

The Office of Immigration Services Commissioner's Response to the

Bar Standards Board Consultation – Public Access Rules

Review and amendments to rule 2(i) and rule 3(1)

1. The Commissioner wishes to make certain general observations about the Public Access Scheme (PAS) and the proposed amendments, and to offer specific comments about the possible impact that these changes could have on her regulation of immigration advice and services.
2. The proposed changes that are of particular interest to the Commissioner are that:
 - (a) PAS is opened to all barristers.
 - (b) Participation in PAS should include those undertaking the second six months of their pupillage.
 - (c) PAS is opened up to include the acceptance of what would/ could have been publicly funded work.
3. Given (a) and (b) above, the BBS must make it explicitly clear who is able to take on PAS work. The definition given is insufficient as there is the possibility of “non-practising” barristers who are issued with a full practising certificate and regulated by the OISC undertaking this work and taking some of their practice outside of OISC direct regulation (paragraph 72 –page 20). This could potentially produce a lacuna in regulation. Further clarification is required on who can take on PAS work. The Commissioner must be sure that either:
 - the BSB will take full responsibility for the regulation of all those that style themselves as barristers, including those that are “non-practising”; or
 - they make it clear that they will not regulate the non-practising barristers, and, for immigration purposes, leave such regulation to the Commissioner – as in section 3.65 of the Bar Handbook 2011-12.
4. Following from the above paragraph, the Commissioner proposes that the following be added to the amendment of Rule 2(i) “and *practising in ways permitted by the Bar’s Code of Conduct*”.
5. Consumers in the immigration field may often decide not to complain. This is due to a number of factors such as culture and fear of authority. Any complaint about the service provided to a consumer would arise after the event when any potential damage was done. This could be a tragedy in the case of the consumers of immigration advice and services who may no longer be in the UK, and where it would be too late for the BSB to intervene, even if the matter was referred to them in the first place.
6. Many consumers of immigration advice and services are unfamiliar with the English legal system and the English language, so it may be difficult for them to make a properly informed choice about (c) above. The theory appears to be that, even where the barrister identifies

that a potential lay client is likely to be eligible for public funding, that client would rationally choose to pay a barrister privately under the PAS. A number of reasons why this may be the case are at paragraph 36 (p 12) of the consultation document. All of these are valid reasons; but they presuppose an element of sophistication and familiarity with the system, which may not be present with an immigration lay client. If the proposal is adopted, then the Commissioner believes that counsel must be under a duty to ensure that the lay client is fully informed of and fully understands the options available to them. Leaving this to an intermediary is unacceptable.

7. Further, a barrister may be asked to perform legal services by an intermediary for the benefit of a named client. An immigration adviser or organisation can be such an intermediary. For example, an immigration adviser may want to obtain a legal opinion for their client from a barrister or ask a barrister to represent their client at the First-tier Tribunal (Immigration and Asylum Chamber). From a consumer protection perspective, when an intermediary is involved, this requirement to fulfil proposal (c) may be compromised. This is because there is no way for the barrister to ensure that eligibility for legal aid has been properly assessed, or the client fully informed about their eligibility. While OISC regulation requires advisers to inform clients about the possibility of legal aid, this is not the position with regards to those acting as an intermediary outside of any regulatory structure.
8. There are a number of other concerns, as outlined below:
 - i. Advisers to use barristers for Fresh Claim Judicial Reviews - The proposals will allow advisers to circumvent the requirements of the tribunal procedure (Upper Tribunal) Rules 2008. This recently adopted amendment allows “Fresh Claim Judicial Reviews” (FCJRs) to take place at the Upper Tribunal (UT) Immigration and Asylum Chamber instead of the High Court. The new rule makes it clear that the only people with rights of representation at this stage are legally qualified persons who have the right to conduct litigation in the Administrative Court. Other persons, including those regulated by the OISC, would continue to be unable, as they are now, to act as a representative in FCJR proceedings in the Upper Tribunal or to address the Upper Tribunal in FCJR hearings. This would be complicated, however, when there is an intermediary acting. The barrister would either have to refuse to act or create the fiction that they are acting directly for the lay client and ignore the intermediary. This would compromise the system’s and the barrister’s integrity.
 - ii. Linked to the above, the PAS proposals may allow OISC regulated advisers to undertake judicial review applications in the High Court. Currently they cannot take on any form of judicial review work because of the provisions of the Legal Services Act 2007. The current proposals will not prevent OISC regulated advisers from acting as intermediaries for High Court work. In fact, the proposals could well encourage it, especially with inexperienced counsel under proposals (a) and (b) above.
 - iii. Level 1 advisers to undertake PAS work- The proposals appear to ignore any other regulatory regime that may exist. The OISC has issued guidance after discussions with the BSB on the use of PAS <http://oisc.homeoffice.gov.uk/servefile.aspx?docid=225>. This confirms that only those regulated at Levels 2 and 3 of the OISC regulatory scheme are permitted to act as an intermediary under PAS. By ignoring the OISC scheme, the PAS rules will allow Level 1 advisers to undertake such work, completely

undermining the OISC regulatory structure by allowing individuals with only basic qualifications to undertake highly complex tasks.

- iv. Immigration advisers to leave OISC regulation - One case has already been reported of an adviser threatening to leave the OISC scheme in order to act as an intermediary under PAS. Given the concerns raised in paragraph 3 above, the regulatory interests of both the BSB and OISC could be compromised by implementation of the proposals as they stand.

Suzanne McCarthy
Immigration Services Commissioner

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