

Recorder 2011

22 /23 June 2011

Family Qualifying Test Feedback Report

Purpose

The purpose of this report is to provide general feedback on candidate performance in the Recorder 2011 Family 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 part provides information on the overall performance of candidates in the Family 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 six questions in the test.

Qualities and abilities

The test was set to assess:

Intellectual capacity:

- High level of expertise in your chosen area or profession.
- Ability to absorb and analyse information quickly.
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire knowledge where necessary.

Authority and Communication skills:

- Ability to explain the 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 judgements expeditiously.

Development of the Family test

The test and marking schedule was devised by one Circuit Judge with experience in the Family jurisdiction.

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 a dry run with a range of volunteer barristers, solicitors and members of the legal professions.

Structure of the test

The 90 minute test presented candidates with six questions based on a case scenario set in the Family jurisdiction. The scenario dealt with the final hearing of applications, concerning a five year old boy, whose mother was seeking a residence order and leave to permanently remove the boy from England to Sweden. The father, by way of cross application sought a residence order for his son to remain in England.

Supporting materials were provided for all candidates immediately prior to the test. An additional 15 minutes was provided before the test for reading of these materials, and candidates were permitted to have these materials to hand throughout the test. The supporting materials provided extracts of relevant statutory law, practice guidance, and excerpts of a case.

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. 120 marks were available for responses against the marking schedule. Discretionary marks of up to 5 were available to the markers with regard to question 4. These could be awarded for the quality of the reasoning offered to support the decision made by the candidate. Discretionary marks were not available in conjunction with any of the other questions.

Marking of the test

The Senior Presiding Judge nominated seven judges experienced within the Family jurisdiction to mark the test papers. JAC staff provided a full briefing to the markers at the outset of the marking exercise. The drafting judge also attended and contributed to this briefing.

The markers worked as a group. Test papers were marked individually. Any queries were considered and reviewed with other markers in order to achieve a consistent approach. Any subsequent decisions required on the interpretation of the marking schedule and use of discretionary marks were taken, only following a full discussion within the team and with the drafter. Such decisions were recorded and formed a precedent for the marking of subsequent test papers. 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 was 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; a substantial proportion of those close to the cut-off point for invitation to selection days; and a further random sample.

Such tests were re marked by a second marker, without sight of the original markers score schedule. Where the total for the whole paper awarded in the first and second marking differed, candidates were awarded the higher of the two overall marks.

The moderation process concluded that the markers had been consistent and fair during the first round of marking and that marking 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

The highest mark awarded was 103 out of a possible 120 marks available and the lowest mark awarded was 24.

General comments on candidate performance

General approach taken by markers

The markers considered candidates' answers thoroughly in order to identify the judicial qualities and abilities sought. There were many instances where candidates gave answers, or part answers, which did not attract the full marks yet demonstrated clear ability. Marks were awarded to reflect this where possible and appropriate.

The markers overlooked evident errors, which appeared in some scripts – for example, references to Spain, or Switzerland, in Question 4 when Sweden was clearly meant. Candidates were not penalised for simple errors which may have reflected working under pressure.

Overall conclusion

The general standard varied as can be seen from the distribution of marks. There were relatively few candidates who scored highly. A significant number of candidates appeared inadequately prepared for a test designed to identify potential judges in that they may have not appreciated its practical and quite rigorous nature. In particular the ability to provide a structured reasoned answer, make a reasoned judgement when requested and to be able to work under time constraints.

Areas where candidates could have attracted more marks

A common issue appeared to be failure to read the question thoroughly and to determine three key important aspects,

- what the examiner is looking for;
- what particular instructions are given (for example, no extra marks for extraneous legal knowledge);
- the number of marks each question carries.

There was a failure to provide sufficiently detailed and structured answers with analysis of each relevant factor set out separately. For example, in Question 4 many candidates did not apply the welfare checklist in a structured and analytical way. With the majority of candidates this appeared to lead to a focus on the competing merits of the cases of the parents rather than on the paramount issue of the welfare of the child.

Many candidates failed to assume a judicial mindset by making a clear decision as the question required, and instead merely hinted at what they might do.

Some candidates failed to adhere sufficiently closely to answering the questions that had been posed. Instead there was sometimes a tendency to provide answers which candidates surmised had been asked.

There were those who ignored the clear instructions to refer only to the supporting materials provided alongside the test paper and referred to other legal sources. For example, no additional marks were awarded for references to the ECHR, however apposite, in the context.

Some candidates risked losing valuable marks through poor presentation for example, illegible manuscripts or a lack of clarity of expression.

Question by question comment

Question 1: McKenzie Friend.

The question asked candidates to decide the litigant father's application for a McKenzie Friend and what factors they would take into account. It was worth 16 marks in total.

Generally, candidates scored reasonably well. The answers were all to be extracted from the Practice Guidance supplied to them. However, very few candidates achieved a full score. Explanations for this could have been –

- a failure to make full use of the material. The question offered 16 marks and candidates should have appreciated that there were 16 discrete points to be made;
- a tendency to move too speedily to the overall conclusion without demonstrating a methodical step-by-step approach;
- a failure to follow the clear wording of the Practice Guidance (for example a 'strong presumption' not just a 'presumption').

Few candidates picked up a mark for the point that the father was entitled to assistance from a McKenzie Friend at his preliminary application to present his case for having one at all. A substantial number failed to distinguish, sequentially, the need to establish each one of three clear points about the proposed McKenzie Friend – his relevant experience, the fact that he had no interest in the father’s case and his understanding of the role and duties of a McKenzie Friend.

Question 2: McKenzie Friend as advocate.

The question required candidates to decide whether a McKenzie Friend could act as an advocate for the father. 9 marks were available.

Generally, candidates tended to score well. Again, however, some failed to make use of the material provided which, for this question, was only a small section within the Practice Guidance provided in the supplementary materials. Some candidates drew, incorrectly, on supplementary material relevant to the using the McKenzie Friend generally, as opposed to using him as an advocate.

Question 3: Evidence.

The question required candidates to rule on the father’s application to put in evidence supporting letters which were not in the form of witness statements and whose authors were not at court. 5 marks were available.

Many candidates failed to identify clearly the distinction between the admissibility of the letters and the weight to be attached to them. A majority missed the first mark for late production of the letters not being a reason for refusing to admit them on the grounds that mother’s counsel could take instructions on their content.

Question 4: The application to remove a child from the jurisdiction.

This question asked candidates, in effect, to give a judgment on the mother’s application to remove the child from the jurisdiction. It required consideration of the Children Act 1989, s. 1, and an extract from the decision of the Court of Appeal in *Payne –v- Payne* [2001] EWCA Civ 166. It carried a total of 65 marks.

This was the single most high-scoring question. Although marks were gained by discrete reference to specific factors, candidates still had some scope to demonstrate a judicial approach. No candidate scored full marks. Some did relatively poorly, principally through a failure to apply themselves methodically to the welfare checklist or by concentrating too heavily on the competing merits of the parents’ cases, rather than on the paramount issue of the welfare of the child.

The facts given were intended to elicit a decision rejecting the mother’s application to remove the child from the jurisdiction, which carried 5 marks; however markers had a discretionary 5 marks to award for a well-reasoned answer in which the application was granted.

Question 5: Orders to be made if the application to remove had been granted.

This question required candidates to decide on the orders to be made on the assumption that the mother's application to remove the child had been granted. It was worth 10 marks.

This required of candidates a strictly practical, and to some extent imaginative, approach. It was generally well-answered. A majority of candidates, however, failed to score a mark for making a residence order in favour of the mother. Many failed to provide sufficient detail of the contact they would order. For example, distinguishing between contact in the UK and contact in Sweden.

A surprisingly significant number of candidates failed to score marks for making a residence order to the mother or by ordering such further contact as the mother and father might agree between them. There was, overall, an absence of an application to the fine detail, which the making of a contact order would require. The answer plainly followed from the decision which candidates had been asked to make in question 4. At the same time many candidates did show some skill and ingenuity with practical suggestions. For example, the making of 'mirror orders' and suggesting undertakings to return to the jurisdiction.

Question 6: Deciding the father's application for a Residence Order.

This question was posed on the assumption that the mother's application to remove the child to Sweden had been refused. Candidates were required to deal with the father's application for a residence order. Fifteen marks were available.

The key to this question was identification of the 'no order' principle at that stage. Many candidates failed to spot this, or in some cases, where they did, they failed to apply it. Numerous candidates who would have made a residence order, in fact, made a shared residence order without adequate, or well-reasoned, justification for it. Many candidates canvassed the welfare checklist when the question did not require, or invite, them to do so. There were a full 5 marks for the answer 'unless there is a good reason to believe mother would not adhere to the current arrangements, no order should be made upon the application'. Only a few candidates gave this answer.