

Summary of decision

The purpose of this summary sheet is to provide a high level and accessible summary of the Legal Services Board's ("the LSB") decision. Readers are recommended to read the formal decision notice below for further detail. **This summary is not and should not be taken as a formal part of the LSB's decision notice under the Legal Services Act 2007 ("the Act").**

The LSB's decision is to grant in full the application from the Bar Standards Board ("the BSB") to make changes to its regulatory arrangements to close a legislative loophole by adding a rule to specifically restrict barristers from supervising immigration advisers who have been subject to serious sanctions by the Office of the Immigration Services Commissioner ("OISC") or by an approved regulator.

Following the assessment of the BSB's application, the LSB has approved the BSB's application.

Decision notice

The Bar Standards Board's application for approval of changes to its regulatory arrangements relating to barristers supervising immigration advisers

The Legal Services Board (“**LSB**”) has granted an application from the Bar Standards Board (“**BSB**”) for approval of changes to its regulatory arrangements relating to barristers supervising immigration advisers.

1. The LSB is required by Part 3 of Schedule 4 to the Legal Services Act 2007 (the “Act”) to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements.
2. This application has been made by the BSB. The Bar Council is an approved regulator and the BSB is the regulatory arm to which the Bar Council has delegated its regulatory functions.
3. This notice sets out the decision taken, including a description of the changes. The notes at page 6 of this notice explain the statutory basis for the decision.
4. The chronology for the LSB's handling of this application is also set out below.

Chronology

- The LSB confirmed receipt of an application from the BSB on 6 December 2019.
- The 28-day initial decision period for considering the application ends on 2 January 2020.
- This decision notice is effective from 19 December 2019.
- The decision notice will be published on the LSB's website by 21 December 2019.

Background

5. On 6 December 2019 the BSB submitted an application to the LSB for the approval of changes to its regulatory arrangements by adding a new rule rC85A to the BSB Handbook concerning the supervision of immigration advisers by barristers.
6. Under section 84(2)(e) of the Immigration and Asylum Act 1999 (the “1999 Act”), barristers are entitled to supervise an immigration adviser for the purposes of offering immigration advice to consumers. Currently, the BSB's regulatory arrangements do not expressly prohibit barristers from supervising immigration advisers who are subject to a serious sanction by another regulator such as the Office of the Immigration Services Commissioner (“OISC”) or a designated qualifying regulator¹. For the purposes of this decision notice, such advisers are hereafter referred to as “Prohibited Immigration Advisers”. The sanctions include those who have been struck

¹ Under section 86A of the 1999 Act, designated qualifying regulators are defined as the Law Society, the General Council of the Bar or the Chartered Institute of Legal Executives.

off, disbarred or otherwise prohibited from practicing, whether permanently or temporarily.

7. The BSB instead relies on guidance to remind barristers to exercise due diligence and check whether an adviser they propose to supervise:

“...has been prohibited, or is currently suspended, from practice by the Office of the Immigration Services Commissioner (OISC)...”

8. Given that the guidance is not mandatory, it is difficult for the BSB to take enforcement action against barristers who do not follow it. This is notwithstanding the fact that barristers who choose to supervise Prohibited Immigration Advisers are likely to breach Core Duty 5 of the BSB Handbook² (see paragraphs 16 to 18 below).
9. New rule rC85A is designed to close this legislative and regulatory loophole by expressly prohibiting barristers from supervising Prohibited Immigration Advisers.
10. The BSB is currently aware of two supervisory arrangements between barristers and Prohibited Immigration Advisers, one of which was brought to the attention of the BSB by the Home Office.
11. The BSB has taken steps to update its guidance for barristers who supervise immigration advisers in order to provide clarity on appropriate supervision and to remind barristers of their obligations under the BSB Handbook.
12. The BSB has also developed an additional question to include during the annual practising certificate application renewal process, which will require barristers to notify the BSB if they currently supervise, or intend to supervise, immigration advisers in the forthcoming year. This will enable the BSB to engage with such barristers to address any concerns.

Proposed changes

13. The BSB's proposal is to add rC85A to the 'associations with others' rules within the BSB Handbook to make it explicit that a barrister must not act as a supervisor of an immigration adviser where the advisor has been:
- refused registration or has had their registration cancelled by OISC;
 - disqualified in accordance with paragraph 4 of Schedule 6 to the 1999 Act;
 - prohibited or suspended by the First-tier Tribunal (Immigration services);
 - permanently prohibited from practising by an approved regulator or a designated body under the 1999 Act; or
 - currently suspended³ from practising by an approved regulator, or a designated professional body under the 1999 Act.

² <https://www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-code-guidance/the-bsb-handbook.html>

³ The BSB has confirmed that it will clarify in its guidance that 'currently suspended' includes those who are temporarily suspended or suspended for a defined period.

Key issues considered in the assessment

14. The LSB welcomes the BSB's proposal which seeks to provide regulatory alignment with bodies that regulate the provision of immigration advice, and to protect consumers from advisers who have been found to have committed serious regulatory misconduct.
15. Having considered the BSB's application and supporting documents, the LSB makes the following key points in relation to the application.

Necessity of the rule change

16. In our engagement with the BSB prior to receiving its application we asked why it did not consider that existing regulations would be sufficient to take enforcement action in relation to the supervision of Prohibited Immigration Advisers. In particular we considered whether the BSB's Core Duty 5 (You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession) was sufficient for the BSB to take regulatory action.
17. In its final application the BSB explained that the absence of an explicit rule has proved to be problematic in practice and hampers the BSB's ability to take effective regulatory action.
18. We accordingly agree with the BSB's view that an explicit rule will bring clarity to the types of supervisory arrangements that are prohibited under the BSB Handbook. We further agree that an explicit rule will enable the BSB to take the regulatory action required to protect consumers. We consider that this of great importance, not least because the BSB has highlighted the potential vulnerabilities of some clients receiving immigration legal services.

Consultation

19. The BSB made the decision to hold a short (four-week) targeted consultation but it also made the consultation available on its website. The LSB accordingly accepts that it was possible for a wider pool of stakeholders and members of the public to access and provide a response to the consultation had they wished to.
20. The BSB has confirmed in response to a request from the LSB, why it considered a consultation period of 4 weeks to be sufficient. The reasons are:
 - The BSB had undertaken preliminary engagement, prior to the consultation being published, so it had a good understanding of the reasons why the rule change was needed, that is, to protect consumers as it will prevent Prohibited Immigration Advisers from providing immigration advice.

- The matter is considered urgent as there are two known instances in which Prohibited Immigration Advisers are currently able to offer immigration advice, which is presenting an unacceptable risk to consumers and which the BSB's current regulatory regime is unable to mitigate against.
- The BSB published the consultation at a time which did not coincide with the summer break period or other major holiday periods to ensure stakeholders were able to respond. It also sent reminder emails to stakeholders to give them a further opportunity to do so.

21. The LSB considers that, in light of the exceptional circumstances in this instance, the consultation period of 4 weeks is both appropriate and proportionate and notes that a longer consultation period would have led to an unnecessary delay to preventing potential consumer harm.
22. The consultation asked whether consultees agreed with the change and asked whether they could provide any examples of good supervision arrangements which could be used to inform guidance and case studies. It received a total of 24 responses, including responses from 19 barristers. The proposals were supported in full by 21 of the consultees.
23. Having considered the responses and evidence, the BSB concluded that the change was appropriate and explained why some of the alternatives proposed through consultation (such as a full ban on supervising unregulated advisers) were not considered to be appropriate.
24. The LSB is satisfied with the BSB's conclusion that the proposed rule is a proportionate way of providing additional public protection.

Guidance, Communication & Impact

25. The LSB notes and it has had sight of the BSB's updated guidance in this area. We expect the guidance to be published on or around the same time as the implementation of new rule rC85A.
26. The LSB is also assured that the BSB will be better informed of the activities of those in its regulated community by the addition of a new question as part of the practising certificate application renewal process. The BSB has committed to supervise any barristers undertaking this type of work to ensure they are aware of the rule and guidance and are practising in accordance with them.
27. We note the BSB's commitment to publicise the change and associated guidance through a series of communications channels.
28. We welcome the BSB's commitment to monitor and evaluate the rule, including by logging queries relating to the interpretation of the rule, engaging with OISC and the Home Office to ensure they are aware of any non-compliance and by reviewing all evidence gathered after the rule has been in place for two years.

Decision

29. The LSB has considered the BSB's application against the criteria in paragraph 25(3) of Schedule 4 to the Act. It accordingly grants the application in full.

30. **Annex A** to this decision notice contains the amended section of the BSB's Handbook that is approved by the LSB.

Matthew Hill, Chief Executive Acting under delegated authority granted by the Board of the Legal Services Board

Notes:

1. The LSB is required by Part 3 of Schedule 4 to the Act to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements.
2. Paragraph 25(3) of Schedule 4 to the Act explains that the LSB may refuse an application setting out a proposed change to the regulatory arrangements only if it is satisfied that
 - (a) granting the application would be prejudicial to the regulatory objectives
 - (b) granting the application would be contrary to any provision made by or by virtue of this Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator
 - (c) granting the application would be contrary to the public interest
 - (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator
 - (e) the alteration would enable the approved regulator to license persons under Part 5 [of the Act] to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or
 - (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.
3. The designation requirements referred to in paragraph 2(b) above are set out in paragraph 25(4) of Schedule 4 to the Act and are
 - (a) a requirement that the approved regulator has appropriate internal governance arrangements in place
 - (b) a requirement that the applicant is competent, and has sufficient resources to perform the role of approved regulator in relation to the reserved legal activities in respect of which it is designated, and
 - (c) the requirements set out in paragraphs 13(2)(c) to (e) of Schedule 4, namely that the regulatory arrangements are appropriate, comply with the requirements in respect of resolution of regulatory conflict (imposed by sections 52 and 54 of the Act) and comply with the requirements in relation to the handling of complaints (imposed by sections 112 and 145 of the Act).
4. In accordance with paragraphs 20(1) and 23(3) of Schedule 4 to the Act, the LSB has made rules⁴ about the manner and form in which applications to alter regulatory arrangements must be made. Amongst other things, the rules highlight the applicant's obligations under section 28 of the Act to have regard to the Better Regulation Principles. They also require applicants to provide information about each proposed change and details of the consultation undertaken.
5. If the LSB is not satisfied that one or more of the criteria for refusal are met, then it must approve the application in whole, or the parts of it that can be approved.

⁴ LSB's Rules for applications to alter regulatory arrangements – Version 2 April 2018
[https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/New%20folder%20\(2\)/FINAL_Rules_for_applications_to_alter_regulatory_arrangements.pdf](https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/New%20folder%20(2)/FINAL_Rules_for_applications_to_alter_regulatory_arrangements.pdf)

Annex A – rule rC85A of the BSB Handbook

The BSB has applied to add rule rC85a to its Handbook, as follows:

rC85A *You must not act as a supervisor of an immigration adviser for the purposes of section 84(2) of the Immigration and Asylum Act 1999 (as amended) (IAA 1999) where the Office of the Immigration Services Commissioner has refused or cancelled the adviser's registration, or where the adviser is:*

- 1. disqualified in accordance with paragraph 4 of Schedule 6 to the IAA 1999; or*
- 2. prohibited or suspended by the First-tier Tribunal (Immigration Services); or*
- 3. permanently prohibited from practising by an approved regulator, or a designated professional body under the Immigration and Asylum Act 1999, pursuant to its powers as such, and removed from the relevant register; or*
- 4. currently suspended from practising by an approved regulator, or a designated professional body under the Immigration and Asylum Act 1999, pursuant to its powers as such.*