

Recorder (Civil) 2009 Qualifying Test December 2009

Feedback Report

Purpose

The purpose of this report is to provide general feedback on candidate performance in the Recorder (Civil) 2009 qualifying test. The first part of the Report describes how the Judicial Appointments Commission (JAC) developed the test and marking schedule, and how the test was structured. The second provides information on the overall performance of candidates in the test, identifying areas where they performed well and where they performed poorly. The third part gives more detailed comments in relation to each of the fifteen questions in the test.

Qualities and Abilities

The test was set to assess:

- Outstanding Intellectual Capacity – the ability quickly to absorb and analyse information
- Authority and Communication Skills – the ability to explain procedure and any decisions reached clearly and succinctly to all those involved

Development of the test

The test and marking schedule were written by two High Court judges nominated by the President of the Queen's Bench Division (PQBD) and the Chancellor of the High Court (the Chancellor). Both judges have extensive experience in both the Chancery and Queen's Bench jurisdictions. The JAC Advisory Group, composed of senior judiciary and representatives of the legal profession, offered advice and guidance during its development. In common with all qualifying tests used by the JAC, both test and marking schedule were subject to an extensive quality- and equality-assurance process. The effectiveness of the test was assessed by means of two dry runs with a range of volunteer lawyers and judges.

Structure of the test

The 90 minute test presented candidates with two scenarios. The first was set in a

hypothetical jurisdiction, that of the *Landlord and Tenant Act 2010*. Candidates were required to apply the hypothetical statute and the *President of the Family Division's Guidance on McKenzie Friends* to a case study and answer nine questions. The second scenario presented candidates with an extract from the *Data Protection Act 1998* and a report of *Gillick v West Norfolk and Wisbech Area Health Authority*. Candidates were required to apply the statute and case law to a case study and answer six questions.

Marking schedule

The marking schedule provided suggested answers and a marking scheme for each question. It allowed for all answers that demonstrated the qualities of outstanding intellectual capacity and authority and communication skills to be rewarded. One hundred marks were available for responses against the marking schedule. Ten further discretionary marks were available to the markers to award for good points raised by candidates not anticipated by the schedule.

Marking of the test

The PQBD and Chancellor nominated eight currently serving members of the judiciary to mark the test. Each judge-marker had extensive experience in the High Court and the county courts.

JAC staff provided a full briefing to the markers at the outset of the marking exercise.

The markers were divided into two teams, with each team taking primary responsibility for marking questions relating to one scenario. Each team was led by a senior judge responsible for guiding their colleagues. Decisions on the interpretation of the marking schedule and use of discretionary marks were taken only after full discussion within the team. Such decisions were recorded and formed a precedent for the marking of subsequent scripts. All scripts were marked anonymously.

Moderation

Markers were invited to identify and put forward for moderation any scripts which they felt that a strict application of the marking schedule either over- or under-rewarded. At the end of the first round of marking, a twenty per cent sample of the scripts was selected for moderation. Those selected included the scripts identified as candidates for moderation by markers; samples of the high-, low- and mid-scoring scripts; all scripts close to the prospective cut-off point for invitation to selection days; and a further random sample. Moderation took the form of markers cross checking each other's work.

The markers concluded markers had been consistent and fair during the first round of marking, and that marking overall had been fair and robust.

It is JAC policy for a Director and the Judicial Appointments Commissioner assigned to a selection exercise to undertake separate quality assurance checks. Their independent conclusion were that marking had been robust and consistent.

Distribution of marks

The highest mark awarded was 80 out of a possible 110 and the lowest 8. There was a broadly even distribution of marks between these two extremes.

General comments on candidate performance

General approach taken by markers

After consultation with the Commissioner assigned to the selection exercise, the markers agreed that they would overlook minor errors made by candidates where the meaning was obvious, for example, references to 'Anton' as 'Boris' and vice versa. The markers also agreed that they would assume a read-across from one answer to another where the sense of later responses demanded. They also agreed that where a candidate presented a list of facts or factors, they would only award marks for those facts or factors listed. That is, the markers agreed not to infer inclusion.

Many of the questions called for the exercise of discretion and allowed the candidate to make a decision either way. Provided the candidate had described a permissible and persuasive route to their decision, by citation of relevant facts and factors important to the discretion, the markers awarded equivalent marks no matter what the decision arrived at.

The markers used the ten discretionary marks sparingly. As and when they identified a point that might have attracted discretionary marks, they shared the issue, jointly decided on the appropriate level of reward, recorded how many marks had been awarded and applied it as a precedent for subsequent scripts. This ensured that the points identified were genuinely new and had not been raised in earlier scripts.

Overall conclusion

The markers were impressed with the general standard of the scripts and with, in particular, the high scoring scripts which fully demonstrated outstanding intellectual capacity as well as authority and communication skills

Areas where candidates could have attracted more marks

Pressure of time

The final view of the markers was that the test had presented candidates with a pressure of time that was an accurate reflection of the pressures of time that a judge working in the Civil jurisdiction would be likely to face. In short, the time allowed for the test paper was about right.

The overwhelming majority of candidates had allowed themselves enough time to assimilate the information they had been provided with and give comprehensive answers to all of the questions. However, it appeared to the markers that a significant minority of candidates had not allowed themselves enough time to provide comprehensive answers to *all* the questions. This was particularly true of the final questions in the paper, questions 14 and 15 in scenario two which, between them, carried 24 marks.

Content

All of the questions called for a decision or response which required findings and reasonings. Candidates were in general more successful in providing clear decisions when addressing the questions relating to scenario 2 which explicitly asked for

decisions than they were in answering questions relating to scenario 1.

Failure to apply the instructions in the Candidate Brief or assimilate information provided in the scenarios

It was clear to the markers that a significant number of candidates lost marks because they ignored the instructions given in the Candidate Brief given on the first page of the test paper. Common issues included:

- candidates wasting time by reciting the facts, and
- candidates failing to deal with the questions on the material they had. There were several examples of candidates seeking further evidence, further submissions, or introducing assumptions about facts not in the materials.

Other common issues included:

- candidates failing to realise that the scenarios related to the day of the trial, either in the fast track or multi track, and thus giving directions or making inappropriate reference to the small claims costs regime,
- candidates summarising the arguments of each side (sometimes very well) but failing to make a final decision between them, and
- candidates not citing the materials provided; or, if citing them, not citing them in specific detail. The markers found it impossible to award many marks to answers that simply referred to the *President's Guidance* or to *Gillick* without saying which part influenced the decision.

Candidates' approach to providing answers

Other candidates could have attained higher scores had they taken a more considered approach to providing answers. Issues included:

- not prioritising questions according to the number of marks they attracted
- not providing answers in sufficient detail to attract the full number of marks available. Some candidates failed to receive the full number of marks available for a question where a large number of marks were available because they did not provide sufficiently detailed answers. Even where a question could be decided simply, facts and reasons supporting the decision had to be cited to gain marks. Question 3 proved particularly problematic in this regard. Equally, some candidates provided long and detailed answers to questions that carried few marks
- not providing answers to all of the questions. The Candidate Brief asked candidates to answer all of the questions set. The markers decided that the natural construction of this instruction was that answer to each question either had to be self-contained, or give appropriate and specific cross reference to a finding in an earlier answer.
- failing to provide detailed and structured answers with analysis of each relevant fact or factor separately. This was particularly evident in the answers to questions in scenario 2, where many candidates did not analyse each item of data; or failed to apply the relevant provisions of the *Data Protection Act* to each item in turn.
- candidates failing to address the obvious themes within sets of questions and failing to making appropriate cross-references. The markers identified the themes of the authority of Mary, and of the agent in scenario 1; and the data in scenario 2 as examples.

Illegible handwriting

Candidates were advised by the test invigilators before starting the test that markers would not be able to award marks to questions they could not read. Despite this advice, a few candidates provided manuscript answers that were partly or wholly illegible. In one case poor handwriting proved to be significant. This was a script that where what was legible attracted high marks but proved mostly illegible.

Bullet point and narrative answers

There was no clear difference between bullet point and narrative answers in terms of marks awarded.

Question by question comment

Scenario 1

Question 1: The question asked candidates to decide what they would do in view of the non-service of proceedings in three different circumstances. The answer required three decisions. The key point is to say that any decision is not binding on Mary. Some candidates inferred (impermissibly) she is in court. The markers considered both a decision to proceed and a decision to adjourn as permissible. Discretionary marks were awarded for:

- citing and applying the overriding objective from the CPR
- referring to any decision made by a candidate in answer to question 2 relating to representation, that is, the issue relating to the law student and adjournment
- citing John's right to contribution.

Question 2: The question asked candidates to decide what they would do in respect of the law student whom John wants to address the court. The question required candidates to provide a full response and decision to be awarded the eight marks that were available. Candidates thus had to refer to the relevant specific points in the *President's Guidance* informing the two decisions. The markers agreed that the preferred sequence of reasoning was reference to Courts and Legal Services Act s 27 *then* to the reference McKenzie Friend (which attracted a discretionary mark) *then* for Citizen's Advice Bureaux/Public Support Unit. Many candidates ran the points together. Some candidates did not realise (possibly because they did not read ahead to question 9(2)) that the landlord was represented.

Question 3: The question asked candidates to explain the significance of Mary's acts. Questions three through six required identification of the facts relevant to each actor and led up to the answers on the statute in questions six through eight. Question three required understanding that Mary's acts are not significant to the surrender. Candidates had to give some reasons for their response to this question. The key issues were to decide whether Mary gave authority to John; and at all stages to

Question 4: The question asked candidates to explain the significance of John's acts. Eight marks were available. The key issue was to provide an analysis of and a decision relating to the acts performed by John (and principally his actions at the agent's office). These were the central findings the candidates had to make. Candidates had either to take the issue of Mary separately; or, alternatively, decide that she gave authority to John. Many candidates did not notice that separation informs the other answers. Other candidates did not separate John's removing *his* possessions from his handing over the keys and explanation to the agent, the latter of which are inconsistent with continuing the tenancy.

Question 5: The question asked candidates to explain the significance of the acts of the letting agent. Eight marks were available. The key issue was a finding that the agent does not have authority to accept surrender but did inform the landlord who alone would decide. Many candidates did not see that the advert for a new tenant was not inconsistent with continuation as the landlord was seeking to limit the breach of occupancy claim and practically to limit the loss of rent.

Question 6: The question asked candidates to decide whether the s.101(3)(a) requirement, relating to acts consistent with immediate termination of a tenancy, was satisfied. Most candidates answered in the affirmative but most did not deal with John having authority (or not) from Mary.

Question 7: The question asked candidates to decide whether the s.101(3)(b) requirement, relating to the landlord's knowledge of acts consistent with immediate termination of a tenancy, was satisfied. Almost all candidates answered in the affirmative.

Question 8: The question asked candidates to decide whether the s.101(3)(c) requirement, relating to the landlord's acknowledgement to the tenant of acts consistent with immediate termination of a tenancy, was satisfied. Most candidates answered in the negative. That is, they got the right answer but did not explain that the critical feature is the absence of the landlord's acknowledgement to John (and Mary). Those candidates who gave a simple 'no' answer were not awarded the full five marks available.

Question 9: This question asked candidates to decide costs in the event that the court held the tenancy was surrendered; and that it was not. The markers awarded most candidates a total of four marks. Costs follow the event. Discretionary marks were available for addressing issues relating to John having time to pay, and for taking an issue-based decision. Many candidates did not appreciate that as a litigant in person John's entitlement was no different.

Scenario 2

Question 10: This question asked candidates to consider whether or not Boris should be able to prevent Anton from making a request under the Data Protection Act (DPA) for his personal data. Most candidates scored well on this but many missed marks because they did not address the point that the definition of 'an individual' in the DPA did not distinguish between adults and minors. The markers gave a discretionary point for those candidates who noted that the fact that Anton as a minor had a suitable Litigation Friend to represent his interests also supported his case.

Question 11: This question asked candidates to consider what items of information were capable of being data within the DPA. Most candidates scored well on this question, appreciating that data could fall within the DPA even if manually recorded. Many dropped points because they did not go on to address separately the position in relation to Anton and Boris.

Question 12: This question asked candidates to consider what items of information were capable of being Anton's personal data. Most candidates scored well on this question. There were a number of candidates who dropped points by not considering the separate items (letter, interview notes, report) separately. The markers did not award discretionary marks to candidates who speculated on other items which might have existed on the grounds that the question did not require them to do so.

The markers concluded that candidates had, in general, found questions 10 through 12 easy to address but questions 13 through 15 very difficult.

Question 13: This question asked candidates to consider what items of information were capable of being Boris's personal data. The main issue was whether or not the notes made by Charmaine of her interview with Anton fell within that category. Relatively few candidates appreciated that it was necessary to go through the detailed analysis of whether the interview notes included reference to Anton's *intentions in respect of* Boris before deciding this question. For this reason very few scored very highly. Candidates commonly and in equal part answered this question by saying either that because the items of information made mention of Boris it 'related' to him and thus was his data; or because it included Anton's opinion of Boris it was his data. The markers gave points for either approach, on the basis that both were credible answers. In neither case, however, did they award maximum marks.

Question 14: This questions asked candidates to consider what order they would make on Anton's request for his personal data. Fifteen marks were available. The question required candidates to consider separately the separate items of information, yet many candidates missed marks by considering only the item which Boris objected to disclosing, that is, his letter of instruction to Charmaine, rather than considering the interview notes and report. Markers did not award a separate point to candidates who noted that Anton was also entitled under s.7(1) to be told about the report and have it communicated to him. The markers did, however, give a *discretionary* mark to candidates who addressed this issue. Very few candidates worked methodically through the question. One way of doing so would have been to consider the DPA to work out whether and, if so, why s.7(4) applied; to consider the possibility of redaction; to work through the s.7(6) factors; and also to consider the wider considerations beyond the s.7(6) factors before reaching a decision. For this reason very few candidates received maximum marks. In some cases the markers were able to infer that candidates attempted this kind of analysis. The markers gave awarded marks to candidates who concluded on credible grounds that they would allow Anton to see everything.

Question 15: This question asked candidates to consider what order they would make on Boris's request for his personal data. Nine marks were available, and one discretionary mark for noting that s.7(4)(b) and 7(6) were engaged because Anton had refused consent. A further discretionary mark was awarded to candidates who noted that s7(6)(c) (capacity to consent) was engaged because of Anton's age. Many candidates missed marks by failing to consider each item of information separately. Candidates who failed to explain whether or not s 7(4)(b) and 7(6) were engaged in relation to each item (and, if so, why) also missed marks.

Questions 13 through 15 relate to Boris's letter - of which he already know the contents – and the Report of which Boris and Anton already had a copy. Few candidates recognised that the practical application of the DPA here is minimal but that the court was being asked to decide legal entitlement by Boris and Anton to each of the three data in the face of Charmaine's refusal to disclose.