



The Inns of  
Court College  
of Advocacy

# Making an Application for a Certificate for Assigned Advocate in the Youth Court

(formerly a Certificate for Counsel)

*"...the general policy of the legislature [is] that children and young persons should, wherever possible, be tried in the youth court, a court best designed to meet their specific needs, avoiding the greater formality and public involvement of the Crown Court."*

- R (on the application of the DDP) v South Tyneside Youth Court [2015]  
EWHC 1455 (Admin), paragraph 28

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## Serious cases in the youth court

There is a presumption that child defendants will be tried in the youth court.<sup>1</sup> Many cases currently heard in the youth court would be tried in the Crown Court if the defendant were aged 18 or over and recent changes mean that serious and complex cases are more likely than ever to be tried in the youth court.<sup>2</sup>

The youth court deals with far more serious cases than the adult magistrates' court for a number of reasons:

- There is an expectation that children will be tried in the youth court.<sup>3</sup>
- Youth courts must deal with all cases involving a defendant aged under 18, unless s/he is charged with a grave crime<sup>4</sup> (sexual or violent offences with sentencing maximum for an adult of 14 years or more), firearms offences with mandatory minimum sentences, or homicide or where s/he is jointly charged with an adult.
- Youth courts have greater sentencing powers; up to a maximum of 2 years Detention and Training Order (DTO).
- Youth courts have the power to commit for sentence.<sup>5</sup> This means many cases previously tried in the Crown Court will now be tried in the youth court with the possibility they will be committed to the Crown Court for sentence.

For all these reasons, there are likely to be many more applications for a Certificate for an Assigned Advocate in the youth court than in the adult magistrates' court.

## The regulations

The regulations governing such an application can be found within The Criminal Legal Aid (Determinations by a Court and choice of Representative) Regulations 2013 paragraph 16

### **Criminal proceedings before a magistrates' court**

(1) Subject to paragraph (2), in relation to any criminal proceedings before a magistrates' court, the right of an individual conferred by section 27(4) of the Act does not include a right to select an advocate.

(2) The relevant court may determine that the individual can select an advocate if:

- a) the proceedings relate to an extradition hearing under the [Extradition Act 2003](#) or an indictable offence; and
- b) the relevant court determines that because there are circumstances which make the proceedings unusually grave or difficult, representation by an advocate would be desirable.

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<sup>1</sup> Section 24 (10) Magistrates' Court Act 1980

<sup>2</sup> Section 3B Powers of Criminal Courts (Sentencing) Act 2000 as amended section 53 Criminal Justice and Courts Act

<sup>3</sup> 3R (on the application of the DPP) v South Tyneside Youth Court [2015] EWHC 1455 (Admin)

<sup>4</sup> Section 91 Powers of Criminal Courts (Sentencing) Act 2000

<sup>5</sup> Section 3B Powers of Criminal Courts (Sentencing) Act 2000 as amended by section 53 Criminal Justice and Courts Act 2015 – in force for offences committed on or after 13 April 2015

Whilst this provision may read as though it is referring to selection of a ‘particular’ and possibly more experienced advocate (as opposed to any advocate at all), it is in fact the correct provision governing an application for ANY assigned advocate. This is clear from the reading of the Interpretation section of the Act:

### **Interpretation**

*In these Regulations... “advocate” means a person who is an authorised person for the purposes of section 18 of the Legal Services Act 2007(1) in relation to the exercise of a right of audience.*

*It should be noted that there is also a power to allow Queen’s Counsel to be instructed in the Magistrates Court. Criminal proceedings before a magistrates’ court: Queen’s Counsel or more than one advocate:*

*17. – (1) Subject to paragraph (2), where an individual is entitled to select an advocate in accordance with regulation 16, the right of an individual conferred by section 27(4) of the Act does not include a right to select a Queen’s Counsel or more than one advocate.*

*(2) the relevant court may determine that the individual can select a Queen’s Counsel or more than one advocate if the individual is*

- a) the subject of an extradition hearing under the Extradition Act 2003; and*
- b) the relevant court determines that the individual could not be adequately represented except by a Queen’s Counsel or more than one advocate.*

## **Making the application**

The application must be made in writing, specifying the determination sought and the grounds:

*“Determinations by the relevant court under this Part<sup>6</sup>*

*11. - (1) The relevant court may make a determination under this Part (1) only if it has considered an application made in accordance with paragraph (2).*

*(2) For the purposes of paragraph (1), an application must:*

- a) be made by the individual seeking the determination;*
- b) be in writing; and*
- c) specify what the relevant court is being asked to determine and the grounds upon which it is being asked to do so.*
- d) When it makes a determination under this Part, the relevant court must give reasons.”*

There is currently no specific guidance provided to magistrates or District Judges.

In serious sex cases, a ticketed District Judge is allocated to hear the case and will be familiar with considering such applications. Applications in these cases are usually be granted.

All either way offences (where an adult/defendant aged over 18 would be likely to receive a custodial sentence of 6 months or more) and all indictable only offences are eligible.

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<sup>6</sup> The Criminal Legal Aid (Determinations by a Court and choice of Representative) Regulations 2013 paragraph 11 – bold added

The written application must set out why the case is 'unusually grave or difficult'. The test of 'unusually grave or difficult' is in comparison to a 'usual case' of its type. It should be noted that defendants aged 18 or over charged with these offences would be tried in the Crown Court and would have their legal aid certificate extended to cover representation by a solicitor and specialist advocate.

The application must be in writing (see paragraph 3.1 above) and the magistrates or District Judge must give reasons for their decision.

## Specialist Youth Advocacy

The BSB has announced plans to improve advocacy for children in the youth court. This comes as a [result of research](#) commissioned by the Bar Standards Board (BSB) and CILEx Regulation in 2015 which found some evidence of poor advocacy in the youth courts. The research exposed the fact that junior barristers lacked sufficient knowledge of youth justice law, procedures and provisions, and struggled to communicate effectively with young defendants and witnesses.

The BSB's stated aim is to "help establish advocacy involving youths and within the youth court as an area of specialism so that young people always receive representation of an appropriate standard [by competent advocates](#)."

Barristers practising in the youth court are now expected to be able to demonstrate their competency to represent children and [specialist training is recommended](#) for any youth justice practitioner.

It is a firmly held view by many that youth justice advocacy should become a specialist area and should no longer be a forum where junior advocates make their foundling mistakes before moving onto more lucrative work in the adult courts. The [Criminal Bar Association](#) (CBA) is currently looking at initiatives to raise the profile of youth justice work and assist those who practise in this area.

Below you will find two templates for an application for a certificate for assigned advocate which may be used as the basis for applications, by amending facts and relevant details where necessary. Both templates were drafted by practising barristers.

# Example application #1

In the XX YOUTH COURT

BETWEEN

REGINA

- v -

AB, a youth born [xx.xx.xx]

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## APPLICATION FOR CERTIFICATE FOR ASSIGNED ADVOCATE

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### Overview

1. This is an application for a certificate for an assigned advocate to represent AB, a child, in his forthcoming trial at XX youth court.
2. On [date], AB made a first appearance before [name] sitting at XX youth court facing two charges: (1) grievous bodily harm, contrary to section 18 of the OAPA 1981 and (2) threatening a person with a blade on school premises, contrary to section 139AA (1) and (6) of the Criminal Justice Act 1988.
3. At his first appearance on [date], AB was produced from custody and pleaded guilty to the 2nd charge but not guilty to the 1st. His trial in relation to the more serious offence is listed for [date] at XX youth court. The youth court retained jurisdiction, [the DJ] noting that the matter could nonetheless be committed to the Crown Court for sentence.
4. It is submitted that the circumstances of AB's forthcoming trial are 'unusually grave and difficult' such that representation by an advocate, as well as a solicitor, would be desirable.

### Facts of the case

5. The Crown's case is that on [date], AB, armed with a kitchen knife, attended the premises of ZZ College, London.
6. After getting into an argument with three other youths, AB is said to have pulled out the knife and swung it at the complainant, XY, also a youth, cutting him deeply to the upper arm.
7. AB is then said to have chased the complainant and the two other boys through the college with the knife still visible in his hand.
8. AB has previous convictions for:
  - a) [Date]: Possession of an offensive weapon in a public place (referral order, 12 months);
  - b) [Date]: Affray (referral order, 12 months);
  - c) [Date]: Supply of a Class A drug (referral order, 12 months);
  - d) [Date]: Possession of a Class A drug (no separate penalty).
9. AB's case has been set for trial and, after a full bail application, he was granted bail on the following stringent conditions:
  - a) Residence at XX with [details]
  - b) Electronically monitored curfew between [times];
  - c) Exclusion from [designated area]
  - d) Reporting to the designated YOT as directed;

- e) Attending education as directed by the YOT;
- f) Not to contact the complainant directly or indirectly;
- g) Not to be in the company of two or more persons under the age of 18 in a public place, unless involved in YOT-directed activities.

### **The test for certificate for an assigned advocate**

10. The test for a certificate for an assigned advocate is set out regulation 16(2)(b) of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013. It provides as follows:

“(1) Subject to paragraph (2), in relation to any criminal proceedings before a magistrates’ court, the right of an individual conferred by section 27(4) of the Act does not include a right to select an advocate.

(2) The relevant court may determine that the individual can select an advocate if:

...

(b) the relevant court determines that because there are circumstances which make the proceedings unusually grave or difficult, representation by an advocate would be desirable”.

### **Submissions**

11. Both of the offences that AB has been charged with are indictable offences and of a different order of gravity to offences generally dealt with by the magistrates’ court.

12. It is submitted that the circumstances of AB’s trial are both unusually grave and difficult in the following material respects:

#### *Trial*

a) The facts of this matter are sensitive and complex, involving several young people and the use of a weapon on school premises.

b) Witnesses who will give evidence in this matter include the defendant and the complainant, both of whom are under 17 and at least two other young eye-witnesses.

c) The instructed advocate will require particular expertise and skill in questioning and cross-examining vulnerable and young witnesses. This is a recognised specialist advocacy skill and one which requires extensive preparation and careful handling.

#### *Sentence*

a) GBH with intent is an offence to which the PCC(S)A 2000, section 91 applies, i.e. an offence carrying at least 14 years’ imprisonment in the case of an adult. Given the power of the youth court to commit the case for sentencing in the event that AB were to be found guilty, it would be open to the Crown Court, on the facts of this case, to pass a longer term of detention than would otherwise be possible for the youth court. Committal for sentence in the event of conviction cannot be excluded as a possibility, particularly in light of AB’s previous convictions.

b) GBH is a “specified offence” as defined by section 224 and Schedule 15, paras. 6 and 64 of the Criminal Justice Act 2003, and so falls within the ambit of the “dangerous offender” provisions of that Act, as amended by the LASPO 2012.

c) Where a person aged 16 or over is convicted of an offence under section 139AA, the court must impose a minimum custodial sentence unless the court is of the opinion that there are particular circumstances which relate to the offence or offender and which would make it unjust to do so in all the circumstances (section 139AA(7)). This will require detailed consideration of the offence and the personal circumstances of AB, including potential issues such as his mental health. The minimum sentence in the case of an offender aged 16 or 17 when convicted is a detention and training order for four months.

13. In light of the unusually grave and difficult circumstances of this case, it is submitted that representation by both solicitor and counsel would be desirable.

A BARRISTER

B Chambers

[date]

## Example application #2

In the XX YOUTH COURT

BETWEEN

REGINA

- v -

AB

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### APPLICATION UNDER REGULATION 16 CRIMINAL LEGAL AID (DETERMINATIONS BY A COURT AND CHOICE OF REPRESENTATIVE) REGULATIONS 2013

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1. AB faces the following charges:
  - Assault by penetration – contrary to section 2 of the Sexual Offences Act 2003.
  - Sexual assault – contrary to section 3 of the Sexual Offences Act 2003.
2. This is an application for a Certificate for Assigned Advocate. If granted the representation order for AB will be varied to include an advocate as well as a litigator in these proceedings.

#### Proceedings

3. On [date], AB was produced from custody before [name] sitting at XX youth court. AB entered not guilty pleas, jurisdiction was retained and his trial was listed for [date]. AB was granted conditional bail.

#### Prosecution case

4. The Crown alleges that the complainant and the defendant are known to each other, having met at school. On [date] they used WhatsApp to exchange messages and arranged to meet at a party. They spent the evening together and were kissing. It is alleged that the defendant grabbed the complainant's bottom, at which point she pushed him away. The defendant is then alleged to have put his hand down the complainant's knickers and inserted his finger in to her vagina. The complainant spoke to some friends at the party about the alleged assault. A few days later she reported the matter to the police and was interviewed by ABE interview.

#### Defence case

5. AB was arrested at school on [date]. He was subsequently interviewed on two occasions by the police.
6. AB denies the allegations against him. He accepts that he was present and that he and the complainant met at the party as arranged. He accepts that he and the complainant took part in consensual physical contact to the extent of kissing and cuddling.

#### Relevant Law

7. Regulation 16, Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013):

16.—(1) Subject to paragraph (2), in relation to any criminal proceedings before a magistrates' court, the right of an individual conferred by section 27(4) of the Act does not include a right to select an advocate.

(2) The relevant court may determine that the individual can select an advocate if—(a) the proceedings relate to an extradition hearing under the Extradition Act 2003 or an indictable offence; and

(b) The relevant court determines that because there are circumstances which make the proceedings unusually grave or difficult, representation by an advocate would be desirable.

### **Application**

8. The charges faced by AB are indictable in that they are indictable only and triable either way. Regulation 16(2)(a) is therefore made out.

### **Circumstances which make this case unusually grave or difficult:**

#### **Sentence**

9. The more serious offence (1a) carries a maximum of life imprisonment. Even placing the matter in the lowest categories of moderate harm and culpability, the offence would have a starting point for sentence for an adult of 5 years custody. The second offence of sexual assault carries a maximum sentence of 7 years imprisonment and the lowest possible starting point for an adult is 26 weeks in custody.

10. Although jurisdiction has been retained in the Youth Court for trial, this was done on the basis that the District Judge noted that there remains an option to commit AB to the Crown Court for sentence after trial, should the sentencing powers of the Youth Court prove insufficient

#### **The defendant**

11. AB is 16 years old and of good character. The consequences of a conviction will for him be particularly grave and serious.

12. It is submitted that, given AB's age, good character and the likelihood of a custodial sentence combined with the life-long consequences of having a criminal record for sexual offences of this nature, this case is unusually grave.

13. Additionally, it is submitted that the case is unusually difficult because of the defendant's particular vulnerability. A report prepared by clinical psychologist, [name] is enclosed. She concludes that, without specialist support, the defendant could not effectively participate in court proceedings due to his severe anxiety, ADHD and social communication difficulties. It is clear from the report that, without the assistance of an intermediary, the defendant will not be able to understand the charge he faces, the function of the court, or the eventual sentencing powers the court may have.

14. The defendant has been granted the assistance of an intermediary. It is submitted however, that, the defendant should also be represented by an advocate. It is imperative that he is properly represented by a specialist advocate given the combination of the very serious charge and the defendant's own particular difficulties with regard to effective engagement and communication during the criminal justice process.

15. The defendant's communication difficulties will make the taking of instructions at Court more difficult. This will be a slower process, requiring clear questioning, with appropriate breaks.

16. AB was interviewed and a transcript of that interview has been obtained. Lengthy instructions will need to be taken from AB addressing all the prosecution evidence. This will be particularly difficult in light of his communication and comprehension difficulties.

#### **Young witnesses**

17. The defendant, the complainant and the majority of the prosecution witnesses are children.

18. The complainant's examination-in-chief will be in the form of a pre-recorded ABE interview and cross-examination will be via live link.

19. The cross-examination of the complainant and other witnesses will be a delicate task given their age, previous good character and the nature of the allegations. The advocate will need a significant level of experience and expertise.

### **The Trial**

20. The trial advocate will need to decide which aspects of the prosecution evidence to challenge and what if any defence expert evidence to present to the court. There are difficult and tactical decisions to be made which will impact on the trial in a significant manner. These are judgments best suited to experienced trial counsel who will have the requisite seniority and skill.

21. At the first hearing the crown indicated their intention to instruct a specialist prosecutor in this case. They have since instructed [name] of [xx chambers].

22. There has been a significant delay in this case being brought to court. There is a strong possibility that the defence will raise an abuse of process argument prior to trial.

### **Conclusion**

23. In light of the serious nature of the allegation, and the particular difficulties which arise through the age and plethora of vulnerabilities of the defendant, complainant and witnesses as well as matters of disclosure and trial preparation, it is submitted that this is a case which is unusually grave and difficult.

24. Representation by an advocate as well as a litigator is therefore fair and necessary and the Court is asked to make the appropriate order.

**Please Note:** This guide has been produced by the ICCA in collaboration with the Youth Justice Legal Centre (YJLC) drawing on their legal knowledge and expertise about children’s rights in the criminal justice system.

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