



Case Number: D 0009/13

D E C I S I O N
of the Disciplinary Board of Appeal
of 21 May 2014

Appellant: N.N.

Decision under appeal: Decision of the Examination Secretariat dated
29 August 2013 refusing the application for
enrolment of the EQE.

Composition of the Board:

Chairman: G. Weiss
Members: T. Bokor
H. G. Hallybone

Summary of Facts and Submissions

- I. The appeal is against the decision of the Examination Secretariat ('Secretariat') dated 29 August 2013 according to which the appellant's application for enrolment for the European Qualifying Examination ('EQE') 2014, pre-examination, was refused.

- II. In the application for enrolment the appellant submitted evidence of a training period as required pursuant to Article 10(2)(a)(i) REE, starting from 3 October 2011 and continuing at least until 1 March 2014. He further filed a copy of his Higher National Diploma (HND) in Software Engineering, issued by Bromley College of Further and Higher Education, and stated that this diploma required a full-time course of three years' duration. He also filed his Provisional Results from the Queen Mary Post Graduate Certificate in Intellectual Property Law, further submitting that this latter provided exemption from the UK patent foundation examinations.

- III. In the decision under appeal the Secretariat held that the appellant's HND does not reach the level of a Bachelor's degree as required by the IPREE, covering merely the first two level of a Bachelor's degree but not requiring "the final demanding level". This finding was supported with a reference to guidance issued by the Office of Qualifications and Examination Regulation ('Ofqual') of the UK. For this reason, Rule 11 IPREE was not complied with. The required length of training (nine years) in order to establish the existence of an equivalent level of knowledge pursuant to Rule 14 IPREE was also not completed.

IV. On 27 September 2013 the appellant appealed against the decision. The appeal fee was paid on the day before. In the statement setting out the grounds of appeal the appellant submitted that his HND was awarded following a three-year course, which included one year working in industry. He further submitted that such sandwich courses were common in the UK and moreover that there was no basis for holding the final year of a university course to be the "most demanding". Following the completion of his HND, the appellant accumulated 18 years of professional experience, working with highly sophisticated technology, namely military aircraft systems. This professional experience had provided the applicant with equivalent knowledge, as foreseen by Rule 14 IPREE, in order to establish the required experience in the activities defined in Article 11(2)(a) REE. Rule 14 IPREE could not be seen to provide an exclusive requirement for obtaining the equivalent knowledge, but rather the intent behind Article 11 REE should have been taken into account. The appellant enclosed his detailed Curriculum Vitae and the letter of the Joint Examination Board of the UK attesting the acceptance of his professional experience for the purposes of sitting the patent attorney examinations in the UK. He argued that his non-admission to the EQE would be absurd in light of his admission to the corresponding exams in the UK. He also submitted a letter signed by the chief IP counsel of his employer, attesting the appellant's professional experience and pointing out that the decision of the Secretariat had undesirable consequences and therefore should be set aside.

- V. The Secretariat informed the appellant in a letter dated 23 October 2013 that it did not allow the appeal. The reasons for the decision were that the Secretariat was bound to assess candidates' experience according to Rule 14 IPREE, and the applicable provisions of the REE in general, which latter did not foresee the possibility of evaluating the professional experience as argued by the appellant. Therefore the Secretariat transmitted the appeal to the Disciplinary Board of Appeal ('Board') with letter dated 23 October 2013.
- VI. In a summons to oral proceedings dated 22 January 2014 the Board informed the appellant of its provisional view that the finding of the Secretariat and its assessment of the applicable provisions were correct, for reasons essentially corresponding to the reasons discussed in points 8 to 12 of this decision.
- VII. Oral proceedings were held on 21 May 2014. Both the President of the European Patent Office (EPO) and the President of the Council of the Institute of Professional Representatives (epi) were informed about the appeal proceedings. The President of epi was not represented at the oral proceedings, nor did he file observations. The representative of the President of the EPO attended the oral proceedings.
- VIII. In the oral proceedings the appellant was accompanied and represented by a professional representative, who submitted that it was in the public interest to allow the enrolment for the EQE of candidates having a significant professional experience, such as the appellant. The EQE admission criteria as foreseen by the REE and IPREE defined the required legal and

technical competences. In this regard the Secretariat had some discretion in determining if these criteria were satisfied. The Secretariat ought to have applied its discretion judiciously. The appellant explained that his motives for choosing the university course leading to the HND were better starting salary and overall good career prospects. He emphasised that he could not have foreseen that this would pose problems for him in the distant future. Throughout his professional career his HND never constituted a disadvantage, and the only organisation not accepting it was the EPO. His professional relationship with others, including engineers with bachelor or higher degrees, were always characterised by healthy mutual respect. He effectively led and managed many engineers, and he was never considered to be inferior to them. He occupied various responsible and leading positions and worked on sophisticated, often revolutionary technical solutions. He further argued that quite apart from the question of his professional experience, the HND itself fulfilled the requirements of Rule 11 IPREE, as it was awarded at the end of a full-time course lasting three years, and as such it was equivalent to a bachelor's degree. The criteria for enrolment to the EQE were anyway questionable, because not objective. Rule 14 IPREE, while opening the door to the enrolment for anyone after ten years of practice, in fact did not ensure any additional technical qualification. The same applied to the well-known "grandfather clause" of the EPC, allowing persons to be registered without having passed the EQE. Generally, it should have been possible to interpret the applicable rules in a flexible manner, taking into account exceptional situations. This was clearly possible under the previous version of the REE

and IPREE, and there were no apparent legislative intent that this should have changed in the present version.

- IX. The appellant requested that the decision under appeal be set aside, and his enrolment for the pre-examination of the EQE be found to meet the requirements. Given that an enrolment for the EQE 2014 was no longer possible, the allowance of the enrolment to the EQE 2015 was requested. The decision of the Disciplinary Board of Appeal was announced at the end of the oral proceedings.

Reasons for the decision

Unless indicated otherwise, REE refers to the version in force from 1 January 2009 (Supplementary Publication to OJ EPO 2/2014, 2), und IPREE refers to the version in force from 1. April 2010 (Supplementary Publication to OJ EPO 2/2014, 18).

1. The appeal is admissible.
2. Article 24(1) REE provides that an appeal shall lie from decisions of the Examination Board and the Secretariat only on grounds of infringement of the REE or any provision relating to its application. Such decisions may therefore in principle only be reviewed by the Disciplinary Board of Appeal for the purposes of establishing whether they infringed the REE, provisions relating to its application or higher ranking law (D 1/92, OJ EPO 1993, 357; D 6/92, OJ EPO 1993, 361). The issue to be examined in the present case is therefore whether the decision of the Secretariat to

- refuse the appellant's application for enrolment for the EQE 2014 pre-examination infringed the REE, any provision relating to its application or higher ranking law.
3. Article 9(2) (b) and (c) REE stipulates that the Secretariat shall prepare and organise the examinations and decide on the registration and enrolment of candidates in accordance with the REE and IPREE. It is noted that following the introduction of the pre-examination (Article 1(7) REE, Rule 10 IPREE), term "registration" is reserved for the examination proper, while "enrolment" is used for the pre-examination. Both concern in essence the formal admission to the respective examinations, which clearly falls in the competence of the Secretariat. Article 10(2) (b) REE stipulates that in performing its duties relating to registration and enrolment, the Secretariat shall not be bound by any instructions and shall only comply with the provisions of the REE and the IPREE.
 4. The appellant applied for enrolment for the pre-examination. The conditions of enrolment for the pre-examination are specified in Article 11(7) REE. Article 11(7) REE, first sentence requires that candidates provide evidence of at least two years' training as under the provisions of Article 11(2) (a) (i) or (ii) REE. Such evidence has been provided by the appellant. Furthermore, Article 11(7) REE, second sentence dictates that all other conditions applicable to the examination shall apply equally to the pre-examination, unless the contrary is specifically stated.

5. Article 11(1)(a) REE stipulates that candidates shall be registered for examination (and implicitly, shall be enrolled for the pre-examination) provided that they possess a university-level scientific or technical qualification, or are able to satisfy the Secretariat that they possess an equivalent level of scientific or technical knowledge, as defined in the IPREE.

6. The Secretariat found that under the provisions of Article 11(1)(a) REE the appellant could not be enrolled, because the qualification of the appellant did not fulfil the requirements as prescribed by Rule 11 or Rule 14 IPREE. An HND did not reach the level of a bachelor's degree. Therefore the appellant could not be considered to possess an equivalent level of scientific or technical knowledge which would correspond to a university-level scientific or technical qualification as prescribed by Article 11(1)(a) REE. This finding of the Secretariat was supported with the guidance issued by the Ofqual (see point III above).

7. In the grounds of appeal the appellant did not dispute the finding of the Secretariat that his formal qualification is not equivalent (at least) to a bachelor's degree. It was only later, in the oral proceedings before the Board, that the appellant also contested this and provided arguments for the recognition of his HND.

8. The appellant submits that his professional (technical) experience of many years must be given sufficient weight, and a direct application of the wording of Article 11(1)(a) REE permits the recognition of this

professional experience (in combination with his HND) as "the possession of equivalent knowledge" for the purpose of this Article. He further submits that while Rule 14 might regulate one possible way of compensating a missing formal qualification, this rule is not an exclusive requirement. Rather, the intent behind the requirements of Article 11(1) REE should be taken into account, so that the "equivalent knowledge" can also be demonstrated in a manner different from Rule 14 IPREE.

9. The Board holds that the finding of the Secretariat and its assessment of the applicable provisions are correct. Article 11(1)(a) REE explicitly refers to the IPREE, and Rule 11(3) IPREE clearly identifies Rule 14 IPREE as the (only) applicable provision when the formal qualification requirements foreseen in Rule 11(1) and 11(2) IPREE are not fulfilled. It follows from the structure of the REE and IPREE that any possible exceptions from the otherwise cogent provisions must be clearly and explicitly identified. As examples of such foreseen exceptions the Board points to Rules 14, 16 and 17 IPREE, which are again based on an explicit permission of a higher ranking law, see Article 11(1)(a) REE, last phrase (for Rule 14 IPREE), Article 11(5) REE (for Rule 16 IPREE) or Article 3(6)(b) REE (for Rule 17 IPREE). No such explicit permission to deviate from the requirements of Rules 11 to 13 IPREE based on the professional experience of a candidate is recognisable either from the REE or the IPREE, other than that foreseen by Rule 14 IPREE.
10. The appellant states that the Secretariat has certain discretion in this respect. The Board does not see any legal basis for such discretion. On the contrary, it

appears that the Secretariat is strictly bound by the provisions of the REE and IPREE, see Article 10(2)(b) REE, also referred to in point 3 above.

11. The appellant further seeks to prove his point by reference to his admission on the same basis to the examinations for qualifying as a UK patent attorney. The Board does not find this argument convincing. In fact the reasons laid out in point 9 above also provide the explanation why the appellant was admitted to sit the exams in the UK, but not for the EQE. It appears that the legal framework in the UK is different, in that the applicable provisions explicitly foresee that certain requirements for educational qualifications may be waived for persons having substantial work experience, see paragraphs 6 and 10 of the 1991 Examination Regulations applicable in the UK, cited in the letter dated 1st September 2011 from the Joint Examination Board (see point IV above). A similar possibility for derogation is simply not foreseen in the EQE regulations, and the Board has no power to grant such derogation, even if the Board would find such a derogation reasonable in the circumstances, or indeed would concede the potentially negative consequences of the non-admission, as submitted in the supporting letter of the IP counsel (see point IV above).

12. The argument of the appellant that his admission to the patent attorney examinations in the UK and non-admission to the EQE would lead to an "absurd result" cannot be followed. Even if one were to set aside the specific difference in the legal framework as explained above, i.e. the specific possibility to take into

account the professional experience of an applicant, it is not apparent why exactly same enrolment conditions should apply. It seems reasonable that some national provisions can be less strict than the EQE regulations. Arguably, if admission to the UK examinations would necessarily entail a right to admission to the EQE, this would then have to apply to the admission requirements of all member states. This would have the effect that the admission requirements to the EQE would constitute the "lowest common denominator" of the applicable regulations of all the patent professions within the member states. The Board is not aware that such low level entrance requirements to the EQE were ever intended.

13. The above assessment of the Board was not changed by the additional arguments of the appellant presented during the oral proceedings. These are discussed below.

14. The Board does not dispute that the enrolment of applicants with a significant professional experience is in itself desirable, and as such may even be considered to constitute public interest. However, it appears that the legislator chose another criterion for enrolment, while not permitting derogation from this criterion, as explained above. The Board does not see on what legal basis it would have the power to ignore the choice of the legislator and to replace it with some other criterion. To that extent the Board is equally bound by the REE and IPREE, in the same manner as the Secretariat. Furthermore, the Board does not consider that the enrolment conditions chosen by the legislator are unreasonable. These conditions apparently make it possible for the Secretariat to rely

on more or less objective criteria. It must be kept in mind that the Secretariat must be able to assess applications from candidates with very diverse backgrounds, so the establishment of enrolment conditions which are comparable to each other and which can be attested with undisputed documents, such as official certificates, is certainly desirable. The Board acknowledges that objective criteria may, on occasion, yield anomalous results but the balance of procedural economy may dictate that such objective criteria are the only viable option for the legislator.

15. The Board adds that the appellant is in fact not completely barred from entering the patent attorney profession, and he does not even have to complete the nine years of training pursuant to Rule 14 IPREE (in conjunction with Article 11(7) REE, first sentence). For example, he is free to work for and represent his employer in practically all proceedings before the EPO pursuant to Article 133(3) EPC.

16. It may well be that the previous version of the REE and the relevant implementing provisions left room for an interpretation of the "equivalent knowledge" as submitted by the appellant, so that his professional experience could have been taken into account under the earlier rules. However, the main reason for adopting the presently applicable versions of the REE and IPREE were exactly the problems of the interpretation of the previous provisions concerning the recognition of the various degrees provided by the different national educational establishments in the member states. Therefore the argument that the appellant would have

been admitted to the EQE under the previous provisions cannot be followed.

17. The new argument of the appellant that the HND itself fulfils the requirements of Article 11(1)(a) REE is not accepted by the Board. In this regard the Board has no reason to gainsay the assessment of an HND by the Ofqual, apparently the competent UK authority on this issue, according to which a HND is a so-called Level 5 qualification. As such it is one level lower than ordinary Bachelor degrees, these latter being Level 6 qualifications (source at the time of writing: <http://ofqual.gov.uk/qualifications-and-assessments/qualification-frameworks/levels-of-qualifications/>, and generally information available on the www.ofqual.gov.uk website).

18. The Board adds that even without the assessment by the Ofqual, the HND does not appear to fulfil the requirements of Rule 11(2) IPREE, which requires a full-time course with a minimum duration of three years. The course leading to the HND consisted of two years with course hours, while the "sandwich year" between the first and second year was spent in industry. Though the Board has no detailed information, it appears that during the "sandwich year" no (or only a few) course hours were held. In this manner such a course cannot be considered as a three year full-time course, but would mostly correspond to two years of full-time study. This can be inferred from the fact that Rule 11(2) IPREE, second sentence also prescribes the minimum technical or scientific content (80%) of the course hours. This latter rule would be meaningless for the purposes of the EQE if the number of genuine course hours (i.e.

where formal teaching takes place) could be arbitrarily small within a given course. This dictates that the term "full-time course with a minimum duration of three years" in Rule 11(2) IPREE is to be understood as a course where the course hours are essentially held full-time during at least three years, i.e. the number of course hours taught indeed requires three years of study, while the time spent with training in industry does not count as "course hours".

19. The appellant also referred to the decision D 15/04 of 14 February 2005, and argued that under the rule of law, laws and regulations must be predictable. The appellant sought to support the argument that laws need to be sufficiently flexible to take into account the permanently changing course contents, in the public interest. The Board notes that this decision criticised the lack of transparency of the then applicable provisions and practice of the Secretariat in treating enrolments to the EQE, and further the insufficient precision of the law. That criticism is clearly no longer applicable, at least not for the reasons cited in the quoted decision, given that the legal framework has changed, as explained above in point 16 above. To that extent, that decision is not relevant for the present case. Furthermore, while it may be true that some flexibility of the law can be required, in order to be able to apply the law to unforeseen facts, such flexibility does have limits, in particular where the law itself is clear concerning its scope. This seems to be the case here, in the sense that an HND is clearly not an academic degree equivalent to a bachelor's degree and as such does not fulfil the requirements of Article 11(1)(a) REE in conjunction with Rule 11 IPREE.

20. Finally, the Board concurs with the observation of the appellant that the application of Rule 14 IPREE will not contribute significantly, if at all, to the expected technical qualification of a candidate wishing to enrol for the EQE. However, the Board takes the view that this is not the primary objective of the Rule. Rather, the Rule provides an exception (or derogation) from the otherwise obligatory requirement of the technical or scientific bachelor's degree. The purpose of this derogation may not be immediately clear from the wording of Rule 14 IPREE. The Board presumes that the legislator considered that the prescribed ten years training and the thereby acquired experience in patent prosecution matters would adequately compensate for the missing formal technical qualification of a candidate. Similarly, the "grandfather clause" (Article 134(3) EPC) does not guarantee any technical or scientific qualification of a professional representative, but rather ensures that the existing patent attorney profession of a newly acceding state is not excluded from representation before the EPO. This provision clearly establishes an exception relating to a transitional period, as a matter of equity. However, even these examples cited by the appellant demonstrate that any exception or derogation from the general rules requires a clear authorisation from the legislator, as stated above.
21. On the basis of the above, the Board finds that the decision of the Secretariat did not infringe the applicable provisions of REE or IPREE, nor of any higher ranking law. Therefore, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

G. Weiss