

BESCHWERDEKAMMERN
DES EUROPÄISCHEN
PATENTAMTS

BOARDS OF APPEAL OF
THE EUROPEAN PATENT
OFFICE

CHAMBRES DE RECOURS
DE L'OFFICE EUROPEEN
DES BREVETS

Case Number: D 0013/93

D E C I S I O N
of the Disciplinary Board of Appeal
of 19 May 1994

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the
European Qualifying Examination dated
9 October 1992.

Composition of the Board:

Chairman: P. Gori

Members: J. Stephens-Ofner

L. Mancini

A. Armengaud

J. Neukom

Summary of Facts and Submissions

I. The Appellant sat the European Qualifying Examination for Professional Representatives on 8/10 April 1992.

II. By registered letter dated 9 October 1992 the Chairman of the Examination Board (hereinafter referred to as the "Board") for the European Qualifying Examination notified the Appellant of his performance in four papers in accordance with the implementing provisions under Article 12 REE published in OJ EPO 1991, pages 88-89 and 226. The grades obtained by the Appellant were as follows:

Paper A:3, Paper B:3, Paper C:6, Paper D:6

The Appellant was therefore informed of not having been successful in the European Qualifying Examination, and was also informed of his freedom to enrol for a future European Qualifying Examination.

III. By letter dated 15 December 1992 the candidate appealed against the above decision, requesting that it be set aside and that he be declared successful in the examination.

IV. In his grounds of appeal, filed on 15 January 1993, the Appellant essentially submitted that:

- (a) in the marking of paper C and D, paragraph II of the implementing provisions under Article 12 REE was infringed;
- (b) a number of questions in paper D, as well as the instructions in paper C, were unclear and misleading;
- (c) in the marking of papers A and D point I of the instructions to candidates to preparing their answers was differently implemented.

When fully analysed, these three objections to the manner in which the papers had been marked boil down to two distinct types of allegation. The first of these constitutes an attack on the manner in which the examination had been conducted, with particular reference to the clarity of the instructions given to candidates, and in particular point I(1) of those instructions, and in consequence the correctness of the marks awarded to the candidate on the papers. In other words, they deal with the substance of the examination procedure *per se*. The second allegation centres upon the infringement of the implementing provisions under Article 12 REE as published in OJ EPO 1991, pages 88 and 89 and 226, as well as on the implicit infringement of Article 11(2) REE as promulgated by a decision of the Administrative Council of 10 June 1983, published in OJ EPO 1983 page 282. It amounts to an assertion that not only the Appellant, but also all candidates whose mother tongue is other than English, French, or German, must in the very nature of the examination, suffer a built-in disadvantage, because they need to read and to understand documentary material written in (to them) three foreign languages, as distinct from those candidates whose mother tongue is one of the above three official languages, who need to do this only in two (to them), foreign languages.

In support of the first allegation, the Appellant gave voluminous details of his performance, and of the marking of the relevant papers, whilst in support of his second allegation (see, paragraph 3.1.1 of the Statement of Grounds of Appeal) he relied, in the main, on the wording and interpretation of the implementing provisions under Article 12 REE II and Article 11(2) REE in the light of, *inter alia* Rule 2 EPC.

V. On the 4 May 1993 the Board decided not to rectify its decision, and forwarded the case to the Disciplinary Board of Appeal for its decision.

VI. The President for the Council of the Institute of Professional Representatives for the EPO and the President of the EPO were consulted under Article 12 of the Regulation on Discipline for Professional Representatives, in conjunction with Article 23(4) REE, and have not made any comment.

Reasons for the Decision

1. The appeal complies with Article 23(2) REE and is therefore admissible.
2. As stated before, the Appellant's Statement of Grounds of Appeal is in two parts: the first dealing with the details and the *minutiae* of the instructions and the marking of the papers by the Examination Board, and the second relying upon detailed legal grounds concerning the alleged disadvantage, and therefore unfair treatment, of certain categories of candidates by the entire scheme of examinations as set up by the REE, and in particular its implementing regulations, especially REE Article 12 (II).
3. The Disciplinary Board of Appeal in reviewing the legality of the contested decision must adhere to the basic and generally accepted principle that in matters connected with examinations the Disciplinary Board of Appeal is empowered only to investigate whether the appealed decision constitutes, or is based on, an infringement of the REE itself, or of higher ranking law and is, accordingly, not empowered to reconsider the entire examination procedure on its merits. It may thus only take into account serious and obvious mistakes that are relevant to the appealed decision, in the sense that the decision would have been different if the mistakes had not been made and, furthermore, that these mistakes must be fundamental ones in the sense that they can be readily verified by the application of the legal principles incorporated in the REE and its implementing regulations. In other words, allegations that a candidate's answers should have been evaluated by the Examiners more favourably do not fall within the jurisdiction of this Board, for value-judgments are not, in principle, subject to judicial review (see cases D1 and D6/92).
4. It follows that the Appellant's first allegation is not susceptible of judicial consideration by this Board.

5. Dealing with the Appellant's second assertion in relation to Article 11(2) REE, the Board is satisfied that the standard of linguistic command that is required for a positive judgment on a candidate's fitness to practice, which is the overriding requirement for deciding whether a candidate shall fail or pass the examination, is not that of a native speaker of any one of the official languages. Rather, it is a standard sufficient to ensure a degree of comprehension of written material, to enable the candidate to practise as a European patent attorney, that is to say as a professional representative under Article 133 and 134 EPC.

There are no doubt a number of European Patent Attorneys who would be able to practise successfully before the relevant patent organs of Contracting States other than their own, and equally there may well be a large number who would be unable to do so, despite being fit and effective practitioners in the EPO, including its judicial arm, the Boards of Appeal. The reason for this lies, of course, in the considerable difference between a degree of command of written material sufficient to pass the qualifying examination, and the verbal facility and dexterity that is indispensable to an effective legal practice in an official language other than one's own native one. Clearly, the required size and depth of active as opposed to passive vocabulary, as well as the familiarity with idiom and syntax needed for effective oral work, far exceeds the corresponding criteria sufficient for effective paper work. It is, therefore, the main, indeed the sole purpose of Rule 2 EPC, on which the Appellant has specifically relied, to bridge this skill-gap by allowing professional representatives to use a language other than the language of the proceedings during the course of oral proceedings before the EPO. The Appellant's inference that the above rule can be prayed in aid of interpreting Article 11(2) REE in such a way as to support his main contention that the entire structure of the REE is unfair to non-English, German or French candidates, is thus not entirely convincing, since no part of the qualifying examination is taken *viva-voce*, and although it is true that Paper D deals with opposition matters, it doesn't follow, as the Appellant has submitted, that Paper D is "tantamount" to oral proceedings. The Board further wishes to observe that it is always open to candidates to give their answers in a language other than one of the official languages i.e. their own native one, subject to the relevant rules governing translation.

6. Accordingly, whilst recognising that the system of examinations established under the REE as at present drafted may contain elements of unfairness, the Board does not think that the possibility of such elements suffices to render invalid the system as a whole, and cannot therefore accept the Appellant's second argument, for it must apply the REE in its present form, irrespective of the possible need to ameliorate some of its provisions - which is the task of the legislature, not of the judiciary.

7. Lastly, the Board sees no valid reason for reimbursing the appeal fee.

Order

For these reasons, it is decided that:

- 1.The appeal is dismissed.
- 2.The request for the reimbursement of the appeal fee is refused.

The Registrar:The Chairman:

M. BeerP. Gori