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Boards of Appeal

Chambres de recours

Case Number: D 0008/04

D E C I S I O N
of the Disciplinary Board of Appeal
of 23 August 2004

Appellant:

n.n.

Decision under appeal:

Decision of the Examining Secretariat of the
European Qualifying Examination dated 1
December 2003.

Composition of the Board:

Chairman: B. J. Schachenmann
Members: C. Rennie-Smith
N. Lenz

Summary of Facts and Submissions

- I. The appellant's application to be enrolled for the European qualifying examination ("EQE") in 2004 was refused by a decision of the Examination Secretariat contained in a letter dated 1 December 2003. The appellant filed a notice of appeal by a letter faxed on 30 December 2003, paid the appeal fee on the same date, and filed a statement of grounds of appeal by a further fax of 30 January 2004.
- II. The Presidents of the European Patent Office and of the Institute of Professional Representatives were invited by letters sent on 10 March 2004 to file observations on the matter within two months. No such observations were received.
- III. The Examination Secretariat's reason for refusing enrolment was that, the appellant not possessing a purely scientific or technical university degree, he must prove that his education is equivalent to such a degree; or, if that should not be the case (as, by implication, the Secretariat considered), he must obtain at least three years additional experience in the patent or another appropriate field. The Secretariat's letter concluded by informing the appellant he could not sit the EQE before 2007.
- IV. (i) The appellant's case is that he holds a master's degree in engineering and management from Chalmers University of Technology. An official certificate from the Swedish National Agency for Higher Education submitted with his grounds of appeal establishes that this degree was awarded on

24 February 1997, that Chalmers University of Technology is a higher education institute authorised to award degrees up to the level of doctorates, and that the appellant's degree required four and a half years' full-time study. The appellant argues that his degree is such that, under the Instructions concerning the qualifications required for enrolment for the EQE (referred to herein as the "Instructions"), he qualifies for enrolment without having to obtain three years additional experience.

- (ii) The appellant additionally claims that other candidates with the same degree have been enrolled for the EQE without the additional experience. The appellant appears to assume that his degree is on List B rather than List A under Article 5(1) of the Instructions, but also says he has been told by the Examination Secretariat these lists are for internal use only, are not publicly available and that he would have to trust the Examination Secretariat's ability to apply the Instructions.

V. The appellant requests

- (i) that the decision under appeal be set aside and that his degree be held to qualify under either Article 2 or Article 4 of the Instructions;
- (ii) that a decision be issued in time for him to sit the EQE in 2005;

(iii) that, if his first request is granted, his degree be moved from List B to List A under Article 5(1) of the Instructions.

Reasons for the Decision

1. The relevant legal provisions are contained in the Instructions concerning the qualifications required for enrolment for the European qualifying examination adopted by Decision of the Examination Board of 19 May 1994 and as subsequently amended (see OJ 1994, 599; OJ 1996, 357; and OJ 1999, 92; a consolidated version can also be found at page 186 et seq. of "Ancillary Regulations to the European Patent Convention 2003").
2. Article 10(1) REE states that candidates shall be enrolled for the EQE provided they possess a university-level scientific or technical qualification or satisfy the Secretariat that they possess an equivalent level of scientific or technical knowledge, and provided further that they fulfil training conditions which are detailed in Article 10(2) REE but are not *per se* germane to the present case. The Board notes at the outset that, if a candidate does possess a university-level scientific or technical qualification, he does not have to satisfy the Secretariat of anything other than, as must be necessarily implied, his possession of that qualification. This is confirmed by Article 1 of the Instructions which says candidates requesting enrolment for the EQE must be able to demonstrate that they possess a university-level scientific or technical qualification as required under Article 10(1) REE. In the case of a candidate who,

again by necessary implication, does not possess a university-level scientific or technical qualification but does possess an equivalent level of scientific or technical knowledge, a greater burden of proof is required, namely the need to satisfy the Secretariat that he or she has that knowledge.

3. How the condition of possession of either a university-level scientific or technical qualification or an equivalent level of scientific or technical knowledge may be met is purportedly set out in Articles 2 to 4 of the Instructions. The Board uses the word "purportedly" since, although each of those three Articles deal with different fact situations, the cross-references in Articles 3 and 4 to Articles 2 and 3, the use of the term "equivalent level" when "level" is at best imprecisely defined and, in Article 4, a high degree of ambiguity all contribute to make interpretation of these provisions, especially as regards candidates with educational qualifications in more than one subject, extremely and unnecessarily difficult.

4. Article 2, Instructions seeks to define what constitutes a university-level scientific or technical qualification, in as much it says a candidate will be considered to have such a qualification if he or she possesses

"a master's degree or a bachelor's degree with honours, a "maîtrise" or equivalent "diplôme de l'enseignement supérieur", a "Hochschuldiplom" or a higher or equivalent-level degree, or any degree corresponding thereto from a university, technical university, technical high school or a similar establishment in one

of the following subjects: biology, biochemistry, chemistry, electronics, engineering, pharmacology, physics."

5. The use, in all three official language texts, of those English, French and German terms for educational qualifications suggests the Article seeks to create some common standard or level of qualification across all universities in all Contracting States. However, if that is the intention, it does not succeed: for example, as is well-known, in English-speaking countries a bachelor's degree usually reflects at least three years study whereas a master's degree reflects only one or two years subsequent study. Thus, whereas possession of both degrees in one subject would *prima facie* reflect a high level of qualification in that subject, a master's degree in that subject following a bachelor's degree in a different subject could reflect less study of the subject in question. Yet Article 2, Instructions would encompass both situations. (By way of *addendum*, the Board notes that in the present case a master's degree was awarded by a Swedish university after four and a half years study, which illustrates further that, in seeking a common level, reliance cannot be safely placed on educational terms drawn from any one language having a generally accepted meaning.)

6. Article 3, Instructions seeks to define what constitutes an equivalent level of scientific or technical knowledge. A candidate is said to possess this if he or she fulfils two conditions. First, under Article 3(a), he or she must have

"a degree, diploma or certificate corresponding to, *inter alia*, a bachelor's degree without honours, a diploma or degree from a vocational college ("Fachhochschule"), a higher technical college or institute, a school of engineering or any similar establishment in the fields of science or technology listed in Article 2".

The second condition, contained in Article 3(b), Instructions, is that the candidate must have at least three years experience in the patent or another appropriate field in addition to the separate training conditions provided for all candidates in Article 10(2) REE.

7. Again, it appears that Article 3, Instructions seeks to create some common standard or level of qualification, in this case by making a distinction between honours degrees and their equivalents and non-honours degrees and their equivalents and/or between universities and similar establishments and vocational colleges and similar establishments. However, such distinctions may be more apparent than real. To take one example known to the Board, in the United Kingdom Scots universities require four years of studies for an honours degree and students who only complete three years can only receive an ordinary degree however high the standard they achieve; in other parts of the United Kingdom, most students receive an honours degree after three years and an ordinary degree denotes a failure to reach the honours standard achieved by most students. Thus even within that one Contracting State, a student with a non-honours degree from a Scots university would have an equivalent qualification to, and might have a better

qualification than, a student with an honours degree from an English university.

8. The fundamental problem with the manner in which Articles 2 and 3, Instructions have been drafted is that the expressions "equivalent" and "similar" are used respectively of educational qualifications and establishments without any precise definition or standard against which to measure equivalence or similarity. The Board fully accepts that it would be far from easy to achieve a pan-European standard covering all universities and other higher education establishments, particularly when there are often differences within one Contracting State - to take another example known to the Board, in Switzerland universities are primarily regulated at canton level with the result that there are several parallel systems of higher education, no doubt with many common features but equally with no guarantee of standard qualifications. When against such a background words such as "degree", "diploma", "certificate" and corresponding words in French and German are used without any definition, the result is bound to be unclear. (The Board notes that, in the present case, the appellant, the Secretariat and the Swedish National Agency for Higher Education all use the word "degree" to describe the candidate's qualification but the document he filed with his enrolment application is called a "diploma".) When such lack of clarity lies at the heart of a set of rules such as the Instructions, the use of terms such as "equivalent" or "similar" can at best do nothing to improve the clarity and may at worst extend the lack of clarity further.

9. Unfortunately it is on that unsure foundation that Article 4, Instructions seeks to build a separate régime to deal with candidates who have educational qualifications combining one of the seven scientific or technical subjects listed in Article 2 with another subject not listed there. In passing the Board notes that, unfortunately, Article 4 refers not to those subjects as such but to "a qualification corresponding to one of those specified in Article 2 or Article 3(a)" and then refers (in the English and French texts) not to other "subjects" but to other "disciplines". Those problems apart, Article 4's first sentence seeks, yet again, to set a general standard or level:

"If a candidate possesses a degree, a diploma or a certificate showing a qualification corresponding to one of those specified in Article 2 or Article 3(a) combined with another discipline not mentioned, the scientific or technical part must be of a level equivalent to the requirements of the articles mentioned."

Thus the intention appears to be to allow candidates with combined qualifications to be treated the same as those with qualifications in one of the seven specified subjects provided their combined qualification includes the specified subject to an "equivalent level". Subject only to the problem already identified, namely the absence of a clear level to which an equivalent can be compared, that is straightforward. Thus, if for example a qualification in chemistry alone was acceptable because it was awarded after, say, three years study or passing ten examinations, then a combined qualification in chemistry and geography would be equally acceptable

if the chemistry element required three years study of chemistry or passing ten chemistry examinations.

10. When one turns to combined qualifications in which the specified subject content is not of an equivalent level, Article 4 presents a minefield of ambiguity. Its second and third sentences read:

"If, in the case of a qualification from an establishment mentioned in Article 2, the level is not equivalent, the qualification will be considered as a qualification mentioned under Article 3(a). In the case of a qualification as mentioned in Article 3(a) or an equivalent qualification, the requirement of Article 3(b) must also be met."

At first sight it might appear that those two sentences simply reflect, for the purpose of combined qualifications without the required specified subject content, the distinction already noted (see paragraph 7 above) in the context of single specified subject qualifications, namely a distinction between honours and non-honours qualifications and/or between universities and similar establishments and vocational colleges and similar establishments, a distinction reflected in Article 2 and Article 3(a). While they do reflect that distinction, they also raise considerable problems of interpretation.

11. There is, in the context of the present case, a minor unclarity in that, while the second sentence refers specifically to combined qualifications with less than the necessary specified subject content, the third sentence does not. However, the Board considers that

this must have been intended since otherwise the third sentence would merely repeat Article 3 and be redundant.

12. A far more serious problem of interpretation arises from the use in the third sentence of the words "the requirement of Article 3(b) must also be met". By stating this in relation to combined qualifications of non-honours and/or non-university status, it appears to be implying that the requirement of Article 3(b) does not apply in the case of combined qualifications of honours and/or university status. Yet the second sentence states that such qualifications which do not have the necessary specified subject content are considered as qualifications under Article 3(a) and Article 3, read without reference to Article 4, clearly makes a dual requirement of both 3(a) and 3(b). The Board is unable to find any interpretation of Article 4 which resolves this ambiguity and finds that either reading of the Article could have been intended - the former (i.e. Article 3(b) does not apply) to preserve the distinction already mentioned in the case of combined qualifications, the latter (i.e. Article 3(b) applies) to prevent a combined qualification of honours and/or university status without the required specified subject content being treated as if it had such content. That latter interpretation is the one that the Secretariat appears to have adopted in the present case.
13. Before turning to the facts of the present case, the Board must observe that it has in the previous paragraphs used expressions such as "required specified subject content", "equivalent level qualifications" and "similar establishments" only of necessity and it remains the fact that since, due to the absence of

definitions, there can be no clear meaning of such terms and concepts, it would be difficult to give effect to Article 4 even in the absence of its ambiguity.

14. The appellant has a master's degree which combines the subjects of engineering and management. It was awarded by a technical university or technical high school, namely an establishment falling within Article 2, Instructions. Being a degree which combined engineering (one of the subjects listed in Article 2, Instructions) with another non-listed subject, the degree falls within Article 4, Instructions. Then, according to the first sentence of Article 4, a first decision must be made, namely whether or not the engineering part of the degree is of a level equivalent to an "engineering only" degree. If it is, then the appellant qualifies for EQE enrolment under Article 2, Instructions. If the engineering part is not of that equivalent level, the appellant's degree is, under Article 4, second sentence, to be considered as a qualification under Article 3(a), Instructions in which case, because of the ambiguity described in paragraph 12, a second decision must be made as to whether or not the appellant must fulfil Article 3(b) by undergoing an additional three years experience.

15. In the absence of any clear guidance in the Instructions as to how to interpret "equivalent level", the Board must do the best it can to decide the level of the appellant's qualification. The following factors appear to the board to be relevant.

- 15.1 The qualification is called "Master of Science in Engineering" and master's degrees are mentioned only in Article 2 and not in Article 3(a), Instructions.
- 15.2 The certificate from the Swedish National Agency for Higher Education filed with the grounds of appeal establishes that the appellant's degree required four and a half years' full-time study, since it explains that it requires 180 credit points to obtain the degree, that an academic year in Sweden is 40 weeks, and that 1 credit point requires one week's full-time study. That period of four and a half years' full-time study is confirmed by information about the appellant's university on the reverse of his degree certificate (confusingly called a "diploma"), which the Board notes was filed with his application for enrolment for the EQE. That information also states that, within the programme leading to the "Master of Science in Engineering" degree, there is no intermediate degree corresponding to a bachelor's degree although the university also offers a three year programme leading to a degree called "Bachelor of Engineering". Thus it seems that, at this particular university, three years study may lead to an engineering degree and four and a half years study to a degree in engineering combined with another subject.
- 15.3 The appellant states in his grounds of appeal, and his certificate (or "diploma") supports, the fact that the holder of his degree is entitled to the professional title "Civil Engineer" in Sweden which suggests that the qualification has provided him with all the necessary training and information to practice as an

engineer regardless of the other, non-engineering content of the degree.

16. All these factors point to the appellant's qualification being of a level such as those actually mentioned (albeit in only general terms) in Article 2, Instructions and further point to the scientific or technical part being of a level equivalent to the requirements of Article 2. Accordingly, under Article 4, first sentence, the appellant should have been enrolled for the 2004 EQE. The appeal must be allowed and the appellant's first request granted. It is therefore not necessary to decide whether or not, had the degree not been of that level, Article 3(b), Instructions should apply. However, it would, as is apparent from observations in this decision, be desirable for the Instructions to be rewritten so as to make them clear.
17. As regards the request that this appeal be decided in time for the appellant to sit the EQE in 2005, the Board can only observe it has dealt with the case as fast as the other commitments of its members has allowed. The appellant has none the less lost the opportunity to sit the EQE in 2004, as was his right, and in other such cases it may be appropriate for appellants to request acceleration of their appeals so as to obtain a decision in respect of the year for which they have sought enrolment.
18. While this appeal can be determined without considering the appellant's further arguments or, as they should perhaps be termed, allegations (see paragraph IV(ii) above), the Board makes two observations. First, if it were true that other candidates with the same degree as

the appellant have been enrolled for the EQE without the additional experience, then such discrimination would appear unjustified. Second, if the Lists A and B maintained under Article 5(1) of the Instructions are for internal use only and are not publicly available, that is unfortunate; if such lists were available to candidates, not only could they establish more easily how the Instructions apply to them, but cases such as the present might be avoided. As regards the appellant's request that, if (as is the case) his first request is granted, his degree be moved from List B to List A, the Board cannot do this. The lists maintained under Article 5(1) of the Instructions are of educational establishments not degrees, although the former may be indicative of the latter. Further, the Board cannot order that a particular establishment or degree be on either list, or transferred from one list to the other, since its competence in EQE matters is limited to infringements of the REE or its implementing provisions (see Article 27(1) REE) and this would appear not to cover the compilation of such lists. It would of course be desirable that such lists are correct since reliance on incorrect lists could give rise to such infringements.

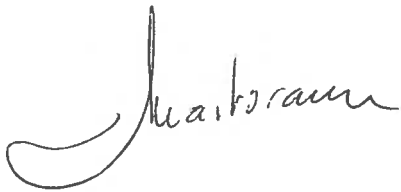
19. Under Article 27(4) REE, if the Board allows an appeal it shall order reimbursement in full or in part of the appeal fee if this is equitable in the circumstances of the case. While the Instructions are so worded as almost to invite mis-interpretation or at least unfortunate interpretation, the appellant in this case has been the innocent victim of such interpretation and reimbursement of the appeal fee in full is thus equitable.

Order

For these reasons it is decided that:

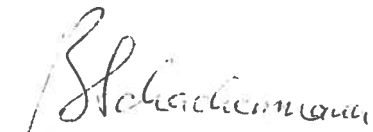
1. The decision under appeal is set aside.
2. The appeal fee is to be reimbursed.

The Registrar:



P. Martorana

The Chairman:



B. Schachenmann