 levels of accreditation:

- **Level 1:** All magistrates and youth court work,
- **Level 2:** Straightforward Crown Court cases (theft, assault, burglary, drug possession, etc.)
- **Level 3:** More complex Crown Court cases (fraud, arson, robbery, drug supply, etc.)
- **Level 4:** Complex Crown Court cases (murder, terrorism, serious sex offences, serious organized crime, etc.)

An advocate will be assessed by a judge (s)he appears before and marked on various competencies. If an advocate fails, then (s)he will no longer be able to appear as an advocate in further cases at that level. Initially the LSB proposed that an advocate would have to undergo 5 assessments but the present proposal is that this be reduced to 2. Advocates that undertake only guilty pleas in the Crown Court would only need a Level 2 assessment. Advocates would have to be re-assessed every 5 years. The LSB proposes that the QASA scheme be reviewed 2 years after implementation.

What were the issues the Supreme Court was asked to address?

The 2009 Regulations implement an EU Directive (2006/123/EC) dated 12 December 2006 on the provision of services in the internal market. This Directive contains 118 recitals and 46 articles. During its Brussels stages the Directive gained the nickname the Bolkestein Directive after the Dutch politician Fritz Bolkestein who was in charge of the Internal Market Directorate at the European Commission at that time. The Directive was a flag ship measure to try and ensure all EU citizens could provide services across the whole of the EU internal market without artificial restrictions being imposed.

Regulation 14 of the Provision of Services Regulations 2009 deals with authorization schemes. It says that a competent authority must not make access to, or the exercise of, a service activity subject to an authorisation scheme unless three conditions are satisfied. These are:

- the authorisation scheme does not discriminate against a provider of the service,
- the need for an authorisation scheme 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.

The Supreme Court had to consider whether the proposed QASA Scheme satisfied these 3 conditions or not. Thomas de la Mare QC for the appellants branded QASA a “spinal tap” measure. He said the LSB proposed a disproportionate measure and was then proposing to turn it down if the evidence which later emerged proved that QASA had been too much. The Appellants said that the LSB did not have any or any sufficient evidence to justify introducing QASA. The Appellants say QASA does not meet the proportionality requirements and in particular that the LSB cannot show a less restrictive measure could achieve the same objective under Regulation 14(2)(c).

Does QASA have any benefits? What is QASA trying to achieve?

The LSB says it proposed QASA in response to concerns from the judiciary about the quality of some advocates that appear before it. The LSB says it is trying to promote common advocacy standards across all 3 professions. Where an advocate fails an assessment, it will mean they can no longer conduct cases at that level but they will still be able to conduct cases at a lower level. For advocates who fail a level 2 assessment, that will mean they can no longer appear in any Crown Court cases.

What are the criticisms of the QASA Scheme?

The Appellants say there is not sufficient evidence for QASA. There is a lingering doubt that judges (who in the main are former barristers) are being overly critical of solicitors with higher rights of audience who now regularly appear before them. The LSB scheme would seem to call into question the validity of advocacy qualifications awarded by the professional bodies – either an advocate with a professional qualification is qualified to be an advocate or they are not.

The boundaries of the 4 levels are arbitrary. For example a murder case (level 4) where a defendant makes a plea of diminished responsibility which is accepted will turn into a straightforward plea in mitigation. Conversely a drug possession case (level 2) where the defendant says the drugs were planted on him could prove to be far more complex to prepare and present. Some of the QASA requirements are petty – for example requiring silks to prove they are indeed a QC.

Advocates who know they are being assessed may over prepare a case or may not want to challenge witnesses quite so robustly in case they incur the wrath of the judge and fail the assessment. This it is claimed would put the advocate's duties in conflict with those of fearlessly representing their client. Sometimes advocates pick up a brief at the last moment and if that is the case that is being assessed, it is said QASA will not make allowance for it. Sometimes advocates act *pro bono* and it is said that it is better that a client be represented by someone legally qualified (even if only certified at a lower QASA level) than not at all. Regular clients would also face having to be told that an advocate that has represented them before and with whom there is an existing rapport cannot represent them on a new matter. It is not clear what would happen if a client insists on an advocate representing them who does not have the required QASA authorisation.

The assessments will create a very heavy administrative burden especially on the judiciary. It is said QASA is not properly targeted in that it tars all advocates with the brush of not being up to scratch.

The Bar Standards Board has proposed a traffic light scheme instead for barristers. The LSB has rejected this saying it is preferable to have 1 scheme that applies to barristers, solicitors and chartered legal executives. If the mischief is poor quality advocacy, then it is said that this could be dealt with by a judge making a report to the advocate's professional body and this would avoid the need for QASA completely.

Finally, lawyers who are qualified in another jurisdiction but who have practised in England and Wales for 3 years or more are entitled to have that qualification recognised under the Professional Qualifications Directive 2005/36/EC and the QASA scheme would be in conflict with this EU rule.

What should lawyers do next?

The appeal was expedited. At the end of the hearing Lord Neuberger gave no indication as to when judgment will appear. If the appeal is allowed, Mr. de la Mare QC has urged the Supreme Court to quash the QASA scheme. If this approach is adopted, then that will be the end of QASA. This would then mean that the LSB would have to think again and, if it wanted to propose another scheme, it would need a proper and thorough evidential basis for doing so.

Solicitors who are contemplating undertaking additional training to obtain higher rights of audience in criminal proceedings should not be deterred in the meantime from doing so.

Nigel Griffin QC (for the LSB) and Timothy Dutton QC (for the Bar Standards Board) agreed with Thomas de la Mare QC that this was the first time that a high appellate court within an EU member state had had to consider the provisions of the Services Directive. Unless the Supreme Court considers that the definitions in the Directive are *acte clare*, then it will have to refer this case to the European Court of Justice. The ECJ will then have to rule on 2 things. Firstly, whether QASA is an authorization scheme covered by the Directive. Secondly, whether the LSB's objective cannot be attained by means of a less restrictive measure. A reference to the ECJ could take another 18 months and then the case would need to come back to the Supreme Court to apply the ECJ's opinion. In the meantime, QASA would remain on ice.

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