

Improving Selection to the Foundation Programme

Appendix A

Legal opinion, July 2011



**ADVICE TO THE UK FOUNDATION PROGRAMME ON ARRANGEMENTS FOR
RECRUITMENT TO THE FOUNDATION PROGRAMME IN THE UNITED KINGDOM**

I set out below the legal questions that have been raised, together with my advice.

1. Are the new arrangements compliant with all relevant legislation?

We have considered in particular the requirements of employment and equalities law, human rights, data protection and public law. There are some potential areas of challenge in relation to the area of equality and diversity. Otherwise, we consider that the proposals are consistent with relevant legislation.

2. If not, what aspects might be challenged and on what grounds?

The particular areas of challenge are dealt with in response to the specific queries below.

Recognising that there are potentially issues around the different aspects of the process, further questions related to the different aspects are:

Inclusion of professional domains in the FP Person Specification

3. Is it reasonable for the FP Person Specification to include the professional domains identified through the Job Analysis of the F1 post undertaken as part of this project?

We have no concerns about the inclusion of the professional domains in the person specification.

Use of an invigilated SJT

4. It is proposed that selection should in part be determined by an assessment of likely professional judgements and professionalism as these traits strongly relate to job performance. Is this a reasonable measure of the qualities of the applicant in



relation to the UKFPO Person Specification, in particular, professional judgements in likely work based contexts?

It is right that the selection of successful candidates should be based on traits which are proven to relate to a strong performance in the role. Clearly, those traits should also be reflected in the person specification. Therefore, provided that the matters being assessed fall within one of the categories set out in the person specification, we consider that this is an acceptable and reasonable measure of an applicant's qualities.

Having reviewed the paper prepared following the pilot SJTs, we note that there was evidence that non-British participants scored lower than British participants on all tests and that the difference in scores, although small, was statistically significant. This does raise the prospect of potential claims of discrimination on the basis of race.

Section 19 of the Equality Act provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ('PCP') which is discriminatory in relation to a relevant protected characteristic of B's. Subsection (2) of section 19 goes on to explain that a PCP is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply it to persons with whom B does not share the characteristic,
- (b) it puts or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

The protected characteristics which are covered under this provision are age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation.

Applying these provisions to the proposal that applicants undertake the SJT, we consider that applicants from overseas could seek to make out grounds (a) to (c) on the basis of the data



which currently exists. We are mindful of the fact that the numbers in the non-British group are small, which renders the data unreliable as being representative of the group as a whole. However, on the face of it the pilot scheme does demonstrate that as a group non-UK candidates are at a disadvantage.

The question that will need to be addressed by the Foundation Programme is whether this disadvantage can be justified as a proportionate means of achieving a legitimate aim. In this circumstance, it is our view that the goal of recruiting the most suitable candidates onto the foundation programme is a legitimate aim. We note that the research literature indicates that SJTs have significant validity in predicting job performance and can offer incremental validity over methods such as ability tests and personality questionnaires. Furthermore, they may be fairer than other methods in contexts where candidates have little or no experience in the target job, and tend to show smaller differences between candidate groups (e.g. based on race) than cognitive ability tests. These factors are all relevant in considering whether the use of the SJT and the need for it to be undertaken in the UK could be justified.

The question of whether the means of achieving this aim are proportionate is more difficult to assess on the basis of the information currently before us, because we do not have any information about what element of the test is creating the disadvantage. If it is the content of the test itself, we consider that it is likely that it would be considered to be proportionate given the very thorough analysis that has been undertaken into the attributes to be tested and their correlation with strong performance in the FY1 role. However, it is necessary to consider whether there are other means of achieving the same end that do not have the same potential to discriminate against certain protected groups. Clearly, to date the Foundation Programme has managed applications without using the SJT. Is there evidence that in doing so it has not always selected the most appropriate candidates or that the current selection process has resulted in anomalies or hardship for applicants? Can some of the benefits of the SJT in terms of predicting job performance and general fairness be achieved by other selection methods that are less likely to have a detrimental impact on some applicants?

Secondly, if the disadvantage is created by a factor other than the content of the test itself, such as language or cultural misunderstanding, then there may be an expectation that more could be done to address the issue. For example, whilst it is reasonable and lawful to expect that a doctor coming to the UK will have a knowledge of the English language which is



commensurate with an ability to undertake safe and effective clinical practice, there may still need to be some recognition of the fact that English is not the first language by offering (say) additional time for non-English speakers to complete the test.

Based on the issues set out above we consider that this is an area which might be open to challenge and where there is a small risk that such challenge could be successful. We recommend that in order to reduce this risk, some research could be undertaken into the reasons for the difference in score between UK and non-UK participants and that the results of this research, together with the outcomes of it, be recorded. This would be consistent with the general approach to assessing the equality impact of new measures that a public body proposes to take. We are, however, mindful that the difference in scores appear to actually be very small and, as mentioned, the sample used in the pilot test was very small so that it could be argued that it was not representative. It is therefore questionable whether, in reality, the difference is really sufficient to support an argument of discrimination.

5. Is it reasonable to run the SJT only on a small number of days (c. 3)?

Yes, in our view, bearing in mind the costs and practical difficulties involved in running an SJT, we consider that it is reasonable to limit the available days to a relatively small number. However, the limitation may be relevant when considered alongside the requirements to undertake the SJT in the UK, and to pay any travel expenses for attending the SJT, which are considered below.

6. To simplify administration it is assumed that UK applicants would sit the SJT at a venue provided by their medical school, while overseas applicants would be invited to sit the test at a UK venue selected to be convenient for overseas travel (e.g. London). Is it reasonable to require all applicants to undertake the SJT in the UK?

As with the matters discussed at 4 above, there is a risk of indirect discrimination claims from applicants that will be placed at a disadvantage by the requirement to undertake the SJT in the UK. Most obviously, those applicants from overseas will be required to travel to the UK in order to undertake the SJT. The question for the Foundation Programme is whether it could



show that the requirement to undertake the SJT in the UK is a proportionate means of achieving a legitimate aim.

The question of whether or not the requirement for candidates to sit the SJT in the UK is justified will depend upon the reasoning behind the decision that the test should be UK based. The key question which will be asked is whether it is possible to offer an arrangement whereby the SJT can be undertaken by overseas applicants without the need to travel, in order to reduce the potential adverse impact for applicants of attending test centres in the UK. For example, could the test be undertaken electronically and invigilated by someone local, or could it be taken at their own medical school? We note the assertion that the decision to hold the tests in the UK is to 'simplify administration'. If a decision were taken to hold tests at overseas medical schools, what would the consequences and barriers be? Would the administration and cost associated with it be so significant as to be potentially prohibitive? Has this been considered in any detail?

As above, we consider that this is an area which might be open to challenge and where there is a small risk that such a challenge could be successful. We recommend that in order to reduce this risk, detailed consideration be given to the justification for only holding tests in the UK, and/or to the possibility of tests being undertaken outside the UK; and that the decision taken as a result of that consideration, and the reasons for it, be recorded.

7. Is it reasonable to require applicants to pay their own travel expenses for attending the SJT?

This requirement will put applicants from overseas at a further disadvantage given the much higher costs that will be associated with taking the test. UK based participants need only pay the cost of attending their usual medical school whereas overseas applicants will have to fund significant travel costs and, potentially, accommodation as well.

As with the other examples of indirect discrimination, the Foundation Programme will need to demonstrate that the requirement for applicants to pay their own travel costs is a proportionate means of achieving a legitimate aim.



The briefing note does not provide an explanation of the reasons for the decision that applicants should bear their own costs. However, I anticipate that it is cost driven (if this is not the case please let me know) given the enormous expenditure which would be associated with paying travel costs of all applicants.

The legal position in relation to cost as a legitimate aim is currently unsettled. Historically, it has been the case that discriminatory practices cannot be justified on the basis of cost alone, although cost may be taken into account alongside other factors. However, two recent Employment Appeal Tribunal decisions criticised this approach and suggested that where the costs involved in avoiding indirectly discriminatory practice would far outweigh the impact of the discrimination, then cost might properly be considered to be a legitimate aim. There is likely to be further case law on this issue and it is an area which we expect to see develop significantly over the coming months.

In view of the cumulative impact of this requirement; the requirement to undertake SJT in the UK and to do so on a limited number of days, we consider this area is vulnerable to challenge. It may therefore be worth considering what steps could be taken to mitigate against the potentially unfair/discriminatory consequences of these requirements, such as introducing hardship grants for those overseas applicants who can demonstrate that they will suffer significant financial hardship if they are required to fund their own travel for the SJT.

8. The funding arrangements for SJT have yet to be determined. One option would be to require applicants to pay a fee to take the test, the fee being set to recover the cost of the SJT. Would such an option be reasonable? Do Whitley Council rules permit it? If that option were adopted, could the fees due from UK applicants be included in, and taken out, of their medical school fees? (e.g. the medical school fees for membership of the Medical Schools Council Assessment Alliance - who would be hosting the SJT item banking arrangements and responsible for development of the SJT for future years - would be increased to include an element to cover a fee to take the SJT).

We consider that it is lawful and reasonable to charge a fee in connection with the SJT, provided that the fee is payable by all applicants equally. Further, it is our view that the fees



due from UK applicants could be included within medical school fees if that were the preferred approach, and medical schools agree to it.

- 9. One possibility being considered is that a threshold SJT score or ranking might be set, below which applicants might be subject to further scrutiny as to whether they meet the UKFPO Person Specification for employment. For example, the answers to the SJT items of the 5% lowest scoring applicants might be subject to further investigation. Would such an approach be reasonable and provide sufficient evidence to exclude the candidate from the application process?**

Yes, provided that the process is set out in advance, is applied equally and fairly to all candidates and that each applicant is considered against the same, specific criteria, this approach would seem to be reasonable and appropriate.

Use of the EPM

- 10. Is it reasonable to use the EPM as a measure of the applicant's overall academic achievement, including clinical skills and knowledge, up to the point of application to the FP?**

Yes, we have no concerns about the use of the EPM in principle as a measure of academic achievement.

- 11. Is it reasonable to award points for the achievement of additional degrees, prizes, publications and presentations up to the point of application to the FP?**

Yes, this would appear to be a reasonable and sensible approach. However, it must be borne in mind that the allocation of points for such additional merits may need to take into account non-standard achievements which are of a similar level, including those gained outside the UK. It must also take account of academic achievements which may now be outdated but which have comparable status in order to avoid any possible taint of discrimination on grounds of age.



This may, in practice, be a very difficult process to manage and assess fairly and may leave the scheme open to criticism and challenge where disputes arise about the relative merits of a particular achievement.

12. Is it reasonable to require each applicant (whether from a UK or overseas medical school) to have a decile score provided in a verifiable form by their medical school?

There is a risk that this will put overseas applicants at a disadvantage if their medical schools are unwilling or unable to provide decile scores. If the UKFPO has evidence of the willingness of medical schools, including those outside the UK, to provide decile scores, this will be highly relevant in assessing the impact of this proposal. Provided the impact assessment does not suggest that those applicants from overseas will be placed at a significant disadvantage as a result of this requirement, and that the scores produced are properly and fairly comparable to one another, this is a reasonable requirement.

As above, there is the potential for dispute here which may ultimately lead to criticism and challenge. The process will therefore need to be scrutinised closely and must be absolutely transparent.

13. If applicants cannot provide evidence of their decile score, is it reasonable to treat them as if they were in the lowest decile? (We believe that any other approach, such as treating them as an average applicant, would be open to abuse, in that an applicant with a low EPM score might claim to be unable to provide it, and thus gain an advantage.)

Yes, this would be reasonable if the applicant is unable to produce evidence of their decile score where they are unable to show that the failure is caused by any external factor outside their control. However, as a matter of fairness if, for example, there is clear evidence the failure to produce the score is due to an error or failure on the part of the medical school, there may need to be an alternative mechanism in place for assessing academic achievement on an individual basis.



14. Is it reasonable to require UK medical schools to publish the framework upon which they have derived the EPM rankings for their applicants?

Yes, we consider that it is appropriate and reasonable that the frameworks used by medical schools be published. This will help to ensure that fair and comparable results are produced across medical schools and should help to eradicate potential criticisms or challenges.

You should, however, be aware that having those frameworks in the public domain will leave them open to scrutiny from disgruntled applicants and, if there are elements of unfairness arising from the frameworks, it may aid a challenge.

15. Is it reasonable to require non-UK medical schools to do likewise?

Yes. However, in order to ensure fairness and comparability, detailed guidance must be issued in order to aid the medical schools in assessing the level of achievement in comparison with standard UK results. Further, there must be sufficient flexibility in the process to allow for recognition of non-standard achievements which are of comparable weight to the standard merits which are awarded points.

16. Where an applicant re-sits the final year of their medical school degree course, is it reasonable to use their original EPM (e.g. their ranking in their original cohort at medical school, rather than their ranking compared with the cohort among which they spend their re-sit year. The basket of assessments up to the point of application would be unchanged, as this would reflect only time at medical school prior to the final year)?

Yes, we consider that this would be a reasonable approach.

17. Is it reasonable to allow each medical school to determine which assessments should count towards the ranking?

It is our view that to allow too much flexibility may lead to an increased risk of criticism and challenge. There could be the potential for medical schools to skew their data to ensure that their candidates score highly, thereby improving their results and their own reputation.



However, there clearly needs to be some degree of flexibility in place in recognition of the fact that medical schools outside the UK will not apply the same assessments.

I consider that the best approach would be to allow some discretion to the medical schools within a central framework and subject to detailed guidance.

SJT/EPM weighting

18. It is proposed that each applicant will be given an overall score derived from the SJT and EPM for the purpose of selection. In deriving this overall score. Is it reasonable to use a combination of the two measures?

Yes, we consider that this approach is reasonable.

19. Is it reasonable to give an equal weighting to the SJT and EPM?

It is our view that the weighting awarded to each score should be determined by the relative value of the information obtained. For example, if the studies show that performance on the SJT has a significantly higher correlation with subsequent performance in the FY1 role, it would be sensible to apportion slightly more weight to that element of the process than to the EPM.

Whatever weighting is determined to be appropriate, it must be applied equally and fairly and it should be made known to the applicants in advance of the process.

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