

# **Salaried Judge of the First-tier Tribunal (Immigration and Asylum Chamber) – March 2010**

## **Purpose**

The purpose of this report is to provide general feedback on candidate performance in the Salaried Judge of the First-tier Tribunal (Immigration and Asylum Chamber). 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 part provides information on the overall performance of candidates in the test, identifying areas where they performed well and where they performed poorly. It also provides detailed comments in relation to each of the five questions in the test.

## **PART 1**

### **Qualities and Abilities**

The test was set to assess elements of the following qualities and abilities: the quality marked with an asterisk was particularly pertinent to the post.

- Intellectual Capacity\*
- Personal Qualities
- An Ability to Understand and Deal Fairly
- Authority and Communication Skills
- Efficiency

### **Development of the test**

The test and marking schedule were devised by experienced judges of the Immigration and Asylum Chamber (IAC).

The JAC Advisory Group (which is 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 the test and marking schedule were subject to an extensive quality and equality assurance process. The effectiveness of the test was assessed by means of dry runs with a range of volunteer lawyers and judges.

### **Structure of the test**

The 90 minute test presented candidates with a scenario loosely based on a reported decision of the Tribunal in the case of Geert Wilders (GW) and An Immigration Officer, Heathrow. This was chosen because it raised suitable issues for discussion. Its subject-matter was unusual and was unlikely to have been encountered by any of the candidates in the normal course of their work, whether or not the candidate had experience of sitting in the jurisdiction. In order to assist candidates with their preparation, they were each referred to the decision in *GW* in advance, along with the Consolidated AIT Procedure Rules 2005, the 2006 EEA Regulations and the Human Rights Act 1998.

### **Marking schedule**

The marking schedule provided suggested answers and a marking scheme for each question. It allowed for all answers that demonstrated the required qualities and abilities to be rewarded. 90 marks were available for responses against the marking schedule. Where reasons were given which were not anticipated in the marking schedule, marks were awarded where this was felt to be justified.

### **Marking of the test**

Judges of the IAC marked the tests. 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 particular questions. Decisions on the interpretation of the marking schedule were taken only after full discussion within the team. All test papers were marked anonymously.

### **Moderation**

Markers were invited to identify and put forward for moderation any test papers where it was felt that a strict application of the marking schedule had caused either over or under reward. A twenty per cent sample of the test scripts were selected for moderation. Those selected included the scripts identified as candidates for moderation by markers: samples of the high/low/ and mid-scoring test papers; all test papers 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 moderation process concluded that the 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 JAC Commissioner assigned to the selection exercise to undertake separate quality assurance checks. Their independent conclusion was that marking had been robust and consistent.

### **Distribution of marks**

Out of a possible 90 marks, the highest mark awarded was 52 and the lowest mark was 7.

### **General comments on candidate performance**

The scenario and questions were designed with the objective of testing the reasoning skills of the candidates. The need to give reasons was set out in the instructions to candidates and in the questions themselves. A significant proportion of the marks were awarded for the reasons given by candidates to support their decisions. The marking scheme allowed credit, where appropriate, for giving alternative reasons to those anticipated in the marking scheme, provided the reasons were adequately related to the facts and the law. While the marking scheme gave credit for getting the basics right, a number of marks were reserved for further insight or reasoning. This allowed above-average answers to be recognised by the award of additional marks.

A significant proportion of the candidates appear to have been hampered by poor exam technique. In this regard the commonest problem appeared to be misallocation of time. For example, Question 1(a) and Question 1(b) each attracted a maximum of 4 marks while Question 2 was worth no more than 10 marks. Nevertheless, many candidates wrote longer answers for Question 1(a) and Question 1(b), and for Question 2(a) and Question 2(b), than they did for Question 5, which was worth a maximum of 22 marks. However good the answers were to Questions 1 and 2, the marks awarded would not compensate the candidate for the marks lost by not properly addressing Question 5. Of course, examination nerves may also have played their part.

The markers recognised that time was tight. Indeed, as a result of feedback from "dry-run" candidates, Question 1 was significantly shortened. There was time to attempt all the questions, but candidates needed to allocate their time carefully. Some candidates misused their time by unnecessarily recording facts in their answers which were set out in the scenario.

Although an individual candidate might answer a particular question well, in order to be among the higher-scoring candidates, a candidate had to obtain relatively good marks on all the questions. Some candidates who gave quite good answers to Questions 3 and 4 did not leave enough time for Question 5, and were only able to secure a handful of marks from the total of 22 available. This pulled down their overall score considerably.

### **General approach taken by markers**

It was recognised in the marking that there was potential for overlapping answers where a candidate referred to material in one answer which was relevant to another. To allow for this, Questions 3 and 4 were marked together by the same marker. Where the answers to Questions 3 and 4 contained material relevant to Question 5, this was flagged for the marking of Question 5. Answers to Questions 1 and 2 were marked together. No single marker marked an entire answer script.

## **PART 2**

### **Question by question comment**

#### **Question One**

Many candidates gave satisfactory answers to parts (a) and (b) of this question but found part (c) more challenging. Some candidates in attempting to answer part (c) spent time which might have been better utilised on later questions, such as Question 5.

**1a.** Candidates were expected to refer to rule 19(1) of the Procedure Rules and recognise that the Tribunal's power to hear an appeal in the absence of a party is discretionary. There was no compelling reason to adjourn without an explanation for the absence of a Presenting Officer, and without any application to do so. Candidates rarely gave more than one reason in this regard although marks were available for two reasons.

**1b.** Under rule 51(7) of the Procedure Rules, evidence must be made available to all the parties to an appeal, although few candidates referred to this. An opportunity had to be afforded to Mrs Kupan to examine the respondent's bundle, but as the bundle was short it would be possible to proceed that day by putting back the start of the hearing.

**1c.** This question concerned judicial bias. There was no need for the Immigration Judge in the scenario to answer the question posed by Mrs Kupan, as impartiality would be assumed. Very few candidates pointed out that, anyway, mere suspicion of bias is not enough. Marks were awarded for exhibiting knowledge of the test for bias and for reference to one of the leading authorities, such as *Locabail* or *Helow*. Although some candidates wrote lengthy answers no one was awarded more than 6 marks out of 10.

### **Question Two**

These were relatively straightforward questions and this was reflected in the total marks available of 10. Common failings by candidates, however, was a lack of reasoning given for each decision and a tendency to write out the relevant rules rather than explaining how they should be applied.

**2a.** Candidates were expected to refer, in particular, to rule 21(2) of the Procedure Rules on the necessity, or otherwise, of an adjournment. An adjournment would not be justified on the basis of the appellant's sister's admission to hospital without some further justification. Relevant issues might be why she was admitted and how long she was likely to stay, or whether she was to give evidence.

**2b.** Reference here should have been made to rule 21(3). The representative would have to explain why the document was not translated prior to the hearing and how it was material. Might the information contained in the document be obtained in another way?

### **Question Three**

Many candidates gave satisfactory answers to this question and were awarded 50% or more of the available marks. The relevant provisions in relation to the right of appeal were regulations 26 and 27 of the Immigration (European Economic Area) Regulations 2006 (EEA Regulations). Mr Kos was seeking to exercise his right of free movement as an EEA national. He had a right of admission under regulation 11, subject to regulation 19(1), in terms of which the reasons for his visit had to be balanced against public policy/security issues. Articles 8 and 10 of the European Convention on Human Rights were also in issue.

### **Question Four**

Most candidates found this a difficult question and while many were able to make some good points, few candidates came close to taking account of all the relevant factors and giving thorough and complete reasons for their decision. The relevant law was mainly to be found in regulation 21(5) of the EEA regulations. A candidate was expected to show how the factual matrix of the scenario related to the issues in regulation 21(5) and then explain how the assessment of the regulation 21(5) issues would affect the outcome of the appeal. Many candidates referred to the point made in *GW* that it would be rare for conduct to fall within regulation 21(5)(c) if it was not prohibited by law. Fewer candidates gave any further analysis of this or referred to any other authorities, such as *Van Duyn*. The substantive decision in Mr Kos's appeal would reflect the approach in *GW* – what evidence was there to show how British Independence Front (BIF) members might respond to being addressed by Mr Kos and what evidence was there to show that Mr Kos's presence in the UK might result in prohibited acts being committed by him? A number of candidates were given credit for pointing out that a British citizen would not be prevented from addressing the meeting, which raised a question of discrimination. Very few candidates went on to add that as Mr Kos was not resident in the UK he could not rely on the relevant provision (Directive 2004/38/EC, art 24.1; Phelan, 6<sup>th</sup> ed., p1178).

### Question 5

On the face of it, this was an easier question to answer than Question 4, but many candidates were affected by a lack of time. Some points for which marks were awarded may have been considered too obvious. For example, a candidate was expected to explain that article 10 would not confer an absolute right and that there was an issue of proportionality. Some candidates obtained credit for pointing out that the issue might be construed as relating more to the denial of a forum rather than preventing the dissemination of Mr Kos's views, although the two issues are related. Credit was given for pointing out that because Mr Kos had a right of free movement, what otherwise might be a small infringement would nevertheless engage art 10. Although there was no prior prohibition on Mr Kos addressing the BIF conference, in doing so he might commit an offence under the Public Order Act 1986 (as amended). The deciding issue was whether it could be shown that it was necessary in a democratic society for Mr Kos to be excluded from the UK. Of the 22 marks available for this question, a maximum of 10 were allocated to article 10.

A candidate was expected to refer to the qualified nature of art 8. Only one mark was available for referring to the *Razgar* questions. Marks were awarded for pointing out that family life was not usually recognised between adult siblings, and relating this to the scenario. Marks were awarded for identifying issues relating to proportionality, such as the health of Mr Kos's sister and whether she would be able to return to Slovenia to visit or reside. It was unlikely, however, that article 8 was engaged, and even if it was, the exclusion of Mr Kos was unlikely to be disproportionate under article 8.

# **CANDIDATE BRIEF**

**Please read carefully before you start**

**You have 90 minutes to complete the entire test.**

**You should attempt to answer every question.**

**The following is a breakdown of marks available and should help you apportion your time between the questions:**

Question 1 is worth a maximum of **18** marks

Question 2 is worth a maximum of **10** marks

Question 3 is worth a maximum of **14** marks

Question 4 is worth a maximum of **26** marks

Question 5 is worth a maximum of **22** marks

- **The answers will be marked anonymously, so please mark each page of your script with your candidate number only.**
- **You do not have to answer the questions in any particular order, but please mark each section of your answer script clearly with the corresponding question number.**
- **You should give your reasons for each answer.**
- **Bullet points can be used where you find this convenient.**



## Salaried Immigration Judge Qualifying Test

### Introduction

You are an Immigration Judge. You are asked to read and consider the fictional scenario relating to the appeal by Mr. Kos, and answer the questions which follow. You are expected to identify and analyse the issues. Your answers must be supported by reasons.

### Case Scenario

Mr Adrijan Kos is 48 years old and is a national of Slovenia. He is well-known in Slovenia for his xenophobic and anti-Semitic opinions. In July 2006 he was convicted by the District Court in Ljubljana for inciting anti-Semitism. A number of violent crimes against Jews occurred in a very short period of time following Mr Kos's key-note speech to a rally. He was sentenced to four years imprisonment. His appeal against that conviction was upheld but he is to be retried. He is currently on bail. It is unlikely his retrial will start before December, 2010.

Mr Kos's sister works in Manchester. She lives alone and was recently diagnosed with breast cancer. Mr Kos is her only surviving close relative. He applied for the terms of his bail to be varied so that he might be allowed to leave Slovenia to visit his sister. His request was granted.

Mr Kos was invited during the time he was expected to be in Manchester to address the annual conference in Southport of the British Independence Front (BIF). BIF is a breakaway faction of a larger extreme right wing party and is generally regarded in the media as having been formed by individuals with violent racist and anti-Semitic views who regarded the larger party as too moderate.

Mr Kos arrived at Manchester Airport. An Immigration officer refused him admission on the grounds that his presence in the United Kingdom was contrary to public policy and/or public security because of his extreme political views and his past conviction. Mr Kos was informed that he could only appeal this immigration decision from abroad. Mr Kos returned to Slovenia and lodged his appeal.

The grounds of appeal were settled in the following terms.

*"I am a European citizen and have rights to enter England. I have a right to express my opinions and my conviction has been overturned. There are family reasons why I need to see my sister."*

Prior to the hearing, the Tribunal received a letter from Mrs Kupan, Mr Kos's Slovenian advocate. She says she will be attending the hearing on behalf of Mr Kos. In accordance with normal practice, a bundle of documents has been supplied by the Immigration Officer. This is not very large and the main items within it are a report by the Immigration Officer who interviewed Mr Kos at Manchester Airport before refusing him admission as well as several newspaper reports about Mr Kos's xenophobic comments in Slovenia.

Just before you start the hearing, your clerk informs you that there is no presenting officer. No reason is given for the absence of a presenting officer but it is clear from the Tribunal's file that notice of the time, date and place of the hearing was sent to both parties along with directions for documents to be exchanged prior to the hearing.

At the start of the hearing, Mrs Kupan makes several opening observations in what you consider to be very good English. Her comments are:

- She has not seen the Immigration Officer's bundle.
- She is concerned that her client might not receive a fair hearing before a judge who is Jewish and she asks you to specify any religious affiliation you may have.
- Mr Kos's sister wanted to come to the hearing but she was taken into hospital last night.
- She wishes to rely on a judicial report regarding the allegations against Mr Kos, but the report is only available in Slovenian.

## QUESTIONS

### Question 1 (*Maximum of 18 marks*)

**Give your decision on each of the following issues and set out your reasons for your decisions:-**

- (a) the absence of a Presenting Officer; (*Maximum of 4 marks*)
- (b) Mrs Kupan's comment that she has not seen the Immigration Officer's bundle; (*Maximum of 4 marks*)
- (c) the inquiry about your religious affiliation. (*Maximum of 10 marks*)

### Question 2 (*Maximum of 10 marks*)

**Give your decision on each of the following issues and set out your reasons for your decisions:-**

After some discussion of the issues raised in the preceding question, Mrs Kupan applies for an adjournment, in terms of rules 21 and 47 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 on the basis that:

- (a) Mr Kos's sister should be present at the hearing. (6 marks)
- and
- (b) time should be allowed for the Slovenian document to be translated (4 marks)

**Please answer questions 3, 4 and 5 on the assumption that the hearing proceeds before you (either on the same day or at a later date, depending on your answer to question 2).**

### Question 3 (*Maximum of 14 marks*)

Identify and set out the provisions giving a right of appeal to Mr Kos and any restrictions on that right. Set out the substantive issues of law or fact you need to consider and determine in considering the appeal

### Question 4 (*Maximum of 26 marks*)

Explain what decision you would reach on the refusal of admission on public policy or public security grounds under regulation 19(1). In your answer you should set out fully the factors you have taken into account and the reasons on which your decision is based.

### Question 5 (*Maximum of 22 marks*)

Explain what decision you would reach on the application of the European Convention on Human Rights to the appeal. In your answer you should set out fully the factors you have taken into account and the reasons on which your decision is based.