



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
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Case Number: D 0003/18

D E C I S I O N
of the Disciplinary Board of Appeal
of 27 May 2019

Appellant: N.N.

Decision under appeal: Decision of the Examination Secretariat of 22 December 2017 refusing an application for registration for the European qualifying examination under Article 11(1)(a) REE and Rule 11(2) IPREE.

Composition of the Board:

Chairman: T. Karamanli
Members: L. Bühler
D. Korper Žemva

Summary of Facts and Submissions

- I. The appeal lies from the Examination Secretariat's finding of 22 December 2017 that the conditions laid down in Article 11(1)(a) of the Regulation on the European qualifying examination for professional representatives (REE, OJ EPO 2017, Supplementary publication 2, 2) and Rule 11(2) of the Implementing provisions to the Regulation on the European qualifying examination (IPREE, OJ EPO 2017, Supplementary publication 2, 18) for registration for the European qualifying examination had not been fulfilled. The Examination Secretariat held that the scientific and/or technical proportion of the appellant's "Bachelor of Science Degree in Physics and Philosophy with a Year Abroad" from King's College London, on which the request for registration he had filed with the Examination Secretariat was based, amounted to a maximum of 70.3% (285 out of 405 credits) only. It did not consider the courses in Philosophy of Physics, Philosophy of Science, Philosophy of Logic and Language and Ethics of Science and Technology to be either scientific or technical.

- II. By letter dated 1 February 2018, the appellant appealed this decision and requested that the decision under appeal be set aside and that his request for registration with the Examination Secretariat be allowed. Should supporting evidence be required, the appellant asked for the opportunity to provide such evidence. In the alternative, he requested oral proceedings.

- III. By letter dated 23 March 2018, the Examination Secretariat informed the appellant that, having taken

into account the new facts submitted with the appeal, it had decided not to rectify its decision and instead to refer the appeal to the Disciplinary Board of Appeal (Appeal Board). It gave reasons for its decision.

- IV. 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, OJ EPO 2017, Supplementary publication 1, 127) in conjunction with Article 24(4) REE.
- V. In a communication dated 25 February 2019, the appellant was summoned to oral proceedings on 27 May 2019. In an annex to this communication, the Appeal Board informed the appellant of its preliminary opinion.
- VI. Due to a change of address, the appellant did not receive this summons. When asked by the registry if he would accept a shorter notice period, he agreed and was subsequently sent a communication dated 9 April 2019 summoning him to oral proceedings on 27 May 2019.
- VII. On 21 May 2019, the appellant filed new arguments and new evidence.
- VIII. The oral proceedings on 27 May 2019 were attended by the appellant, his legal representative (Article 24(4) REE together with Article 17 RDR), a person appointed by the President of the Council of the epi and a person appointed by the President of the European Patent Office (Article 24(4) REE together with Article 14 RDR).

- IX. The appellant's arguments, where relevant for the decision, may be summarised as follows:
- The decision under appeal was not correct, because the scientific/technical proportion of his qualification had been calculated on the basis of credits instead of course hours as required by Rule 11(2) IPREE.
 - The available evidence of the number of course hours related to 20 modules corresponding to 360 credits, i.e. 89% of the total of 405 credits awarded for the appellant's bachelor's degree. For the two modules for which no evidence of the number of course hours could be provided, the appellant argued that he should be able to rely on credits for the calculation of the scientific/technical proportion of his qualification.
 - In the alternative, the appellant submitted that the evidence showed that credits for modules in Physics correlated with a higher number of course hours (in terms of lectures, seminars and tutorials) compared with the same number of credits for modules in Philosophy. 15 credits in Physics thus equalled four course hours per week, whereas 15 credits in Philosophy equalled two course hours per week. It should be possible to calculate the scientific/technical proportion of his qualification on the basis of this correlation pattern.
- X. The appellant requested that the decision under appeal be set aside and that his registration with the Examination Secretariat for the European qualifying examination be allowed under Article 11(1)(a) REE and Rule 11(2) IPREE.

Reasons for the Decision

1. *Fresh case on appeal*

1.1 The Examination Secretariat must base its decisions on requests for registration for the European qualifying examination solely on the facts and evidence submitted by the candidate. When making a request for registration, candidates who want a decision in their favour must therefore submit appropriate evidence and information on their own initiative.

1.2 Moreover, it is not the purpose of appeal proceedings pursuant to Article 24(1) REE to give appellants the opportunity to amend their initial request for registration as they see fit. Indeed, Article 24(1) REE states that an appeal lies from decisions of the Examination Board and the Secretariat only on grounds of infringement of the REE or any provision relating to its application. As a rule, therefore, such decisions may be reviewed by the Appeal Board only for the purposes of establishing whether they infringe 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). This means that appeals are primarily examined on the basis of the facts and the evidence on which the appealed decision was based. It is thus normally not for the Appeal Board to decide in place of the Examination Secretariat on requests for registration based on facts which are presented for the first time on appeal.

- 1.3 According to point 2.1 of the contested decision, the appellant's request for registration for the European qualifying examination was based on a transcript of records for his Bachelor of Science Degree in Physics and Philosophy from King's College London. This transcript is based on credits. Upon inquiry by the Examination Secretariat, the appellant provided course descriptions for four courses ("Philosophy of Physics", "Philosophy of Science", "Philosophy of Logic and Language" and "Ethics of Science and Technology") and further information on his degree. However, in his calculations, the appellant relied on credits instead of course hours. For the first time on appeal, the appellant challenged the Examination Secretariat's calculation based on credits instead of course hours, presented new calculations based on course hours, and filed new evidence in support of his calculations.
- 1.4 Where new facts and evidence submitted on appeal require that the Appeal Board reassesses whether the conditions for registration for the European qualifying examination laid down in Article 11(1)(a) REE and Rule 11 IPREE are fulfilled, several options are open to it as to how to proceed.

Pursuant to Article 24(4) REE in conjunction with Article 25(1) RDR and Article 114(2) EPC, the Appeal Board may disregard facts or evidence which are not submitted in due time. However, if such new facts and evidence are disregarded and the appeal is dismissed, the question is then whether the dismissal precludes the filing of a new request for registration with the Examination Secretariat based on the facts and evidence on which the appellant was unable to rely in the appeal

proceedings and on which no substantive decision has been taken. Should the matter not be regarded as definitively settled by the Appeal Board's decision, the Appeal Board takes the view that a new request for registration may be filed, which will lead to a further decision by the Examination Secretariat, which is likewise open to appeal.

Another option available to the Appeal Board is to take the new facts and evidence into consideration but restrict its review to examining whether the Examination Secretariat contravened the Regulation on the European qualifying examination for professional representatives or any provision relating to its application (Article 24(1) REE) and/or whether the new facts and evidence are likely to have a bearing on the outcome of the case. Should the Appeal Board's review reveal that the decision under appeal infringes the legal provisions and/or that the new facts and evidence are liable to deprive the decision of its basis, it may remit the case to the Examination Secretariat for consideration of those new facts and evidence (Article 24(4) REE in conjunction with Article 25 RDR and Article 12 of the Additional Rules of Procedure of the Disciplinary Board of Appeal, OJ EPO 2019, Supplementary publication 1, 50), especially if settling the matter involves a discretionary decision. While the conditions laid down in Article 11(1)(a) REE and Rule 11 IPREE for registration for the European qualifying examination leave little room for taking factors into consideration which are not explicitly addressed in these provisions, the Examination Secretariat can nevertheless exercise a certain amount of discretion when evaluating a candidate's qualifications for the purposes of deciding

on the candidate's registration for the European qualifying examination.

Lastly, depending on the particular circumstances, it may even be appropriate for the Appeal Board not only to admit the new facts and evidence into the appeal proceedings but also to decide in place of the Examination Secretariat on whether or not the candidate can be registered.

- 1.5 In the present case, the Appeal Board decided to admit the evidence and arguments filed by letter dated 21 May 2019 and presented at the oral proceedings despite their belated submission, in order to spare the appellant the uncertainty over the outcome of a new request for registration with the Examination Secretariat. As to the extent of review, the Appeal Board examined whether the appellant's case presented on appeal was sufficient to deprive the contested decision of its basis. More precisely, it looked at whether, on the basis of the new facts and evidence, the appellant's qualification could be deemed to have the scientific and/or technical proportion required by Rule 11(2) IPREE.

2. *Interlocutory revision*

- 2.1 While the Appeal Board appreciates that the way the Examination Secretariat dealt with the new facts in the present case was aimed at avoiding consecutive appeals, it nevertheless finds that it exceeded its powers under Article 24(3), first sentence, REE because, despite having formally decided not to rectify its decision of 6 March 2018, it also gave reasons, in its letter dated

11 June 2018, as to why it considered the appeal not to be allowable. It thus decided de facto that the conditions laid down in Article 11(1)(a) REE and Rule 11(2) IPREE for registration for the European qualifying examination had not been fulfilled even if the appellant's submissions on appeal were taken into account.

2.2 By way of exception to the devolutive effect of an appeal, Article 24(3), first sentence, REE empowers the Examination Secretariat to rectify a decision if it considers the appeal to be admissible and well-founded. It can thus take a decision to the effect that it grants rectification by setting aside the decision under appeal if the reasons for this decision no longer hold in light of the submissions on appeal. If, however, it considers the appeal to be either inadmissible or unfounded, it has to refer the case to the Appeal Board without giving reasons, since such reasons would amount to a decision on the merits of the appeal. Therefore, given that the appellant had presented new facts and evidence which deprived the contested decision of its factual basis (as rightly acknowledged by the Examination Secretariat in point 2.1 of its letter of 11 June 2018), the Examination Secretariat could have either set aside its decision dated 6 March 2018 and resumed the registration procedure with a view to taking a decision based on the newly presented facts (which would have given the appellant more time to produce additional evidence) or referred the case to the Appeal Board without further ado. In the Appeal Board's opinion, there is a lot to be said for the first option, as it can help to avoid procedural ping-pong between the bodies deciding at

different instances, and in doing so help ensure procedural economy.

- 2.3 Nevertheless, the fact that the Examination Secretariat exceeded its powers under Article 24(3), first sentence, REE has no consequences for the present appeal proceedings, since the Appeal Board did not remit the case to the Examination Secretariat without any consideration as to substance, but dealt with the appeal as set out in point 1.5 above while ignoring the reasons given by the Examination Secretariat in its letter dated 23 March 2018.

3. *Basis for calculation*

- 3.1 The Appeal Board agrees with the finding in decision D 9/14 of 30 January 2015 (point 11) that if there is a discrepancy between the result of a calculation based on course hours and that of a calculation based on credits, the former result is authoritative. However, it is also acknowledged in decision D 9/14 that many educational establishments issue certificates showing only the credits awarded, and not the number of course hours. In such a situation, although the rules do not expressly provide for the possibility of calculating on the basis of credits whether the requirement of 80% of scientific and/or technical course hours in Rule 11(2) IPREE has been met, the Examination Secretariat may rely on such credits as the basis for its calculation if it is satisfied that the credits awarded are essentially proportional to the number of course hours. Nevertheless, where information and evidence provided by a candidate in support of their request for registration relate, as in the present case, to credits only, the

Examination Secretariat cannot reasonably be expected to carry out its own investigations. It would, however, be appropriate for the Secretariat to draw the candidate's attention to the precedence given to calculations based on course hours. Where the alternatives are (a) refusing a request for registration for lack of evidence as to the course hours taken or (b) calculating on the basis of credits whether the 80% proportion of scientific and/or technical course hours required by Rule 11(2) IPREE has been achieved, the latter should be given precedence in accordance with the principle of proportionality.

- 3.2 For studies completed on the basis of the European Credit Transfer and Accumulation System (ECTS), 60 credits are allocated for the workload associated with a full-time academic year, which ranges from 1 500 to 1 800 hours of work. This means that one credit corresponds to 25 to 30 hours of work. Under the ECTS, workload is an estimation of the time an individual typically needs to complete all the learning activities - such as lectures, seminars, projects, practical work, internships and individual study - required to achieve the defined learning outcomes in a formal learning environment. The credits awarded do not therefore strictly correlate with "course hours" within the meaning of Rule 11(2) IPREE and include instead time allocated for learning activities other than course units. Where this difference might have a bearing on the calculation of whether the requirement for 80% scientific/technical course hours in Rule 11(2) IPREE has been met, it is for the candidate seeking registration for the European qualifying examination to substantiate, together with their request for

registration, that this is the case by providing suitable evidence from the academic institution concerned.

3.3 However, neither Rule 11(2) IPREE nor decision D 9/14 of 30 January 2015 allows for a calculation based on both credits and course hours (the former being taken as the basis for some subjects of the appellant's degree and the latter for others).

4. *The appellant's calculations*

4.1 By letter dated 21 May 2019, the appellant submitted evidence of the number of weekly course hours for each semester of 10 weeks. Evidence was available for 20 out of 22 courses (modules) taken by the appellant to obtain his Bachelor of Science Degree in Physics and Philosophy.

4.2 The appellant argued as follows: The available evidence of the number of course hours related to 360 credits, i.e. 89% of the total of 405 credits awarded for his bachelor's degree. The evidence showed that, of a total of 755 course hours (weekly course hours in the form of lectures, seminars and tutorials, multiplied by 10 weeks per semester), 590 were either scientific or technical. Of the 360 credits awarded for modules for which evidence of the number of course hours was available, the scientific/technical proportion was thus 78% when calculated on the basis of course hours. Since 360 credits represent only 89% of all credits, the 590 course hours amounted to a scientific proportion of the overall degree of 69% (78% of 89%).

As regards module 5CCPYA10 "Physics - Year Abroad" and module 6CCP3131 "Third Year Project in Physics", no evidence with respect to the number of course hours could be provided. It was therefore justified to rely on credits for the calculation. The 45 credits awarded to these modules represented 11% of the total of 405 credits. They related entirely to eligible scientific and/or technical subjects according to Rule 13 IPREE. Therefore, an additional 11% of the overall degree was technical. As a consequence, at least 80% of the appellant's Bachelor of Science Degree in Physics and Philosophy was scientific and/or technical (69% + 11% = 80%).

4.3 The Appeal Board could not accept this calculation since it is based on credits for modules for which no evidence of the number of course hours could be provided (i.e. module 5CCPYA10 "Physics - Year Abroad", and module 6CCP3131 "Third Year Project in Physics"), and on the equation of credits awarded for the remaining modules (360 credits) with the number of effective course hours taken (755 hours). There is no basis in the REE or IPREE for an approach combining a calculation based on credits for one part of a degree with a calculation based on effective course hours for another. Moreover, decision D 9/14 of 30 January 2015 invoked by the appellant did not set a precedent in this respect.

4.4 The Appeal Board agrees with the appellant that the modules for which no evidence of the number of course hours could be provided should not be ignored. Indeed, the scientific and/or technical proportion required must always be calculated with respect to the given academic degree as viewed in its entirety. The Appeal Board is

also conscious of the difficulties the appellant faced in providing evidence of the number of course hours. Under the European Credit Transfer and Accumulation System (ECTS), educational establishments increasingly issue certificates which only indicate the credits awarded, and not necessarily the course hours. However, this does not disqualify the criteria for registration set up by the legislator in order to implement Article 11(2)(a) REE. Moreover, the way the Examination Secretariat dealt with this situation is reasonable for the purposes of Rule 11(2) IPREE. As explained by the representative of the President of the European Patent Office, in the absence of evidence relating to the number of effective course hours, the Examination Secretariat assesses the scientific/technical proportion according to Rule 11(2) IPREE based on the assumption that the credits awarded are essentially proportional to the number of course hours. The Examination Secretariat would, however, also accept, for the benefit of the appellant, evidence other than that relating to the number of effective course hours for each course, e.g. a correlation of credits with course hours.

- 4.5 In view of the Appeal Board's concerns regarding the first calculation, the appellant presented a second line of reasoning. He argued that the evidence, in particular the declaration by the King's College Physics Departmental Co-ordinator dated 20 May 2019, showed that credits for modules in Physics correlated with a higher number of course hours (in terms of lectures, seminars and tutorials) than the same number of credits for modules in Philosophy. 15 credits in Physics thus equalled four course hours per week, whereas 15 credits in Philosophy equalled two course hours per week. The

two modules in Physics for which no evidence on course hours could be provided (i.e. module 5CCPYA10 "Physics - Year Abroad" and module 6CCP3131 "Third Year Project in Physics") therefore accounted for 12 course hours per week, corresponding to the 45 credits awarded. Adapting the first calculation (see point 4.2 above) accordingly, 120 hours had to be added to the total of 755 course hours and to the 590 course hours which had been proven to relate to scientific and/or technical subjects within the meaning of Rule 13 IPREE. Thus, of a total of 875 course hours, 700 were scientific or technical. The scientific and/or technical proportion of the appellant's bachelor's degree was therefore exactly 80%.

- 4.6 The Appeal Board accepted that the declaration by the King's College Physics Departmental Co-ordinator dated 20 May 2019 showed that the credits awarded in the two disciplines Physics and Philosophy did not correlate with the same number of weekly course hours. In view of the appellant's difficulties in providing evidence of the number of course hours, and mindful of the information provided by the representative of the President of the European Patent Office that the Examination Secretariat was likely to accept a calculation based on a conversion of credits into course hours, the Appeal Board did not wish to apply stricter criteria than the Examination Secretariat.
- 4.7 The Appeal Board did, however, take issue with the second calculation, in view of the fact that it was based on 10 effective course hours per week for module 4CCP1350 "Mathematics and Mechanics", for which 30 credits had been awarded, and 1.5 effective course hours per week for module 6AANC000 "Dissertation in

Philosophy", for which 30 credits had been awarded. This meant that the second calculation also combined two different approaches, namely a calculation relying on the number of effective course hours and a calculation based on a conversion of credits into course hours. There is no basis in the REE or IPREE for such a mixed calculation.

- 4.8 In view of the Appeal Board's concerns regarding the second calculation, the appellant presented a third calculation. Of the 405 credits, 255 credits were awarded in Physics and 150 in Philosophy. Based on the equation of 15 credits in Physics to four course hours per week and 15 credits in Philosophy to two course hours per week, the 255 credits in Physics equalled 68 course hours per week (i.e. 680 course hours in total), whereas the 150 credits in Philosophy equalled 20 course hours per week (i.e. 200 course hours in total). However, since there was proof on file that module 4CCP1350 "Mathematics and Mechanics" consisted by way of exception of 10 course hours per week, 70 course hours per week (i.e. 700 course hours in total) had to be accepted as being devoted to scientific and/or technical subjects. Furthermore, half of the course hours for the modules in Philosophy "Methodology" (4AANB008) and "Philosophy of Physics 1: Space and Time" (5AANB053) were devoted to scientific/technical subjects within the meaning of Rule 13 IPREE. Therefore, two additional hours per week were technical. In sum, 72 weekly course hours (or 720 course hours in total) out of 90 weekly course hours (or 900 course hours in total) were scientific or technical. The scientific or technical proportion of the appellant's bachelor's degree was therefore exactly 80%.

4.9 In support of his claim that 50% of the course hours of the "Methodology" (4AANB008) and "Philosophy of Physics 1: Space and Time" (5AANB053) modules in Philosophy were devoted to scientific or technical subjects, the appellant relied on the following evidence: With respect to the module "Philosophy of Physics 1: Space and Time", the appellant referred to point 18 of the declaration dated 20 May 2019 by the King's College Physics Departmental Co-ordinator and the lecture schedule on page 3 of the course syllabus for the academic year 2014/15 for module 5AANB053 "Philosophy of Physics 1: Space and Time" filed as exhibit 11, which lists aspects of contemporary physics that were examined in view of their implications for an understanding of space and time. With respect to the "Methodology" module, the appellant referred to the learning outcomes in the course description filed as exhibit 4, which referred to the concepts of elementary set theory, probability theory and modal logic. In the appellant's view, these concepts were of a technical nature. After a break in the proceedings, the appellant additionally filed a copy of the course syllabus for the academic year 2014/15 for module 4AANB008 Methodology. The Appeal Board held the new evidence filed by the appellant in support of the scientific and technical content of modules 4AANB008 "Methodology" and 5AANB053 "Philosophy of Physics 1: Space and Time" (see point 4.9 above) to be late-filed but relevant and pertinent. It therefore admitted it into the appeal proceedings.

4.10 With respect to the third calculation presented by the appellant, the Appeal Board cannot accept the appellant's contention that he should be allowed to

deviate in respect of a single module of his degree from the correlation of credits and course hours which was demonstrated to be different for the two disciplines Physics and Philosophy. Indeed, it would be somewhat paradoxical to accept, as a substitute for the incomplete evidence relating to the number of effective course hours, evidence showing a correlation pattern between credits awarded and course hours taken, but then to deviate from this pattern and to include in the calculation effective course hours for a specific module. On the basis of the demonstrated and accepted correlation pattern (15 credits in Physics equals four course hours per week and 15 credits in Philosophy equals two course hours per week), the Appeal Board accepted that modules 4CCP1350 "Mathematics and Mechanics" and 5CCPYA10 "Physics - Year Abroad" each accounted for eight course hours weekly, and that modules 6CCP3131 "Third Year Project in Physics" and 6AANC000 "Dissertation" each accounted for four course hours weekly. As regards module 6CCP3131 "Third Year Project in Physics" in particular, the Appeal Board accepted the appellant's contention that, by awarding 30 credits in Physics to his year of study abroad, King's College London had certified that this year accounted for at least eight course hours in Physics per week. In sum, 68 weekly course hours (or 680 course hours in total) out of 88 weekly course hours (or 880 course hours in total) can be acknowledged as being scientific or technical, which amounts to 77.3%.

- 4.11 On the other hand, the Appeal Board accepted that the appellant could still claim that two modules in Philosophy were interdisciplinary and that 50% of the respective course hours were in fact devoted to

technical subjects. Proof for this contention revealed to be crucial in order for the Appeal Board to be able to accede to the appellant's request for registration under Article 11(1)(a) REE and Rule 11(2) IPREE. Indeed, should two additional hours per week be scientific or technical, 70 weekly course hours (or 700 course hours in total) out of 88 weekly course hours (or 880 course hours in total) could be acknowledged as being scientific or technical, which amounts to a proportion of 79.5%. As had been stated during the oral proceedings by the representative of the President of the European Patent Office in response to a question by the Appeal Board, the Examination Secretariat, when confronted with a slight shortfall in the scientific or technical proportion of a degree, was bound to apply the clear limit established by Rule 11(2) IPREE relatively strictly, but could nevertheless round fractions up to the nearest integer. For example, a proportion of 79.5% could be rounded up to 80% in accordance with the accepted rounding rules. Thus, were it to be demonstrated that 50% of the respective course hours for the modules "Methodology" (4AANB008) and "Philosophy of Physics 1: Space and Time" (5AANB053) were devoted to scientific or technical subjects, it was to be expected that the Examination Secretariat would allow the appellant's request for registration under Article 11(1)(a) REE and Rule 11(2) IPREE. The Appeal Board was therefore satisfied that the appellant's case presented on appeal was sufficient to deprive the contested decision of its basis.

5. *Remittal and reimbursement of the appeal fee*

5.1 In the circumstances, the Appeal Board did not consider it appropriate for it - and not the Examination Secretariat - to evaluate the evidence on the technical proportion of the "Methodology" (4AANB008) and "Philosophy of Physics 1: Space and Time" (5AANB053) modules. Rather, the need for uniform practice and, perhaps, further evidence justified remittal.

5.2 In view of the fact that the case the appellant presented on appeal was fresh but incomplete, and that he did not complete the case until the oral proceedings the Appeal Board did not consider it to be equitable in the circumstances of this case to order the reimbursement of the appeal fee (Article 24(4) REE).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examination Secretariat for further prosecution.

The Registrar:

The Chairwoman:

N. Michaleczek

T. Karamanli