



PRESIDENT: THE RT. HON. THE LORD SLYNN
CHAIRMAN: CHRISTIANE VALANSOT

Comments on the review of the Queen’s Counsel selection process from the Bar Association for Commerce Finance and Industry (“BACFI”)

Introduction

The Bar Association for Commerce, Finance and Industry was founded in 1965 to promote the interests and professional status of barristers employed in commerce, finance and industry. BACFI is a Specialist Bar Association, affiliated to the Bar Council but operating independently to represent employed barristers practising outside chambers. Our members are employed in a diverse range of organisations including financial services, banking, large corporations, the Government Legal Service and solicitors’ firms.

BACFI is keen to play its part as a representative organisation in helping shape the development of the Bar of England and Wales, by bringing forward the views of its members and pressing for appropriate change. BACFI actively supports the objective of an independent and high quality bar, accessible to all.

We understand that currently there is a review taking place of the QC selection process and we would like our views to be taken into account as part of that review.

Current eligibility criteria for appointment as QC

The existing eligibility requirement¹ states that “the award of Queen’s Counsel is for excellence in advocacy in the higher courts”. Although the paragraph goes on to state “The advocacy may be in oral or written form and relates to developing a client’s or employer’s case to secure the best outcome for the client in a dispute”, the competencies are clearly related to contentious work and applicants are required to list 12 judges “in front of whom they have appeared substantively in cases of substance, complexity or particular difficulty or sensitivity...”.² Although the QC Secretariat has stated that “a number of the Selection Panel’s recommendations have been advocates who appear in court relatively rarely”³, it seems clear to us that a barrister who does not appear in court and does not have a practice which involves litigation has very little chance of being selected.

¹ QC applications website; General guidance for Applicants, para 4.

² *ibid*; Summary of Revised Process for QC Award for England and Wales, para 5.2

³ *ibid*; Some Myths about the Selection System 2008

The nature of the award of Silk

The appointment as QC is a recognition of excellence and achievement at the Bar and is a quality mark signalling to the public (in the widest sense) that the barrister is an expert in his or her field. “The QC mark continues to be hugely important to the future of the profession. Silk is a kite-mark of excellence, a sign of high quality and distinguishing part of the brand of our legal system at home and abroad”⁴.

The position of employed barristers

Since the reforms of 2000, employed barristers have had equal rights with self-employed barristers. The concept of “One Bar” is now firmly entrenched in the organisation and structure of the Bar. The employed bar represents over 20% of all barristers and many barristers transfer from employed to self-employed status and vice-versa. It is proposed that from 2010 employed barristers will pay the same practising certificate fee as self-employed.

Usually the barrister employed in a commercial company has very little opportunity to go into court. In fact in most companies litigation is strenuously avoided wherever possible. Where litigation does occur the general counsel of a company will usually instruct specialist solicitors and counsel rather than appear in court personally.

Opportunity for employed barristers to be awarded Silk

Barristers working for the CPS and to a lesser extent the government legal service may be able to satisfy the competencies laid down in the Competency Framework. It is however interesting to note that although 6 employed barristers applied for silk in the 2007 round, none were appointed.⁵

Although the Panel stated that it was confident that employed advocates who regularly engage in written or oral advocacy on behalf of their employer will be able to demonstrate the competencies to the required level and merit appointment, it is very unlikely that barristers in commercial companies will have any prospect of meeting the competencies or putting forward acceptable assessors, for the reasons stated above. Even if they have appeared in court while in self-employed practice this may have been several years earlier and perhaps while they were relatively junior.

Proposal to widen the criteria

Given that the QC appointment is awarded for excellence at the Bar, it seems unfair to restrict the award to those who engage in court advocacy as part of the litigation process. There are many employed barristers who have reached positions of great seniority due to their skills as an advocate (in the wider sense) in the boardroom, in ministerial briefings, before regulators and in multi million pound ADR negotiations. They are highly regarded and valued by their employers and respected by their peers. However they may never have appeared before a judge or an arbitrator.

⁴ Chairman of the Bar, Geoffrey Vos, 19 March 2007 commenting on the applications in the 2007 round.

⁵ QC applications website; Report of the Queens Counsel Selection Panel for England and Wales; January 2008 Awards, para 3.

BACFI has long campaigned for a wider definition of advocacy and as part of the current review of training for the Bar is proposing that more pupillages could be made available in commerce if advocacy were given its wider meaning.

We support the “Dutton definition” of advocacy which is as follows:

" The essential skills for a persuasive modern advocate are, in combination:

- *The ability to persuade orally;*
- *The ability to persuade in written argument;*
- *Cogent legal and factual analysis;*
- *The ability to develop reasoned argument; and*
- *Forensic skills with evidence (both written and oral)*

All of the foregoing undertaken to high ethical standards”⁶

The Bar Council Working Party on Judicial appointments and Silk in its Consultation Paper of March 2003 stated:

“The Lord Chancellor’s Department has recently encouraged employed barristers to apply for Silk, but few, if any, are thought to have applied recently. Apart from the award of Silk as an honour, e.g. to the Treasury Solicitor and the Master of the Crown Office, the appointment of an employed barrister as a QC is exceptional. Silk is mostly awarded to those who are amongst the leaders in advocacy, but this is not always the case. Some Chancery and Tax practitioners, for example, have been appointed to Silk largely as a result of their skill in drafting and advisory work. Some employed barristers have to advise on most complex and important legal problems, and their advice is influential in Government and major organizations. We believe that the honour of Silk should be regarded as a proper reward for such excellence, and we recommend that the Bar Council should make it clear that applications for Silk from the most distinguished members of the employed Bar will be welcomed.”⁷ .

It is worth noting here that up to 1987, seven Chairmen of BACFI were appointed QCs with the “substantive” rank on the basis that they were general counsel or equivalent of major corporations and had been elected by their peers to represent employed barristers in commerce finance and industry. After 1987, such awards were on an honorary basis.

There have been proposals in the past to establish an alternative rank of merit for employed barristers. We are opposed to this suggestion as it does not accord with the “One Bar” principle and will inevitably be seen as a second rate award. As noted above, employed barristers have in the past been appointed Silk Honoris Causa. Whilst this may be appropriate in some cases (this year the criteria for this rank have been widened considerably), we do not see it as fulfilling the same recognition of quality and excellence as the substantive rank. It is an honour rather than a mark of quality.

⁶ First set out in a report of a Working Party chaired by Timothy Dutton QC (published in October 2002) on the organisation, delivery and outcomes of advocacy training for barristers in the future.

⁷ Bar Council Working Party On Judicial Appointments and Silk, Consultation document, March 2003, Appendix 2, para 4.

Therefore BACFI proposes that the criteria for appointment as QC are modified to enable all employed barristers to be able to meet the requirements. It would also be necessary to widen the categories of assessors so that employed barristers could put forward those most able to comment on their performance.

Conclusion

We hope that the review body will consider our proposals and we would be very happy to provide more information or to meet with the review team if required.

BACFI
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