



**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 0002/21

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 3 February 2022**

**Appellant:** N.N.

**Decision under appeal:** Decision of the Examination Board dated 31 March 2021 concerning the pre-examination of the European qualifying examination 2021.

**Composition of the Board:**

**Chairman:** W. Sekretaruk  
**Members:** T. Karamanli  
C. Rebbereh

## **Summary of Facts and Submissions**

- I. The appeal is against the decision of the Examination Board posted on 31 March 2021 to award the appellant's answer paper the grade FAIL in the pre-examination of the European qualifying examination 2021 (hereinafter "the pre-examination 2021") in accordance with Rule 6(2) of the Implementing provisions to the Regulation on the European qualifying examination (IPREE, OJ EPO 2019, Supplementary publication 2, 18) because his answer paper had been awarded 69 marks.
  
- II. By letter dated 29 April 2021, received on the same day by the Examination Secretariat, the appellant filed a notice of appeal including a statement setting out the grounds for appeal. The appeal was also validly paid.  
  
The appellant contested the marking of statement 12.4 in question 12 and statement 19.4 in question 19 of the pre-examination 2021.
  
- III. The Examination Secretariat remitted the appeal to the Disciplinary Board of Appeal notifying that the Examination Board had decided not to rectify its decision.
  
- IV. The President of the Council of the epi and the President of the European Patent Office (EPO) were given the opportunity to comment pursuant to Article 12 of the Regulation on discipline for professional representatives (RDR, OJ EPO 2021, Supplementary publication 1, 140), in conjunction with Article 24(4) of the Regulation on the European qualifying examination for professional representatives (REE, OJ EPO 2019, Supplementary publication 2, 2). No

written observations were received.

- V. From the appellant's statement of grounds of appeal, the Disciplinary Board of Appeal in the present case (hereinafter "the Board of Appeal") infers that the appellant's requests are as follows:

The appellant requested that the decision under appeal be set aside and that his answer paper in the pre-examination of the European qualifying examination 2021 be awarded a PASS grade, and he requested oral proceedings in case these requests were to be rejected. He also requested that the appeal fee be reimbursed and: *"In case of compliance of the appeal, setting a reasonable deadline for the registration to the main-examination of the EQE 2022, if the deadline has expired."*

- VI. The appellant argued that "True" was the correct answer to the statement 12.4 in question 12 of the pre-examination 2021 - or that at least the answer "False" was ambiguous - essentially for the following reasons:

The term "low" was generally recognised as an undefined relative term and was usually objected to for clarity reasons under Article 84 EPC. Also, the description of the first application did not indicate that the term "low temperature" had a generally accepted meaning in the art. Since the first application did not disclose what a "low temperature" was, to achieve this teaching candidates would have had to use their own knowledge and that would be against the provisions of Rules 10(5) and 22(3) IPREE.

In response to the Examiners' Report on question 12.4, first paragraph: The term "high" was also not clear and

thus the term "low", which allegedly was clear only due to the comparison to the term "high", had to be considered unclear under Article 84 EPC.

Even if the term "high" was considered clear, the claim would still be considered unclear concerning the term "low" in view of GL F-IV 4.6.1, since the term "low" in itself was not clear from the context of the whole disclosure (even when compared with the term "high"). There was not a single range or value mentioned of what would be a "low temperature". Moreover, the terms "high" and "low" were not related to each other in view of the disclosure of the application.

Regarding the Examiners' Report on question 12.4, second paragraph, the statement was due to a personal opinion of the Examining Committee that was neither based on explicit indications of GL 2019 F-IV 4.6.1 nor equivalent thereto. This passage in the Guidelines for Examination did not deal with the case where the relative term was not used as the only distinguishing feature. Hence this passage in the Guidelines for Examination did not exclude that the relative term could be objected if it was not used as the only distinguishing feature. The reasoning in the Examiners' Report therefore presented a conceptual leap from what was stated in that passage of the Guidelines for Examination. This could neither be accepted nor shared by the appellant.

The argumentation in the Examiners' Report was also in conflict with the main principle in GL F-IV 4.1 and 4.2 that the meaning of the terms of a claim had to be clear from the claims alone. Reference was also made to Case Law, II A.3.1 and II A.6.3.5, in particular to decisions T 1129/97 and T 49/99.

The appellant further argued that "False" was the correct answer to question 19.4 and gave reasons for his view.

VII. The following parts of question 12 of Part 3 of the pre-examination 2021 are relevant to the case at hand:

**Statement 12.4** in Question 12 reads:

*"Claim I-8 is unclear due to the use of the term low."*

**Claim I-8** reads:

*"A process for manufacturing a photochromic lens from the glass composition according to any one of claims I-1 to I-7, which comprises the following steps:  
(i) mixing components A and M together in a first vessel to obtain a first mixture;  
(ii) heating silicon dioxide in a second vessel to an [sic] high temperature;  
(iii) adding the first mixture from step (i) to the second vessel from step (ii) to form a second mixture;  
(iv) adding component X to the second mixture;  
(v) forming a photochromic lens; and afterwards  
(vi) allowing the photochromic lens to cool to a low temperature."*

**Paragraph [09]** of the description of a European patent application (date of filing: 31 March 2019) reads:

*"Component M reduces the water-solubility and improves the stability of the glass composition, but only if it is present in certain amounts, otherwise component M has detrimental effects. The content of component M*

*must be about 5% to about 10% by weight of the glass composition. If the content of component M is less than 5% by weight of the glass composition, the glass composition is not stable enough for use. If the content is greater than 10% by weight of the glass composition, the glass composition solidifies at high temperatures which makes it unusable."*

### **Reasons for the Decision**

1. The decision in the case at hand is taken in written proceedings. The appellant requested oral proceedings on an auxiliary basis, i.e. in the event that his request to be awarded a PASS grade was not granted. As his request can be granted for the reasons given below, it was not necessary to hold oral proceedings.
2. The appeal is admissible.

The appeal lies from the decision of the Examination Board posted on 31 March 2021 which adversely affects the appellant. A notice of appeal including the statement setting out the grounds for appeal was filed in writing with the Examination Secretariat on 29 April 2021 and thus within the one-month period under Article 24(2) REE. The appeal fee was also paid within said period. The appeal therefore complies with Article 24(2) and (4) REE.

*Request that the contested decision be set aside*

3. The appellant requested that the contested decision be set aside. He alleged obvious and serious errors in the assessment of his answers to statement 12.4 in question 12 and statement 19.4 in question 19 of the

pre-examination 2021. He essentially argued that in the Examiners' Report - Pre-examination 2021 (hereinafter "the report"), the answers to the statements 12.4 and 19.4 and the reasoning given for them were not correct.

4. In accordance with Article 24(4) REE and the consistent case law of the Disciplinary Board of Appeal (hereinafter "the DBA"), which followed decision 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 Committees and the Examination Board have some latitude in their evaluation which is subject to only limited judicial review by the DBA. Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the DBA 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 upon which the contested decision rests (D 2/14). Another example of an obvious mistake would be a question whose wording is ambiguous or incomprehensible (D 13/02). All other claims to the effect that the papers have been marked incorrectly are not the responsibility of the DBA. Value judgments are not, in principle, subject to judicial review (see e.g. D 1/92, *supra*, points 3 to 5 of the Reasons).
5. This established case law on the limitation of judicial review in relation to the European qualifying

examination within the meaning of Article 1(1) REE (hereinafter: "the examination"), applies mutatis mutandis to the European qualifying pre-examination (hereinafter "the pre-examination"), just as the provisions of the REE apply mutatis mutandis to the pre-examination pursuant to Article 1(7) REE. However, insofar as the award of points for the pre-examination paper is based on a pre-determined solution scheme (e.g. a multiple-choice test), the pre-examination leaves no room for discretionary marking. In the pre-examination, candidates are expected to respond to clearly defined statements in a multiple-choice mode, to which they can only answer "True" or "False" by ticking a box; they have no possibility to add any reasons or explanatory notes. Any such indications will not be taken into account (see Instructions for answering the pre-examination paper and marking scheme for the pre-examination 2021, No. 1.(d)). The formulation of the facts and the statements to be evaluated in a question are therefore of utmost importance in the pre-examination. The questions to be answered and the statements to be evaluated in a multiple-choice test such as the pre-examination should therefore be formulated clearly and unambiguously (see also decisions D 5/16 and D 6/16). Therefore, when setting an examination question for the pre-examination, it must be ensured that only one answer can be given to the respective statement when taking an informed and objective view or interpretation of the wording of the facts and the respective statements in the question (D 15/16, point 2.3 of the Reasons). It is thus crucial to formulate the statements in such a way that clearly only one answer, i.e. either "True" or "False", is possible and "correct" under the given circumstances (see also decisions D 5/16 and D 6/16). In particular, terms and formulations are to be avoided



which initially lead the candidates to an interpretation, which, as a result, partly leads them away from the answer and technical and/or legal assessment actually pursued by the authors of the paper, and which thus leads the candidates to considerations and results which do not do justice to the sense and purpose of the pre-examination (see e.g. D 5/16, point 32 of the Reasons; D 6/16, point 19 of the Reasons). Contradictory, misleading or ambiguously formulated facts and/or statements can have the consequence that candidates judge them differently from the solution scheme of the Examination Board without having the possibility to present a different opinion which is not wrong but justifiable. Unlike in the examination, such deficiencies in the pre-examination paper can therefore not already be recognised in the course of the correction of the papers and taken into account in the marking, but can only be corrected - if at all - in the course of an appeal (see also D 15/16, point 2.3 of the Reasons). Therefore, in a pre-examination, unclear and confusing facts or statements constitute a serious and obvious mistake (see also D 3/19, point 2.3 of the Reasons with reference to D 13/02, point 4 of the Reasons).

However, if a statement is logical and makes sense, so that, using common sense, it is clear what answer was expected, candidates cannot rely on exceptions to the rule or explore alternative interpretations with a view to showing that a different answer might also be conceivable in specific instances (see e.g. D 5/16, point 33 of the Reasons). It follows that in the case of a pre-examination, the review requested by the appellant does not concern the question of whether the evaluation of the assessment of the respective statement *stricto sensu*, i.e. the appellant's

assessment of the statement concerned as "True" or "False", is correct. It is rather a question of the correct interpretation or the general understanding of the statement concerned, including the facts underlying the pre-examination question and the conclusion to be drawn therefrom as to whether the statement concerned is clearly to be assessed as "True" or "False". The assessment itself, i.e. the awarding of points, is then usually carried out on the basis of the simple solution scheme of a multiple-choice test with solution statements that are either "True" or "False", i.e. on a completely objective basis (see also decision D 15/16, point 2.2 of the Reasons).

6. Statement 12.4

Statement 12.4 of Question 12 of Part 3 of the pre-examination 2021 reads: "*Claim I-8 is unclear due to the use of the term low.*"

According to the report, statement 12.4 had to be answered "False", instead of "True" as the appellant did. Consequently, the appellant's answer was considered not to be correct and, as two of the answers to the four statements within question 12 were considered correct, 1 mark was awarded for question 12.

7. However, the Board of Appeal considers that statement 12.4, including the facts underlying the pre-examination question, cannot be answered clearly and unambiguously with "False" for the following reasons.

8. As the appellant has correctly pointed out, according to the general principles developed by the case law on clarity under Article 84 EPC (see Case Law of the Boards of Appeal of the European Patent Office

(hereinafter "Case Law"), 9th edition 2019, II.A.3.1), the claims per se must be free of contradiction (see e.g. decision T 2/80, OJ EPO 1981, 431) and they must be clear in themselves when read by the person skilled in the art, without any reference to the content of the description (see e.g. decisions T 2/80, supra, T 1129/97, OJ EPO 2001, 273 and T 49/99; Guidelines for Examination in the EPO 2019 (in the following "GL") F-IV 4.1 and 4.2). It is also established case law of the boards of appeal that relative terms may be used in claims provided that the skilled person is able to understand their meaning in a given context (see e.g. decision T 860/93, OJ EPO 1995, 47, and further decisions in Case Law, II.A.3.6; GL F-IV 4.6.1). The description is taken into account for the purposes of interpreting the claims and has in some cases also been considered when determining clarity and conciseness (see Case Law, II.A.6.3.).

9. With regard to statement 12.4, there is no question that the term "low" in feature (vi) of claim I-8 is a relative term and that the term "low temperature" does not have a generally accepted meaning in the relevant art. It is also apparent that the description of the application does not disclose the exact meaning of the term "low temperature".
10. However, the report does not explain why claim I-8 itself does not have to be clear and why the description can be used. In this context the Board of Appeal notes that a number of decisions pointed out the limits to the use of the description and drawings in the examination relating to the clarity requirement (see Case Law, II.A.6.3.5, and e.g. decisions T 2/80, supra, T 1129/97, supra, point 2.1.2 of the Reasons, and T 49/99, point 12 of the Reasons). Therefore, the

question arises as to whether a statement is suitable for a pre-examination if its answer cannot be clearly and unambiguously stated as "True" or "False" in the light of the relevant case law.

11. In the report, the reasons given for the expected answer "False" are that the term "low" in feature (vi) of claim I-8 was clearly distinguished from the term "high" in feature (ii) of that claim, that the description of the application defined the term "high" in paragraph [009] and that accordingly, in the context of the whole disclosure of the application, the term "low" was considered to be clear.
  
12. However, these reasons in the report do not clearly and unambiguously justify the answer "False". It is not comprehensible why it should be important for the clarity of the term "low" in feature (vi) of claim I-8 that it is clearly distinct from the term "high" in feature (ii) of that claim. There is also no indication for this approach in the description of the application. Moreover, paragraph [009] of the application does not contain a definition of the term "high", and even if it did, the reasoning that this would provide clarity of the term "low" compared to the term "high" cannot be understood. Nowhere in the description of the application is it stated that the two terms are in such a relationship. Therefore, it is not possible to derive any definite value or any definition for a "low temperature" from the description either.
  
13. In view of the above, the expectation that candidates should be able to derive the clarity of the term "low temperature" in feature (vi) of claim I-8 from the term

"high temperature" in feature (ii) of that claim is not considered justifiable by the Board of Appeal.

14. Further, the report states with regard to statement 12.4:

*"In any case, if a relative term is not the only feature to distinguish the subject-matter of a claim from the prior art, the use of the relative term may not be objected to under Article 84 EPC. The word "low" is not the only feature to distinguish the claim from the prior art, as none of the prior art discloses the claimed process. Although broad, the term is not necessarily unclear [GL 2019 F-IV 4.6.1]."*

15. This further reasoning in the report also does not justify that the answer to statement 12.4 can be clearly and unambiguously stated as "False":

The relevant passage in the GL 2019 F-IV 4.6.1 reads:

*"Relative or similar terms such as "thin", "wide" or "strong" constitute a potentially unclear element due to the fact that their meaning may change depending on the context. For these terms to be allowed, their meaning must be clear in the context of the whole disclosure of the application or patent.*

*However, if a relative or similar term is used by the applicant as the only feature to distinguish the subject-matter of a claim from the prior art, the use of this term is objected to under Art. 84 unless the term has a well-recognised meaning in the particular art, e.g. "high-frequency" in relation to an amplifier, and this is the meaning intended.*

*Where the relative term has no well-recognised meaning the division invites the applicant to replace it, if possible, by a more precise wording found elsewhere in the disclosure as originally filed. Where there is no basis in the disclosure for a clear definition and the term is no longer the only distinguishing feature, it may be retained in the claim, because excising it would generally lead to an extension of the subject-matter beyond the content of the application as filed - in contravention of Art. 123(2)."*

16. It seems highly questionable whether the second paragraph of this passage in the GL 2019 means conversely that if a relative term is not the only feature to distinguish the subject-matter of a claim from the state of the art, the use of this relative term may not be objected to under Article 84 EPC. Rather, it could well be argued that the first paragraph of GL 2019 F-IV 4.6.1 then applies, so that if a relative term is not the only distinguishing feature, it is still required that its *"meaning must be clear in the context of the entire disclosure of the application or patent"*. Furthermore, while paragraph 3 in GL 2019 F-IV 4.6.1 indicates that a relative term may be maintained in a claim if there is no more precise wording and deletion of that term would contravene Article 123(2) EPC, it does not say that the relative term would then be clear. Consequently, even if the term "low" is not the only feature distinguishing claim I-8 from the prior art, this does not mean that claim I-8 is therefore clear and that statement 12.4. must therefore be assessed as "False". Finally, the statement *"Although broad, the term is not necessarily unclear."* in the report does not justify that "False" is the only correct answer to statement 12.4. On the contrary, to say that a broad

claim is not necessarily unclear is simply to say that the breadth of a term cannot be given as grounds for a clarity objection. Nevertheless, a broad term may be unclear for other reasons, e.g. because it is a relative term.

17. For the above reasons, the answer "False" cannot be considered to be the only correct answer that can be given to statement 12.4 when taking an informed and objective view or interpretation of the wording of the facts underlying the pre-examination question 12 and the statement 12.4. As a consequence, the question of whether or not statement 12.4 is correct cannot be answered with either "True" or "False" as required by a "multiple-choice" question in the pre-examination.
18. Since in a pre-examination unclear and confusing facts or statements constitute a serious and obvious mistake, the appeal is well founded and allowable. The further objection concerning statement 19.4 need not be dealt with in this decision. According to Article 24(4), second sentence, REE, the contested decision is to be set aside.

*Request that the contested decision be altered to a PASS grade*

19. The appellant further requests that his answer paper be awarded a PASS grade for the pre-examination 2021.
20. In accordance with the case law of the DBA (see e.g. decisions D 2/14, points 5 et seq. of the Reasons, D 3/14, points 12 et seq. of the Reasons, and D 4/14, points 11 et seq. of the Reasons), the Board of Appeal 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 (OJ EPO 2021, Supplementary publication 1, 67) present themselves for not remitting the case to the Examination Board for a new decision. These reasons allow the Board of Appeal - rather than the Examination Board or the competent Examination Committee - to scrutinise the marks given for the answer to statement 12.4 in the appellant's answer paper in the pre-examination 2021 and decide whether his answer paper is to be awarded a PASS or a FAIL grade on the basis of the revised marking.

21. The appellant's answer "True" to statement 12.4 is to be considered correct for the reasons given above. In the appellant's answers to the statements of question 12, two answers were already marked as correct by the Examination Board and, in accordance with the marking scheme for the pre-examination 2021, 1 mark was awarded for question 12. Taking into account the correction with respect to the appellant's answer to statement 12.4, question 12 is to be awarded now a total of 3 marks pursuant to the marking scheme for the pre-examination 2021. The total marks awarded for the appellant's answer paper in the pre-examination 2021 thus rise from 69 to **71**. For this reason alone, the appellant's answer paper is to be awarded the grade PASS pursuant to Rule 6(2)(a) IPREE. Consequently, there was no need to rule on the appellant's further objection concerning statement 19.4.

*Reimbursement of the appeal fee*

22. The appellant requested reimbursement of the appeal fee. If the Board of Appeal allows the appeal, it orders reimbursement in full or in part of the appeal fee if this is equitable in the circumstances of the case (Article 24(4), third sentence, REE). Given that



the present appeal is successful, a full reimbursement of the appeal fee is equitable. Therefore, the appeal fee is to be reimbursed in full.

*Request regarding the enrolment to (main) European qualifying examination 2022*

23. *The appellant requested: "In case of compliance of the appeal, setting a reasonable deadline for the registration to the main-examination of the EQE 2022, if the deadline has expired."*

It is not within the power of the DBA to decide on such requests. However, to the knowledge of this Board of Appeal, the Examination Secretariat takes into account the special circumstance of a successful appeal against the Examination Board's decision on the pre-examination when considering the timeliness of an enrolment for the (main) European qualifying examination.

## **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 of the European qualifying examination 2021 is awarded the grade PASS pursuant to Rule 6(2) (a) IPREE.
3. The appeal fee is to be reimbursed in full.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated