

# Applications under the Higher Courts Qualification Regulations 2000

## Frequently asked questions

Education and Training Unit

Version 2

### Contents

<b>General questions on applicant experience, application procedure and the provision of references .....</b>	<b>2</b>
<b>Development route.....</b>	<b>4</b>
<b>Accreditation route .....</b>	<b>7</b>
<b>Exemption route.....</b>	<b>8</b>
<b>Former barrister route .....</b>	<b>8</b>
<b>Barristers with existing higher rights of audience who are preparing to transfer to the solicitors' profession .....</b>	<b>9</b>
<b>Continuing professional development - post qualification.....</b>	<b>9</b>
<b>Comparable jurisdiction experience .....</b>	<b>10</b>

## **General questions on applicant experience, application procedure and the provision of references**

1. There is written advocacy and oral advocacy - in terms of my application, which is the most important?

Written advocacy is always taken into consideration. Clearly, however, since the award of higher rights entitles the holder of the award to appear “on their feet” in the higher courts, the Higher Courts Qualification Casework Committee (the Committee) places most emphasis on the oral advocacy undertaken by the applicant. Usually, any reference to advocacy in guidance issued by the Solicitors Regulation Authority (SRA) in relation to gaining higher rights of audience, is a reference to oral advocacy

2. How quickly will my application be dealt with?

It depends on when you apply. The Committee generally meets once every two months or so. Where possible, scheduled meetings are detailed on the SRA higher rights of audience web page. If your application just misses a meeting it will have to go to the next meeting which will probably be about two months ahead. Subject to availability of committee members, Committee dates can change and it should be noted that if necessary meeting dates will be changed without notice. If you are applying via the development route, your application may not have to go before the Committee for consideration – see the ‘Development route guidance for mentor and portfolio’ document.

3. I don’t know how much experience I need to submit an application. Do any benchmarks or minimum flying hours criteria exist?

No. The Committee has not prescribed any minimum threshold criteria which an applicant must satisfy in order to achieve success. The Committee takes every application on its own merits taking into account a number of factors including:

- the breadth and depth of the applicant’s experience in terms of the seriousness and complexity of the cases they have dealt with in the appropriate courts
- the extent and regularity of their advocacy experience including the extent to which they have used their existing rights of audience
- the quality of the referees and the contents of their references
- training and observation an applicant may have undertaken
- regulatory factors such as complaints against the applicant or the reasons for the applicant holding a conditional practising certificate.

The above list is not intended to be exhaustive.

4. I am unclear about the selection of appropriate references – could this be clarified?

Regardless of which route you apply under you should seek to acquire the strongest independent reference you can get from someone who has “seen you on your feet”. Clearly, a reference from a Judge who can say they have seen you on your feet recently and regularly would be very useful. A reference from a Judge who has only seen you once or twice in simple matters is less useful.

The seniority of the referee is only one factor which the committee would take into account. A reference from a holder of a judicial or other office who has gained considerable experience of an applicant as an advocate may be given more weight than the reference from a referee who has only seen the applicant on a few or an isolated occasion. References from people who have not actually seen you on your feet are less useful. As a rule of thumb only, and taking account of what has been written above in this paragraph, applicants might wish to seek references from referees in the following order:

1. References from individuals who have seen you on your feet whilst sitting in a judicial capacity in the court you wish to appear - for example Circuit Judges or High Court Judges.
2. References from individuals who have seen you on your feet whilst sitting in a judicial capacity in the lower courts where you have appeared - for example District Judges.
3. References from individuals who have seen you on your feet and who hold some kind of part-time judicial post – for example a professional opponent who is a Deputy District Judge or Assistant Recorder.
4. Other independent referees – for example the Clerk to the Justices or professional opponents such as Barristers and Solicitor Higher Court Advocates.
5. Counsel or solicitors who have seen you on your feet.

The list is not intended to devalue any reference provided by any individual, but simply reflect the fact that references from individuals holding judicial positions will naturally strengthen any application.

At the end of the day, however, it is for the applicant to obtain the best and most appropriate references they can. If you cannot supply a reference of the type described above because you have little or no recent advocacy experience then you are probably considering attempting the accreditation route. If this is the case, you may wish to use Counsel as your referee.

N.B references are not required for applications via the development route.

5. As it happens, I currently hold a conditional practising certificate. Is that going to be fatal to my application?

No. Clearly some conditions which are placed on practising certificates are of a more serious nature than others. However, the Committee does not seek to automatically exclude any potential applicant and each application will be taken on its own merits.

6. Are there any issues of confidentiality which arise when I submit my application form?

You have correctly identified the obligation on solicitors to keep confidential to their firm the affairs of clients (Rule 4 of the Solicitors' Code of Conduct 2007). In order to ensure that this is observed it is suggested you take any step you feel necessary to anonymise the details contained in your application form.

You may wish to blank out names in copy documents or substitute initials for real names. It is a matter for you to ensure your compliance with the above principle.

7. How soon after the meeting of the Committee will I hear the result of my application?

The SRA makes every effort to notify applicants within ten working days. Clearly, the speed at which applicants are notified depends on how many applicants there are. On occasion, it may not be possible to notify every applicant within the normal time scale. Applicants are asked not to call the office for details of the decision on their application. Numerous applicants calling the office slows down the correct notification procedure considerably.

## Development route

8. The advocacy I wish to observe as part of the requirements for the portfolio will be just one instance of a number of instances which will take place as part of a trial or other hearing which will take place perhaps over a number of months. Can I include this observation as a valid instance of observed advocacy in my portfolio?

You may include in your portfolio observed advocacy which is a discrete part of a lengthy trial or other type of hearing, for example, an appeal. However, the instance of advocacy you choose to observe must be a substantial piece of advocacy.

You should not consider the advocacy you observe in isolation, but within the context of the case generally and with reference to issues such as the approach of the advocate, the calling of expert witnesses and the legal arguments being put forward (this is not meant to be an exhaustive list of issues).

In accordance with the guidance notes on mentors and the portfolio, it is expected that the applicant will discuss the advocacy with the advocate as well as the mentor. The discussions may take place both prior to and after the advocacy has taken place.

It is acceptable to use an instance of observed advocacy from a case which has not been completed, but it is the duty of the applicant to have regard to the issues of confidentiality and ensure that the matter is suitably anonymised to avoid the case being compromised. Where the applicant feels that it is impossible to anonymise properly an ongoing case then it should not form part of the portfolio.

9. I am having difficulty finding a mentor. Do I have to have a mentor who is a solicitor higher court advocate?

No. The SRA accepts that the relatively low number of solicitor higher courts advocates makes it unlikely that every applicant under the development route will be able to secure such a mentor. Any solicitor or barrister will be acceptable provided they meet the requirements of having been admitted/called for five years and are currently practising as an advocate.

10. Can an individual attempting the development route be a mentor for someone else at the same time?

Yes, there is no reason why an individual undertaking the development route cannot be a mentor, provided they satisfy the criteria of having been admitted for at least five years and are currently practising as an advocate.

11. I have read the document entitled 'Development route guidance for mentor and portfolio' – does any further guidance exist about the breadth, depth, gravity and type of cases I am expected to include in my portfolio?

No. The Committee has agreed that no further guidance will be made at this time until sufficient applications have been made for any useful guidance to be formulated. Irrespective of the guidance which exists now and in the future, the SRA will continue to consider each application and portfolio on its individual merits.

12. I am a trainee solicitor who has undertaken the training in procedure evidence and ethics both as a Professional Skills Course (PSC) elective and for the purposes of gaining a higher court qualification under the development route. I know I have to pass the examination for the purposes of gaining the higher rights award but is it necessary for me to pass the examination in order to complete the course as a PSC elective?

No. Clearly, you must pass the examination for the procedure evidence and ethics course to count towards your application for a higher court qualification. However, you do not have to have passed the examination for the course to be regarded as having satisfied the PSC elective.

13. I am a non-practising barrister who never completed pupillage and I am due to be admitted as a solicitor later this year - which route is the best for me to qualify under?

On balance, the route which is most likely to apply to you is the development route. The Committee has decided that applicants who have successfully completed the Bar Vocational Course (BVC) may be exempted from the training and assessment required by the development route. In other words, the applicant need only complete their portfolio before applying for an award. The presumption made in recommending the development route above other existing routes is that via the other routes applicants must have practised as lawyers for at least three years either as a barrister or a solicitor and have a certain breadth and depth of advocacy experience which it is assumed that a non-practising barrister working in a solicitor's firm is unlikely to have. Important note: the BVC and the portfolio must have been undertaken in the five years preceding the application for higher rights.

Important note: Under the Higher Courts Qualification Regulations 2000 the portfolio may only be undertaken whilst in a training contract or after being admitted as a solicitor. Therefore barristers working in a solicitor's firm cannot commence the portfolio until after admission – unless for some reason it has been necessary for them to enter into a formal training contract with the firm – however, please see the FAQ below.

14. The Higher Courts Qualification Regulations 2000 state in regulation 5(2)(i) and 5(2)(ii) that the training, assessment and up to six months of the experience (the portfolio) set out in Regulation 5(1) may be undertaken before admission as a solicitor, but only after having successfully completed the LPC and with the experience requirement being undertaken whilst in a training contract or after being admitted as a solicitor.

This appears to exclude barristers, FILEX and solicitors admitted in other jurisdictions who are under no obligation to either attempt the LPC or enter into a training contract to the extent that they may only attempt the development route after having been admitted as a solicitor in England and Wales. Is this correct?

Strictly speaking yes. However, any lawyer who cannot now or is unlikely in the future to satisfy regulations 5(2)(i) and 5(2)(ii) may wish to apply for a waiver to allow them to undertake this route without having first completed the LPC and without them having to enter a training contract or be admitted as a solicitor in England and Wales to commence the experience requirement.

This should ideally be done prior to commencing the development route by writing a letter to the Committee applying for a waiver. Any person who has already commenced the route will have to apply retrospectively. However, retrospective applications are not advised as a waiver will not be granted automatically and each case will be decided on its merits.

Some applicants with extensive experience prior to becoming a solicitor may also choose to apply for a waiver of regulation 5(2)(iii) which requires that at least six months of the experience requirement takes place following admission as a solicitor in England and Wales.

Each application will be considered on its individual merits. It is for the applicant to state clearly which regulations they require a waiver from and to present the arguments in support of their application. In response to queries and subsequent applications for a waiver, the Committee has issued the following policy statement:

- (i) in principle, the Committee has no objection to any suitably qualified individual such as a solicitor admitted in a comparable jurisdiction or a barrister who did not complete pupillage, attempting the development route;
- (ii) the presumption being that in obtaining their existing professional qualification, the applicant has undertaken and passed comparable training to the LPC;
- (iii) however, each application will be considered on its own merits and any individual considering the development route is advised to apply

for a waiver of Regulations 5(2)(i) and (ii) before commencement of the training and experience requirements.

- (iv) in respect of any waiver of Regulation 5(2)(iii), the requirement to undertake at least six months of the portfolio post admission, the Committee takes the view that experienced solicitors from comparable jurisdictions or barristers are able to gain higher rights via either the accreditation, exemption or former barristers routes respectively. Therefore, if less experienced individuals are required to undertake the development route, six months post admission experience for the purpose of constructing the portfolio should be regarded as appropriate and necessary. Therefore, only in exceptional circumstances will the Committee consider agreeing a waiver Regulation 5(2)(iii).
- (v) Applicants requesting a waiver are required to set out their experience in the jurisdiction of England and Wales and other relevant jurisdictions along with representations as to why a waiver of Regulation 5(2)(iii) should be agreed.

## Accreditation route

15. I have considerable litigation experience but have undertaken very little recent advocacy. Is this likely to have any bearing on my application for a certificate of eligibility to attempt the advocacy assessment?

Each application is considered on its individual merits. It should be noted that via this route an applicant is required to have:

“satisfied the Society that by reason of their experience (which must be at least three years) of litigation in the higher courts of England and Wales or of a comparable jurisdiction or of a jurisdiction listed in Article 1 of the EC Parliament and Council Directive 98/5/EC, they have acquired a sound understanding of the procedure, evidence and ethics applicable in those proceedings for which they seek to exercise rights of audience.....”

In assessing whether an applicant satisfies this criterion the Committee will take a number of factors into consideration and each case will be considered on its merits. It should be noted that the Higher Courts Qualification Regulations 2000 also state:

“in assessing an applicant’s understanding of the procedure, evidence and ethics for the purposes of regulation 6(1), the SRA shall have regard to the applicant’s recent experience of litigation and advocacy, any relevant training and any advocacy observed by the applicant.”

16. I am completing the questionnaire and I do not have certain experience that the questionnaire requests information on. Is failure to show certain experience fatal to the application?

No. Where an applicant cannot show the specific experience the questionnaire is requesting, they should provide evidence of alternative

experience in an attempt to show the Committee that they satisfy the criteria laid down in the Regulations.

17. I intend to book myself onto an advocacy assessment and acquire a certificate of eligibility from the SRA in the meantime. Is there any problem with this procedure?

Yes. The Committee may impose any conditions it thinks fit on a certificate of eligibility. It would be unwise to commit yourself to an advocacy assessment without first acquiring a certificate of eligibility. If the Committee imposes conditions on your certificate which have to be satisfied prior to you attempting the advocacy assessment, you may struggle to complete those conditions in time. Cancellation of an advocacy assessment at short notice may result in you losing part of the fee.

18. Must I satisfy any conditions prior to attempting the advocacy assessment or can I do them in my own time, perhaps after the advocacy assessment?

If a condition exists which must be complied with prior to attempting the advocacy assessment it will state so on your certificate of eligibility. It is not acceptable to complete these conditions after the advocacy assessment.

## **Exemption route**

19. I am completing the Exemption Route application form. The form asks me to detail all my cases in the last two years. Is this really necessary?

No. If you have an extensive caseload, it may be prudent to write a summary. The pre-requisite for this route is that you can demonstrate advocacy or judicial experience in the higher courts of England and Wales or a comparable jurisdiction. You should therefore set out your higher court experience in as much detail as possible.

Having demonstrated experience in the higher courts of England and Wales you are required to show that by the totality of your experience you are suitably experienced and qualified to exercise rights of audience before the higher courts in the proceedings in which the qualification for which you have applied would entitle you to appear. This should be done with reference to your experience in all courts and tribunals.

If you are able to list your cases on two or three pages then it might be just as easy to do that.

It will help the Committee to get a feel for how active you are if you are able to supply figures on how often you appear and in which courts.

## **Former barrister route**

20. I note that the application form asks me to provide a certificate from the General Council of the Bar confirming that I had higher rights of audience at the time of my transfer to become a solicitor. I provided a certificate when I

actually made my transfer, is a copy of that sufficient for my application for higher rights of audience?

No. The certificates provided by the General Council of the Bar for the purposes of gaining higher rights of audience also state that the applicant was not subject to disciplinary proceedings at the time of the transfer and in this respect it is different to the certificate you were issued with previously.

21. I am currently dual qualified, being both a barrister and a solicitor. Does this mean that I cannot make an application via the former barristers etc route unless I disbar?

No. The regulation also applies to those who hold a dual qualification. The purpose of the regulations is to ensure that only persons with an appropriate level of competence are able to practice advocacy in the higher courts and to make sure that solicitors are not required to undertake a more onerous route to obtaining these rights of audience than necessary.

## **Barristers with existing higher rights of audience who are preparing to transfer to the solicitors' profession**

22. I am in the process of transferring to the solicitors' profession. At what point do I have to apply to retain my existing higher rights of audience?

Good news, you don't. When you apply to join the roll, you will be asked to declare that you were formerly a barrister with higher rights of audience and with no disciplinary proceedings in progress. A certificate confirming your higher rights will be issued automatically.

## **Continuing professional development - post qualification**

23. The Regulations refer to a requirement to undertake at least five hours continuing professional development (CPD) relating to the provision of advocacy services in the higher courts in each of the first five continuing professional development years following the grant of the qualification. What might be usefully described as "advocacy services" and when do I have to start this CPD?

This requirement is not in addition to a solicitor's compulsory continuing professional development (CPD) requirement. It only applies to solicitors who gain their award under the 2000 regulations and beyond and commences the CPD year following the CPD year they are currently in. The definition of advocacy services may be interpreted broadly and it is up to the individual to decide what their training needs are in relation to the advocacy services they provide. Therefore, the training may be advocacy training, training on new procedures or on substantial law if relevant to higher court practice. Less obviously related training such as customer awareness/customer services might be considered appropriate if the solicitor can (if required) show a sufficiently close relationship between the training undertaken and the provision of advocacy services.

24. Can I claim continuing professional development for being a mentor or for being mentored under Regulation 5 of the Higher Courts Qualification Regulations 2000?

Yes. For it to count, however, the most important factor is that the mentoring sessions must be accredited under an in-house authorisation agreement for the provision of continuing professional development. If the mentor and the mentee are from different firms, the mentoring sessions can be accredited by either firm if they are accredited. In addition, there are a number of criteria relating to the length of the mentoring sessions, their structure and documented outcome which must be satisfied for the purposes of continuing professional development. For further details, enquirers should contact the SRA's Education and Training Unit, The Solicitors Regulation Authority, Iplsey Court, Berrington Close, Redditch B98 0TD or telephone +44 (0) 1527 504433 and ask for the "Coaching and mentoring guidance note for solicitors" document.

## **Comparable jurisdiction experience**

25. I have practised in a jurisdiction which is not Scotland, Northern Ireland, the Republic of Ireland or any of those jurisdictions listed in paragraphs 1 and 2 of the Schedule to the Qualified Lawyers Transfer Regulations 1990. Does this mean that my experience cannot be taken into account?

Not necessarily. It is for you to demonstrate to the Committee that your experience in a jurisdiction not currently listed in paragraphs 1 and 2 of the Schedule of the Qualified Lawyers Transfer Regulations 1990 should be considered as experience gained in a comparable jurisdiction. To achieve this, in addition to setting out your experience, you may wish to outline the legal system of the jurisdiction and explain how the procedures in the courts in which you have practised compare to the procedures of the higher courts of England and Wales. To help, you may wish to examine the book "Kimes" (Sweet & Maxwell) which outlines the legal systems for most countries.