



**Case Number:** D 0004/16

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 30 August 2016**

**Appellant:** N.N.

**Decision under appeal:** Decision of the Examination Board for the pre-examination of the European Qualifying Examination dated 31 March 2016.

**Composition of the Board:**

**Chairman:** G. Weiss  
**Members:** C. B. Brandt  
E. J. Christiansen

## Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examination Board of 31 March 2016 awarding the appellant the grade "FAIL" in the pre-examination for the European qualifying examination 2016 (hereinafter: pre-examination 2016), her answer paper having been awarded 69 marks.
- II. By letter dated 2 May 2016, received on 3 May 2016, the appellant filed a notice of appeal including a statement of grounds of appeal. The appeal fee was paid on the same day. By letter of 15 June 2016, the Examination Secretariat remitted the appeal to the Disciplinary Board of Appeal notifying that the Examination Board had decided not to rectify its decision and that the following comment had been made by the Examination Board:
- "With respect to statement 5.4, reference is made to the Examiner's report. This statement relates to representatives dealing with international applications in general and is not restricted to PCT-G and to a specific representative."
- III. The appellant essentially argues that the answer in the Examiner's Report contains clear and manifest errors in the evaluation of statements 5.4 (main request), 12.3 (first auxiliary request), 18.2 and 18.4 (second auxiliary request).

Question 5 of the pre-examination 2016 reads as follows:

Last week, Greta validly filed with the German Patent and Trade Mark Office (DPMA) the international patent

application PCT-G. Now, she wants to appoint Hassan as her representative. Hassan is entitled to act before the DPMA but he is not a European patent attorney. Greta and Hassan are resident in Germany.

For each of the statements 5.1 - 5.4, indicate on the answer sheet whether the statement is true or false:

5.1 Greta can validly appoint Hassan to represent her before the EPO as the International Searching Authority for PCT-G.

5.2 As a general rule, a power of attorney need not be submitted with the EPO as the International Searching Authority.

5.3 According to the provisions of the PCT, it is mandatory that the Demand for International Preliminary Examination is signed by the applicant, even in the case where a representative has been validly appointed.

5.4 According to the provisions of the PCT, a representative can only validly withdraw an international application if the representative has filed a power of attorney.

IV. The answer to statement 5.4 as given in the Examiner's Report is "false". The reasons given for this answer are as follows:

"Statements 5.2 to 5.4 relate to representatives (agents) dealing with international applications in general, and these statements are not restricted to PCT-G and Hassan as a representative (agent). [...] A withdrawal of an international application has to be filed either by the applicant(s) signing the request, the demand, a separate power of attorney or a general power of attorney (Rule 90bis.5, Rule 90.4(a) PCT and Rule 90.5(a) PCT. [Note that the case referred to in

Rule 90.4(e) PCT does not apply whenever the representative (agent) was appointed by the applicant signing the request or the demand.]

- V. The appellant essentially argues that the Examination Committee had based its evaluation on an incorrect premise, since the Examiner's Report was based on a question different from that inferable from statement 5.4 on an objective reading. Therefore, the decision was based on serious and obvious mistakes which could be established without reopening the entire marking procedure. Statement 5.1 referred to Greta, Hassan and the PCT-G application. In statement 5.2 the term "as a general rule" made it clear that it did not refer to the exact situation explained in the introduction. However, in statements 5.3 and 5.4, only reference to "provisions of the PCT" could be found, without information about who would be ... "a/the representative" in statement 5.4. In statement 5.4 the expression "a representative" was translated differently in the English and German versions. It could be rightfully assumed that this was a deliberate distinction in the German version and that because of the direct reference to "der Vertreter" statement 5.4 would be understood as referring to Hassan and not to "Vertreter" in general. On this factual basis the answer "False" for statement 5.4 in the Examiner's Report was clearly not consistent with the wording of the question.

According to the sketched situation it was no longer possible for the applicant Greta to appoint Hassan by signing the request, so that he would then be allowed to withdraw the application. The representative could

also be appointed by signing the demand for international preliminary examination, but the sketched situation did not mention such a demand.

VI. Since, as will be set out in the reasons below, the Board establishes that there was an obvious error with regard to statement 5.4 with the result that the decision under appeal is set aside and the contested decision is corrected to "PASS" in accordance with the appellant's "main request" it is unnecessary for the Board to reproduce and comment on the appellant's objections to statements 12.3, 18.2 and 18.4.

VII. The President of the Council of the epi and the President of the European Patent Office were given the opportunity to comment pursuant to Article 12 of the Regulation on discipline for professional representatives (RDR, Supplement 1/2014 to OJ EPO, 123), in conjunction with Article 24(4) of the Regulation on the European qualifying examination for professional representatives (REE, Supplement 2/2014 to OJ EPO, 2). No written observations were received.

VIII. The appellant requests

1. reversing the contested decision and that she be awarded the grade PASS for the pre-examination for the European qualifying examination 2016,

2 the appeal fee be reimbursed according to Article 24(4) REE,

3. extension of deadline for applying for the European qualifying examination 2017 in case the result of the appeal is not known by 2 June 2016,
4. oral proceedings in case the written request is rejected,
5. accelerated processing (letter of 23 June 2016).

### **Reasons for the Decision**

#### *Request that the contested decision be set aside*

1. In accordance with Article 24(4) REE and the Disciplinary Board's of Appeal (DBA) consistent case law (following D 1/92, OJ EPO 1993, 357), decisions of the Examination Board may in principle only be reviewed for the purposes of establishing that they do not infringe the REE, the provisions relating to its application, or higher-ranking law. It is not the function of the DBA to reconsider the entire examination procedure on the merits. This is because the Examination Committee and the Examination Board have some latitude in their evaluation which is subject to only limited judicial review by the appeal board. Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the Board take this into account. The alleged mistake must be so obvious that it can be established without reopening the entire marking procedure. This is for instance the case if an examiner is found to have based his evaluation on a technically or legally incorrect premise on which rests the contested decision. Another

example of an obvious mistake would be a question whose wording was ambiguous or incomprehensible (D 13/02). That would be clear straight away, without any reference to marks awarded, from the meaning that common sense would ascribe to the wording of the question concerned.

2. The appellant essentially argues that the Examination Committee based its evaluation on an incorrect premise, since the Examiner's Report was based on a question different from that inferable from statement 5.4 on an objective reading. In view of the direct reference "der Vertreter" in the German version statement 5.4 could be understood as it referring to Hassan and not to representatives in general. On this factual basis the answer "False" for statement 5.4 in the Examiner's Report was clearly not consistent with the wording of the question.
3. The definite article "der" before "Vertreter" refers in this context to a specific individual. Contrary to the note of the Examination Board in its letter dated 15 June 2016, the definite article in the context of statement 5.4 cannot be interpreted in a generalised sense as "representatives in general". With regard to Rule 22(3) IPREE, which applies analogously to the pre-examination, the words "der Vertreter" can only be seen as a reference to the representative Hassan indicated in the introductory case.
4. However, statement 5.4 also contains the indefinite article "eine/an", which is used before "international application". This indefinite article has to be interpreted in a generalised sense and thus not as

- referring to the international application PCT-G indicated in the introductory case.
5. As a consequence, statement 5.4 (German version) is self-contradictory and confusing, in that it leads on from a given situation, at the same time containing a generalisation.
  6. If statement 5.4 is to be interpreted as was by the Examination Board that is, as referring to representatives in general, who deal with international applications, and not as being limited to PCT-G and a specific representative, then the correct marking of statement 5.4 should be "false", as indicated in the Examiners Report.
  7. However, if statement 5.4 is to be interpreted as referring back to the introductory situation, it can only be deduced from this situation that Greta filed the international application and that she intended to appoint Hassan as her representative. Statement 5.4 making the assumption that she has appointed Hassan as her representative, but leaves it open how this has been effected. In particular, there is no hint that a demand for international preliminary examination has already been filed and that Hassan has been appointed as representative by Greta signing the demand. It is also unclear whether such a demand is still possible or intended. Only an appointment as representative together with the filing of the international application is clearly excluded by the facts of the introductory case.



8. If candidates limited themselves to the facts indicated in the introductory case of question 5 (Rule 10(5), Rule 2(3) IPREE) and statement 5.4, the Board considers justifiable that they did not take into account that Hassan's appointment has already been effected or is still possible within a demand for international preliminary examination. Against this background candidates were perfectly entitled to conclude that Rule 90.4e) PCT applied as the sole alternative ("nur dann" / "only") with regard to a withdrawal of the application. On this basis the correct answer would be "true". To have considered Hassan being appointed in a demand for international preliminary examination would have required a candidate to go beyond the stated facts of the case, contrary to Rule 22(3) REE. Furthermore, according to statement 5.4 Hassan has already been validly appointed as representative. In any case, no allegation can be derived from the introductory case and the statement 5.4, which without additional suggestions could be clearly answered with "true" or "false".
  
9. A further ambiguity in respect of the interpretation of statement 5.4 lies in the difference regarding the respective wording, namely "a representative" in the English version in contrast to "der Vertreter" in the German version.
  
10. Hence, the Board considers that for an examination question statement 5.4 has not been formulated in a sufficiently clear and comprehensible manner to ensure that the answer could be only "true" or "false" what is required by a "multiple-choice" question of the pre-examination. An unclear and confusing examination

question constitutes an obvious mistake (D 13/02, point 4 of the Reasons).

11. Therefore, the contested decision is based on serious and obvious mistakes which have been established without reopening the entire marking procedure. The appeal is thus well-founded and allowable. According to Article 24(3) REE, the contested decision has to be set aside and the appeal fee reimbursed.

*Request that the contested decision be corrected*

12. The appellant requests that she be awarded a "PASS" grade for the pre-examination for the European qualifying examination 2016.

Following decisions D 2/14 (point 5 ff. of the Reasons), D 3/14 (point 12 ff. of the Reasons), D 4/14 (point 11 ff. of the Reasons), D 5/14 (point 6 ff. of the Reasons) and D 6/14 (point 9 ff. of the Reasons) and the respective reasoning of in these decisions, the Board in the present appeal case considers that special reasons within the meaning of Article 12 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (Supplement to OJ EPO 1/2014, 54) are given for not remitting the case to the Examination Board for a new decision. These reasons allow the DAB rather than the Examination Board or the competent Examination Committee to scrutinise the marks given for question 5 of the appellant's examination paper and decide whether she is to be awarded a "PASS" or a "FAIL" grade on the basis of the revised marking.

13. The appellant's answers to statements 5.1 and 5.2 were correct. In accordance with the marking scheme for the pre-examination, she was thus awarded 1 mark. Taking into account the correction with respect to statement 5.4, the appellant is given a total of 3 marks for question 5. The total marks awarded for the pre-examination thus rise from 69 to 71. Therefore, the grade "PASS" is to be awarded for the appellant's paper, pursuant to Rule 6(2) IPREE.
14. In view of the above, the appellant's "main request" is allowable and the further objections concerning statements 12.3 (first auxiliary request), 18.2 and 18.4 (second auxiliary request) need not be dealt with in this decision. Furthermore, it is not necessary to hold oral proceedings, which were requested on an auxiliary basis.
15. Since the deadline for applying for the European qualifying examination 2017 mentioned in request 3 and in the request for accelerated processing filed by letter of 23 June 2016, has not expired at the time of the present decision there is no need for an extension of the deadline.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The appellant's answer paper for the pre-examination for the European qualifying examination 2016 is awarded 71 marks and therefore, pursuant to Rule 6(2) IPREE, the grade "PASS".
3. The appeal fee is reimbursed.

The Registrar:

The Chairman:

P. Martorana

G. Weiss