



Case Number: D 0015/05

D E C I S I O N
of the Disciplinary Board of Appeal
of 14 February 2005

Appellant: N.N.

Decision under appeal: Decision of the Examination Secretariat dated
12 December 2004 refusing the application for
enrolment for the EQE 2005.

Composition of the Board:

Chairman: B. Schachenmann
Members: R. Menapace
K. Büchel

Summary of Facts and Submissions

- I. On 4 October 2004 the Appellant filed by facsimile the application for enrolment for the European qualifying examination ("EQE") 2005, more specifically for re-sitting paper C, together with a debit order for the examination fee. The closure date for the application of re-sitters was 15 November 2004.
- II. At the end of the official enrolment form (EPO Form 51015), which the Appellant used as prescribed in point I.4 of the "Announcement of the European qualifying examination 2005" (JO 2004, 119), just over the space for the candidate's signature the following information is given: "Receipt of your application for enrolment will be acknowledged by e-mail. Candidates who have not received an acknowledgement by 31 December 2004 should contact the Examination Secretariat".
- III. On 20 October 2004 an e-mail was sent to his business address on behalf of the EQE Secretariat, in which the receipt of the enrolment by fax was confirmed and it was stated: "Please send the original enrolment form to us as soon as possible, (OJ EPO 3/2004, p. 120)".
- IV. By letter dated 12 December 2004 the Appellant was informed of the decision of the Head of the Examination Secretariat to refuse the Appellant's application for enrolment for the EQE in 2005 "because the Examination Secretariat has not received a confirmation copy within a period of one month of [the] faxed application dated 04-10-2004, see OJ 3/2004, p. 119-120)".

V. On 3 January 2005 the Appellant filed an appeal against said decision together with a debit order for the appeal fee. He submitted that he had, subsequently to his faxed application, sent a hardcopy of it via regular mail, but that hardcopy did apparently not reach the Examination Secretariat. As it was sent from his home address, he was unable to confirm any other details of it. When faxing the application he was aware only of the previous practice, which allowed faxing of applications of re-sitters without the formal requirement of a confirmation copy. Whilst he regretted his ignorance, he asserted that he acted in good faith and in line with a genuine desire to enrol to paper C of the EQE 2005.

VI. The Presidents of the EPO and the Institute of Professional Representatives were invited to file observations on the matter, but none were received.

Reasons for the Decision

1. Facsimile filing is since long recognized in the proceedings under the EPC, national authorities and even judicial bodies as an efficient, reliable and valid alternative to the time-consuming and often less reliable delivery of documents by post. In line with this, facsimile filing is also available in respect of the application for enrolment for the EQE 2005 - see point I.4 of the "Announcement of the European Qualifying Examination 2005" (JO 2004, 119).

2. According to the conditions governing facsimile filing of patent applications and other documents as laid down by the President of the EPO based on Rule 24(1) and 36(5) EPC in the relatively few cases, where a confirmation is still prescribed, it has to be supplied at the invitation of the Receiving Section/the EPO; the legal sanction for non-compliance with said invitation and its legal basis are expressly indicated: refusal of the Application under Article 91(3) EPC or, respectively, that the facsimile shall be deemed not to have been received, as provided in Rule 36(5) EPC (see Article 4 of the Decision of the President of the EPO dated 26 May 1992, OJ 1992,299). It is the evident purpose of this regime to preserve as much as possible the advantages of facsimile filing and, at the same time, to the extent as the requirement to file a written confirmation in the conventional way is upheld, to diminish as far as possible the risk of loss of rights for non-compliance with that formal requirement.
3. The Regulation on the EQE ("REE") adopted by the Administrative Council of the EPO (OJ 1994,7 with later amendments) as well as the implementing provisions thereto drawn up by the Examination Board under Article 7(6) of the Regulation being silent on the way in which applications for the enrolment for examination have to be "addressed to the Secretariat" (Article 21(1) REE), the admission of facsimile filing and its conditions is a matter of discretion by the department responsible for arranging the yearly EQE, i.e. the Secretariat. This discretionary power has to be exercised in a reasonable manner, i.e. oriented towards the objective purpose and in consideration of general legal principles.

4. The relevant sentence in point I.4 of the Announcement of the EQE 2005 (point 1, above) reads: "Where an application for enrolment is filed by **facsimile**, written confirmation reproducing the contents of the facsimile documents must be supplied within a non-extendable period of one month." Contrary to facsimile filings under the EPC (pt. 2 above), an invitation to file the required confirmation copy is not mentioned, with the effect - at least, as it appears to be the understanding of the Secretariat - that no such formal invitation is issued to the candidate and the one-month time limit has to be calculated from the date of the facsimile filing of the enrolment request. Moreover, the text is silent on what would be the legal consequence, if the confirmation copy is not received by the Secretariat within said time limit.
5. Under these circumstances the apparent practice of the Secretariat to issue an e-mail warning sent to the candidate's personal mailbox, is not an effective compensation for the greater risk which candidates are exposed to under the regime as set out in the preceding point, neither in law (not mandatory, no effect on the calculation of the time limit for filing the confirmation copy), nor in fact, as the present case demonstrates: it was either overlooked by the Appellant, or not understood by him as a warning that the failure to supply "a written confirmation reproducing the contents of the facsimile [enrolment form] within a non-extendable period of one month" from the fax transmittal would render his application invalid. Rather, the wording "Please send the original enrolment form to us as soon as possible", whilst being polite,

leads away from such an understanding and is certainly not suitable as a reminder to that time limit and such a sanction in the case of non-compliance. This is even less so because of the information given in the mandatory application form (see point II, above), from which a candidate may reasonably infer that as regards the receipt of the application documents she/he has nothing to check before the end of the year.

6. The fact that the provisions of the EPC are not directly applicable to the enrolment for the EQE does by no means exempt the Secretariat, which acts on behalf of the EPO, from its obligation to respect well established general legal principles governing all acts of the Office, in particular the protection of legitimate expectations and the obligation to draw attention to easily remediable deficiencies. Where a department of the Office did not take on its side all "due care" required by the circumstances in this respect - e.g. where it issued incomplete or inconsistent and therefore misleading statements - , it acted contrary to good faith. This may not operate to the disadvantage of the addressees and thus it may not lead to a loss of rights for the affected party - as a matter of course, and thus irrespective of whether specific conditions for legal remedies provided by the EPC, e.g. those pursuant to Article 122 EPC, were fulfilled or not. As a consequence, it is of no relevance that in the present case the confirmation copy never made its way to the file. However, there is no need to pursue this issue further, since there exist two (other) reasons for which the impugned decision under appeal cannot stand (see below).

7. Special circumstances which would justify stricter conditions for facsimile filings with the EQE Secretariat than with the rest of the EPO with the effect that candidates were exposed to a higher risk of a loss of rights than it is the case when other documents are filed with the EPO by facsimile are not at all evident. Nor did the decision under appeal invoke such circumstances; rather, the sole ground given for the refusal was the fact, that no confirmation copy had been received within the one-month period. Neither the decision under appeal, nor the Announcement mentioned any legal basis for a refusal, the latter not constituting such a basis already for the mere ground, that it is silent on the legal consequences of not filing a confirmation copy.

8. Given this, the impugned refusal of the application for enrolment for the EQE 2005 is flawed both for inappropriate exercise of discretionary power and for lack of legal basis. For that reason and in view of the Secretariat's role and resulting duties also in respect of candidates, reimbursement in full of the fee for appeal is equitable in the circumstances of the present case (Article 24(4) REE).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside
2. The Appellant's application for enrolment is considered to have been validly filed.
3. Re-imbusement of the fee for appeal is ordered.

The Registrar:

The Chairman:

P. Martorana

B. Schachenmann