



RESPONSE FOR THE FACULTY OF ADVOCATES

to the Consultation

on

OISC Guidance on Competence 2017

“Question 1: Please provide any comments you have in relation to the proposal to introduce a new category of work – Judicial Review Case Management (JCRM) - and any observations on the mechanism for approving advisors to undertake such activity”

Response: We have no objection in principle to the introduction of this new category of work provided:

- (1) the required competencies are clearly defined; and
- (2) advisers are competent in an understanding of –
 - (i) not just the judicial review procedures of the relevant Court or Tribunal (It should be borne in mind that in Scotland judicial review in immigration matters remains predominantly in the Court of Session), but also;
 - (ii) substantive administrative law principles that form the basis of judicial review challenges (including an awareness of the potential for different law (including remedies) in different jurisdictions;
 - (iii) the professional obligations and rights of counsel, including the differences in different jurisdictions; and
 - (iv) the professional rules on instruction of counsel, including the scope of work undertaken and not ordinarily undertaken by counsel and the potential for differences in different jurisdictions.

We consider that a proper understanding of the scope of judicial review requires a proper understanding of the principles of administrative law and remedies.

Where regulated advisers are to be able to instruct counsel, we consider it important that they understand the proper role of counsel in the preparation of judicial review proceedings, including the limits of what is professionally and ordinarily the work done, and not done, by counsel, to avoid the risk of confusion and possible oversight.

In all of the above there will be different approaches in the various jurisdictions in the United Kingdom. There should be an awareness of those differences.

We have no particular observations on the “mechanism” for approval other than ensuring that regulated advisers are aware of the above.

“Question 2: Do you believe that the requirement to demonstrate full working knowledge of both asylum and immigration at Level 1 for practitioners who seek registration should be retained? If not, does the idea of a requirement for “awareness” seem appropriate, and how might this awareness be demonstrated?”

Response: We consider the requirement should be retained. Few claims do not raise human rights issues, and a mere “awareness” of such fundamental rights is an insufficient test of ability to offer advice on matters that will have serious consequences.

“Question 3: Are the definitions provided sufficiently clear to allow advisors to recognise the OISC level of registration that would be required for advisors to undertake a particular piece of work? If not in what respects might they be amended?”

Response: We appreciate that it is not easy to categorise different areas of work and distinguish one from another. With one exception, we agree that the definitions are sufficiently clear. However, in the new category of JRCM, at page 10 of the Guidance, the head of “Work Permitted” includes “...appearing...at the Hearing...” but under the head of “Work not permitted”, the adviser is (correctly) not allowed to conduct the Judicial Review. The generality of the description of the permitted work admits of a potential for confusion and inappropriate conduct. The Guidance should make clear the limit of the permitted work. Further reference might be made to entitlement only where permitted by the relevant judicial body. (As already noted, it should be borne in mind that judicial review in immigration matters in Scotland is still ordinarily undertaken by the Court and not before the Upper Tribunal).

“Question 4: Please provide any comments regarding either the categorisation of the work listed above in terms of the Level at which advisors should be permitted to

undertake this work, or the clarity of the explanation as set out in the draft Guidance.”

Response: We have nothing to add to our response to Question 3 which appears to raise the same//similar issue.

“Question 5: Do you agree that it is necessary for the Commissioner to add to the required Level 1 skills, the ability to support a client in drafting a simple witness statement to support their application where Human Rights issues are being raised as additional factors?”

Response: We agree so long as the issue such an adviser was expected to assist with was no more than basic. Few cases do not raise human rights issues (*see our response to Question 2*). However, we do not think it is appropriate for an adviser at this level to be expected to be aware of more complex human rights matters.

“Question 6: Do you agree with the skills sets set out at page 24-27 in relation to JRCM? Are there any additional skills and aptitudes that you believe advisors working in this area must have?”

Response: We have nothing to add to our response to Question 1 which appears to raise the same/similar issue.

Further: terminology used to identify Counsel in Scotland (as opposed to barristers in England) is inconsistent throughout the Guidance. We suggest that wherever the term “barrister” is used it should always be followed by reference to “*or members of the Faculty of Advocates.*”