

Circuit Judge 2010

22 June 2010

Qualifying Test Feedback Report

Purpose

The purpose of this report is to provide general feedback on candidate performance in the Circuit Judge 2010 Qualifying Test, used to shortlist candidates to proceed to a selection day. 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 performance was weak. The third part gives more detailed comments in relation to each of the questions in the test.

Qualities and Abilities

The test was set primarily to assess intellectual capacity, specifically the ability to absorb and analyse information. To a lesser extent, it also assessed:

Personal qualities

- Sound judgement
- Decisiveness
- Objectivity

Ability to understand and deal fairly

- Ability to treat everyone with respect and sensitivity regardless of their background

Authority and communication skills

- Ability to explain procedure and any decisions reached clearly and succinctly to all those involved

Efficiency

- Ability to work at speed and under pressure
- Ability to organise time effectively and produce clear reasoned judgments expeditiously

Development of the test

The test and marking schedule were devised by two Circuit Judges nominated by the Senior Presiding Judge, Lord Justice Goldring.

The JAC Advisory Group, which is composed of senior judiciary and representatives of the legal profession, offered advice and guidance during development of the test.

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

There were two parts to the 90-minute test. Part A presented the candidate with six questions on a case study set in a criminal context. Part B comprised three scenarios relating to a case set in a family context, with a total of eight questions. Both parts of the test were designed to be equally accessible to candidates experienced in the crime, civil or family jurisdictions.

A hypothetical Act and Rules were supplied in a separate Supporting Documents Booklet. Candidates were advised to refer only, in their answers, to general principles and the hypothetical Act and Rules given. Candidates were given ten minutes of reading time to familiarise themselves with the supporting documents before the start of the test.

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. A hundred marks were available for responses against the marking schedule, evenly split between Part A and Part B. Up to ten discretionary marks were available to the markers to award for:

- a) Display of focus and clarity of thought in the answers provided, as opposed to a discursive approach
- b) Display of good and logical reasoning in answers; and/or
- c) Good points made that were not anticipated in the marking schedule

Marking of the test

The Senior Presiding Judge nominated four serving Circuit Judges to mark the test papers.

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

The markers were divided into two teams, with one team taking primary responsibility for marking Part A of the test, and the other for marking part B. 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 test papers. All test papers were marked anonymously.

Moderation

A twenty per cent sample of the test papers was selected for moderation. Those selected included samples of the high-, low- and mid-scoring test papers; all test papers close to the cut-off point for invitation to selection days; and a further random sample. Such papers were re-marked by a second marker, without sight of the original marker's sheet. In the event of any significant disparity between the scores given, both markers jointly reviewed the paper and agreed a final mark.

At the conclusion of the moderation process, the markers were all satisfied that the marking had been fair and consistent.

It is JAC policy for a Director and the JAC Commissioner assigned to the selection exercise to undertake separate quality assurance checks. Following that process, a handful of further papers were placed before the markers for review. Once all these steps had been completed, the Director and Assigned Commissioner were satisfied that the approach taken to marking had been robust and the outcome fair.

Distribution of marks

The highest mark awarded was 88 out of a possible 110 and the lowest was 22.

General comments on candidate performance

General approach taken by markers

Many of the questions called for an 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, the markers attributed appropriate marks.

The markers used the discretionary marks sparingly. As and when they identified a point that might attract discretionary marks they shared the issue, jointly decided on the appropriate level of reward, recorded how many marks had been awarded and applied it consistently to all papers.

The markers did not deny candidates marks for minor errors where the meaning was obvious, for example referring to K when they clearly meant H. The markers also read across from one answer to another where the sense of later responses demanded.

Overall conclusion

The markers of Part A considered the general standard of answers to be good. The best answers showed evidence of an ability to make considered decisions and give rulings on points of law or directions to assessors where necessary.

The standard of answers to Part B was generally lower.

Areas where candidates could have attracted more marks

Content

Many of the questions called for a decision or decisive action, for example whether Barry should give oral evidence. Those candidates who merely recited the opposing arguments or considerations without reaching a definite “Yes” or “No” decision achieved fewer marks than those who came to a conclusion. The marking scheme provided for a preferred answer but marks were also awarded for an alternative answer provided it was well reasoned.

It appeared that some candidates missed out on marks due to not fully reading and absorbing the Rules. Marks were available for specifically identifying relevant Rules; candidates who simply made general reference to the Rules missed out on these marks.

In Part A, some candidates took a rather peremptory approach to keeping order, being anxious to remind everyone of who was in charge at all times and occasionally to the extent of threatening counsel with custody for contempt. They would have scored more marks had they not adopted such an approach.

There were a number of marks available in Part A for hearing from counsel. Some candidates “directed”, “reminded” and “explained to” counsel without ever “hearing from” them.

Another common failing in Part A was to proceed on the basis that the Assessors had withdrawn or been directed in accordance with the development of the case, without actually saying so. Candidates could have picked up more marks by making it explicit.

In Part B, those who failed to address the purpose of the proceedings and to take into account the need to balance the interests and welfare of both children scored less well.

Approach to providing answers

A number of candidates had allowed themselves enough time to assimilate the Rules provided, before answering and were then able to answer all the questions, often scoring strongly. This was not apparently the case for all candidates. The markers were of the view, that advance sight of the Rules may have allowed candidates to be fully familiar with the Rules.

Many candidates had not allowed themselves enough time to provide comprehensive answers to all questions, particularly in Part B. The markers felt that where time was an issue for candidates, there was perhaps a loss of confidence, as despite a good start earlier in the test, such candidates lost marks towards the end.

Some candidates could have benefitted from a more considered approach to providing answers, for example

- Reading the question and ensuring it was fully understood and all the points to be answered taken account of
- Prioritising questions according to the number of marks available, and citing the relevant facts or supporting documents to support conclusions reached.
- Answering decisively
- Using bullet points to give reasons for decisions. This generally resulted in being able to get across more information in the time given and score higher marks.

Question by question comment

Part A

Question 1 asked what the candidate would do about failures to comply, referring to the relevant Rules.

Most candidates correctly referred to Rule 11 of the Unified Local Courts Procedure Rules 2009 (ULCPR), but very few specifically identified Rule 6(2) as having been apparently breached. A number of candidates wasted time reiterating the Rules, when simply identifying the correct Rules would have sufficed.

Marks were awarded for directing immediate compliance with the Rules, backed up by a threat of sanction under Rule 13. Many candidates failed to make a positive decision.

The interests of justice required that the defendant be allowed to put forward a defence. These rules, however, required a balance to be struck; the prosecution needed to serve a statement as well. Several candidates proceeded as though the rules did not matter, simply allowing the defence to put forward an unpleaded defence in spite of non compliance with the Rules.

Question 2 asked how the candidate would deal with H's outburst and refusal to enter the dock, including the approach they would take with the Assessors. Candidates were asked to refer to the relevant rules and describe any directions they would give.

The vast majority of candidates rightly said that they would direct the Assessors to ignore the outburst from H before sending them out.

A good answer was to stop H at once and invite his counsel to take instructions before anything further was said; then to order H into the dock and warn him of the consequences of refusal.

Marks were awarded for exploring the option of keeping the defendants separate in the dock.

Marks were available for asking if the prosecution had investigated H's claims, however no candidate made this point.

Supposing there was no evidence to support H's outburst, he should have been warned of the potential consequences of any further outbursts, that is prison or a fine under rule 13.

Question 3 asked how the candidate would proceed in relation to paragraphs 9 and 10 and what decision and what directions they would make.

Marks were awarded for directing immediate service of a statement of the defence case, adjourning for a short time to allow defence to comply.

Candidates were divided over how to deal with the claim that the defence did not want their cases disclosed to the other defendant. Some took a robust approach and ordered immediate compliance; others ordered disclosure to the prosecution and the court but not to the co-defendant. The same marks were available for either argument, provided it was well reasoned.

Question 4 asked how the candidate would deal with a question of bias.

Marks were awarded for:

- asking the Assessors to leave court
- considering, in light of the overriding objective, whether it was possible to be fair
- referring to rule 2(3) which specifically recognises the situation

This was perhaps the easiest question, with most candidates achieving full marks. However, some said that they would discharge the Assessors in light of having heard that K had previously been sentenced to a term of imprisonment. Accordingly, they did not directly address the recusal point on the basis that the trial was coming to an end.

Question 5 asked the candidate to address two issues relating to K's interpreter: H said, firstly, that K could speak perfect English and it was unfair for him to have an interpreter, and secondly that he overheard the interpreter suggesting that K should raise the issue of bias.

Marks were awarded for:

- sending the Assessors out
- questioning K's counsel as to the need for an interpreter
- asking the interpreter whether there was any truth in the allegation that the interpreter advised K to raise the issue of bias
- if yes, discharging the interpreter pending further investigation and replacing him/her as soon as possible
- providing a short ruling to the effect that no unfairness arises and the trial can proceed with a new interpreter
- explaining in open court with the Assessors that the matters had been dealt with

A significant number of candidates followed this process, but many baulked at discharging the interpreter.

Question 6 asked the candidate to deal with an incident that occurred outside the courtroom, where two Assessors observed a witness apparently defying a direct order not to speak to a following witness about the case.

Marks were available for:

- telling the Assessors concerned not to mention the incident to the other Assessors
- extracting a fuller account from the Assessors
- raising the matter (in the absence of Assessors) with all counsel
- questioning the witnesses concerned as to what was said and why
- considering action against the witnesses, or a warning, or proceeding without them
- considering sitting with only four Assessors having discharged two OR proceeding with all Assessors but giving a clear warning not to hold the incident against the defence

It was evident from their answers that some candidates did not grasp the fact that there were two Assessors involved, as opposed to one. As this did not materially affect the approach to take, the markers did not penalise them for this.

Part B: Scenario 1

Question 1.1 asked whether Barry should be allowed to give oral evidence at the fact finding hearing.

Most candidates agreed that the preferred answer was “Yes” but comparatively few scored well on their reasons. A candidate answering “No” could still gain up to 9 out of a possible 11 marks for correctly identifying relevant factors. The majority of candidates attained far fewer than the 11 marks available for this question.

Many candidates referred to Barry’s welfare as paramount, when in fact Section 2 of the hypothetical Intervention in Family Life Act 2009 (IFLA 2009) provided only that the child’s welfare was paramount when a court determines any question with respect to the upbringing of a child. In this case, the issue of Barry’s giving evidence was not about his upbringing as a child. Thus, while his welfare was relevant, it was not paramount and had to be balanced against other factors, for example the benefit to him of being able to defend himself against a serious allegation and the long term consequences to him of any findings that might be made.

Most candidates gained marks for referring to Barry’s functional age and the psychologist’s report. Further marks were available for referring to the fact that his police interview was only audio-taped, not videoed; and that he was less likely to be harmed by giving his explanations in evidence than in being denied the opportunity to do so.

Question 1.2 asked what order would be required to permit Barry to give evidence and be accompanied at the hearing by a volunteer adult.

The relevant provision was rule 10 of the hypothetical Intervention Proceedings Rules 2009 (IPR 2009); the majority of candidates correctly identified this.

Question 1.3 asked whether Grace should be allowed or required to give oral evidence and be cross examined at the fact finding hearing, identifying any significant different factors in respect of Grace, from those relevant to Barry.

The preferred answer was “No”. As with Barry in Q1.1, Grace’s welfare was relevant but not paramount. A good quality video interview with Grace was available, with a detailed account of the incident. Such hearsay evidence was admissible under Section 4(1) of the IFLA 2009. Grace was younger than Barry, but of average maturity. She did not want to give evidence.

As the apparent victim of Barry’s abusive behaviour, Grace was more likely to be harmed by the distress of giving oral evidence against her brother, in circumstances where the mother did not believe her. Few candidates identified this issue.

Many candidates gave the answer “Yes” and then had difficulty giving cogent reasons. A permissible argument would have been that the importance of the issue to Barry may justify cross-examination of Grace despite any harm to her; however few candidates identified the issue of harm to Grace.

Several candidates referred to the video of Grace’s interview with the police being used as her evidence in chief but still required her to be cross-examined. Those who did so thereby failed to link the good quality video with the ability to admit hearsay evidence.

Part B: Scenario 2

Question 2.1 asked if the candidate had powers to require Barry to give evidence.

The correct answer was yes and most candidates received two marks for correctly identifying s3(1) IFLA 2009 as the relevant authority.

Question 2.2 asked whether such a power should be exercised.

“Yes” was the preferred answer, but 4 out of 5 marks were available for a reasoned “No” decision.

The importance of truth in a child protection matter, particularly for Grace in this scenario, strongly favoured Barry giving evidence. An adverse decision would have significant long term effects for Barry and he was less likely to be harmed by giving his explanations in evidence than by not having the opportunity to do so. Under s5(1) IFLA 2009, Barry could not refuse to answer on the ground of self incrimination. Any statement or admission he might make would not be admissible against him in other proceedings (s5(2) IFLA 2009).

If candidates answered “No”, marks were available for arguing that the benefit to the administration of justice had to be measured against any harm to Barry. The court would have to ensure that Barry was warned that an adverse finding could be made against him – very few candidates identified this point. Barry’s police interview and other statements were admissible as hearsay under s4(1) IFLA 2009. A further mark was available for noting that the interview with Barry was audio-taped not videoed and thus qualitatively poorer than video evidence.

Question 2.3 asked the candidate what steps he/she would take to get Barry to court, supposing he were required to give evidence.

This question was generally well answered. To achieve all six marks, candidates needed to identify the steps to be taken, following s3 IFLA 2009. First, order Barry to attend court under s3(1), explaining the importance of the issues. At the functional age of 12 he should be capable of understanding such a direction. Second, order the mother to bring Barry under s3(4). Despite her stated reluctance, she may comply with a direct order. Third, the court could order some other person to bring Barry, under s3(3). The litigation guardian would be the most likely choice, with a police officer being the most heavy-handed method, to be used only as a last resort.

Question 2.4 asked whether media attendance and reporting should be allowed at the fact finding hearing.

The better answer was that attendance and reporting should not be further restricted, but the subsequent reasoning accounted for most marks. Many candidates referred to the relevant hypothetical statutory provisions (in sections 6&7 IFLA 2009) yet failed to apply them properly or at all. Most candidates restricted or barred reporting without good reason, perhaps betraying a prejudice against press reporting.

Few candidates attached appropriate weight to the starting point that there should be publication of fair and accurate reports of the proceedings (s7(1)) or that the attendance of the media and fair and accurate reporting is a right unless the court makes an order restricting it under s6(1).

In addition it was clear from the statutory provision that any restriction on reporting was “exceptional” and had to be “necessary”. Those who said that they would restrict reporting rarely pointed to any exceptional features in the list in s7(2).

The identification of the children was forbidden in any event under s6(2). An anonymised report of the criminal trial had already been published.

The purpose of the reporting, whilst critical of family justice, was not a reason for preventing an accredited reporter from attending and making a “fair and accurate” report.

Overall, few candidates scored highly on this question.

Part B: Scenario 3

Question 3.1 asked the significance, for the issues in the intervention proceedings, of Barry’s acquittal in the criminal trial.

A number of candidates did not answer this question, whether because they ran out of time or simply neglected to turn over the last page. Those who did answer the question, scored well. Marks were available for indicating that there was very little significance to the issues in the intervention proceedings in Barry’s acquittal, and pointing out the differences in the standard of proof and purposes of the two jurisdictions.