



## DECISION 20 - 411

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of the Examination Appeals Board of Leiden University  
in the matter of the appeal of

[name] from [place], appellant,

against

the Board of the Faculty [X], respondent.

### **The course of the proceedings**

The respondent admitted the appellant to the Master's Programme in [X], specialising in [X] (hereinafter: the Programme), subject to the condition that he met the language skills requirements as laid down in Article 5.2.3.2 of the Course and Examination Regulations (*Onderwijs en examenregeling*, OER).

In the decision of 2 September 2020, the respondent informed the appellant that the results of the TOEFL test he sat on 17 August 2020 were not good enough to be able to admit him to the programme.

On 11 September 2020, the appellant submitted an administrative appeal against this decision.

The respondent informed the Examination Appeals Board that an attempt was made to reach an amicable agreement on 2 October 2020. No amicable settlement between the parties was reached.

The respondent submitted a letter of defence on 9 October 2020.

The appeal was considered on 18 November 2020 during a public hearing of a chamber of the Examination Appeals Board. The appellant was present at the hearing. [name], chairman of the Board of Admissions of the Faculty [X] (hereinafter referred to as "the Board of Admissions"), appeared on behalf of the



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### Considerations

#### 1 – Facts and circumstances

The appellant requested to be admitted to the programme. The respondent admitted him conditionally to the programme, on the condition that he achieved a minimum result of 100 points in the TOEFL test, with a minimum of 25 points in each of the four components.

On 17 August 2020, the appellant sat an online TOEFL test. He achieved a total result of 103 points, composed of 28 points for the component “reading”, 28 points for the component “listening”, 24 points for the component “speaking”, and 23 points for the component “writing”.

On 7 October 2020, the appellant sat another TOEFL test. He achieved a total result of 106 points, composed of 26 points for the component “reading”, 28 points for the component “listening”, 24 points for the component “speaking”, and 28 points for the component “writing”.

#### 2 – The position of the respondent

According to the respondent, the results of the appellant in the TOEFL test(s) are insufficient to admit him to the programme. The respondent holds that it was possible up to 21 September 2020 to qualify by tests sat in September 2020. Even the TOEFL test that the appellant sat on 7 October 2020 was taken into consideration, but the achieved result did not meet the requirement. Although the respondent would like to see the appellant in the programme, as stated at the hearing, this is impossible since he does not meet the admission requirements. These requirements apply to all students and the respondent is unwilling to make exceptions to this. Out of a total of 240 candidates, 14 to 15 candidates were rejected as a consequence of an unsatisfactory result in the TOEFL test.

A few years ago, the programme raised the admission requirements in the field of language skills. The respondent does not have the discretion to diverge from these requirements. Moreover, this would not be fair to other students.



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The appellant argued that, in his opinion, there were special circumstances that would provide grounds to diverge from the strict admission requirements. Due to corona measures, he was only able to sit an online TOEFL test, which limited his opportunities to take the language skills test. He finds it difficult to “speak” online. It was also relevant that he was in a lockdown situation in [X] when he sat the test and was not able to take the test in peace and quiet in his home environment.

The appellant holds that he has sufficient language skills in English. His level of English is C1. Five years ago, he was awarded a Cambridge Certificate in Advanced English. He also attended an Erasmus Programme at [X] University for a year and lived in [X] and [X] for several years.

The appellant wishes to demonstrate in a different manner that he has sufficient language skills in English. In the context of the programme that he has been attending since 1 September 2020, he has completed an assignment that demonstrates that he has adequate language skills. He also participates in projects.

He wants to continue with this programme and is trying to catch up the weeks he was unable to attend due to the fact that his university account was closed in early November. His final grades are a 7 for a group assignment, a 7.8 and 7.5 for a paper.

4 – Relevant legislation

In so far as relevant, the Course and Examination Regulations of the Master's Programme in [X] 2020-2021 (“OER”) stipulates:

Article 2.8.1

Subject to the Code of Conduct on the Language of Instruction and Examination, the language in which the instruction is given is *English*, and the language in which the examinations and final examinations are held is: *English*. Students are expected to have an adequate command of the language(s) of instruction and examination in the programme, in accordance with the requirements stated in article 5.2.3. As appropriate, the Faculty publishes OER in English for English-taught programmes.

Article 5.2.3.1

(...) a student who wishes to be admitted to an English-taught master's programme must have one of the following diplomas or must meet the criteria of:

- an international Baccalaureate diploma (with English A);



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- a diploma of secondary or higher education completed in the United States, the United Kingdom, Ireland, New Zealand, Australia or Canada (with the exception of French-taught education in Canada)
- a diploma of an English-taught university degree programme completed at a Dutch research university;
- a pre-university education (VWO) diploma;
- a high school (of higher) diploma determined by SEA (Admissions Office) in an EER country, where English has been studied up to and including the final year of the programme, and where the level of English can be considered comparable to Dutch VWO (pre-university education);
- course units to be determined by the Board of Admissions, which provide evidence of a particular level of language, obtained in a bachelor's programme.

Article 5.2.3.2

If a student who wishes to be admitted does not meet the requirements in 5.3.2.1, at least one of the following language requirements can be set:

- IELTS 7,0 (a minimum score of IELTS 7,0 required for each of the four components);
- TOEFL (internet based) 100, a minimum score of TOEFL 25 is required for each of the four components;
- CPE of CAE 185.

5 – Considerations with regard to the dispute

In accordance with article 7.61, paragraph two, of the Higher Education and Academic Research Act (*Wet op het Hoger Onderwijs en Wetenschappelijk Onderzoek*; WHW), the Examination Appeals Board must consider whether the contested decision contravenes the law.

The Examination Appeals Board notes that requirements that are set in Article 5.2.3.2 of the OER on the language skills test are intended to be able to assess whether the student has sufficient skills in the English language to be able to attend and complete the programme successfully. This follows from Article 2.8.1. of the OER (“*to have an adequate command of the language(s) of instruction and examination in the programme*”).

The authority to admit or not to admit a student to the programme has been delegated by the legislator to the Board of the Institution (read: the Faculty Board). This authority is exercised on behalf of this Board by the Board of Admissions, of which the members were appointed based on their expertise in the content of the relevant programme. In order to adopt resolutions efficiently, some of the admission requests are decided upon by the Admissions Office on behalf of



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the Board of Admissions Committee. The Board of Admissions is also fully responsible for these decisions. The Admissions Office itself does not have authority in the matter. That is also the reason why the Board of Admissions appears in procedures relating to the admission of students on behalf of the Faculty Board and not the Admissions Office.

The above does not detract from the fact that the Examination Appeals Board understands the practical choice to allow the Admissions Office to assess whether prospective students meet the admission requirements set in the OER that are applied objectively. The involvement of the Admissions Office will ensure, for example, that the evaluation of foreign diploma's based on which admission is requested is carried out in a uniform manner. However, the Board of Admissions cannot take refuge behind the Admissions Office and it may be expected to consider whether it actually wishes to support a decision taken by the Admissions Office when an appeal is lodged against a negative decision. The amicable settlement procedure, which is compulsory by law, or efforts to reach such a settlement, is an adequate means to achieve this.

Although the OER allows students an explicit option to choose from various language skills tests, each with its own characteristics, the respondent has not refuted that the appellant was unable to exercise this choice due to the corona measures. At the time, it was only possible to sit the TOEFL test online. Furthermore, it was not refuted when the appellant stated that he had issues with explicitly taking this test online. This relates both to his sub-optimal home situation during a lockdown, as well as to the "speaking" component, which he finds difficult. However, it is not acceptable that the negative consequences of the outbreak of the corona virus can be passed onto the student unilaterally in this manner. In these circumstances, the Examination Appeals Board deems it not reasonable to adhere literally to the requirement set in the OER in respect of the TOEFL test, namely that students must at least achieve 25 points for each component of the TOEFL test. This required a substantial assessment, taking into account all facts and circumstances of the specific case. Such assessment was – also pending the administrative appeal – withheld wrongfully.

In all of the components of the TOEFL test he sat and submitted in this procedure, the appellant achieved a final score well over the required minimum score of 100 points and achieved well over the required minimum in three components. He only performed one point short of the requirement twice in the component "speaking". Moreover, it cannot be ignored that the appellant attended a university programme of a year taught in English at [X] university and that he has demonstrated in the first few months of this study year that he can attend lectures in this programme successfully and achieve good results in the programme.



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Based on this, it cannot be maintained that the appellant does not “have an adequate command of the language(s) of instruction and examination in the programme”, as required by the OER. As such, taking into account the exceptional circumstances we find ourselves in at present, he has met the conditions set in the admission decision with regard to his English language skills. Since the respondent has not argued nor demonstrated otherwise that the appellant does not meet any of the other admission requirements laid down in the OER, this leads to the fact that he was admitted unconditionally to the programme as of 1 September 2020. This does not require a further decision.

The above considerations entail that the contested decision was not prepared with the required rigour and cannot be supported by the arguments upon which it is based. As such, the decision was taken contrary to Articles 3:2 and 3:46 of the General Administrative Law Act (*Algemene Wet bestuursrecht*). Hence, the appeal is founded and the decision must be annulled.

The Examination Appeals Board deems it conceivable that the appellant has experienced obstacles and/or limitations when studying as a consequence of the decision of 2 September 2020. It is up to the respondent to ensure, in consultation with the appellant, that he will be compensated accordingly in order to prevent any study delay or further study delay as far as possible. This includes that the appellant will be supported by the university in the usual manner to obtain any residence documents he needs, to regain access to BrightSpace, and be allowed to register for education and examinations. The Examination Appeals Board assumes that the respondent will ensure or facilitate that this will be arranged in the short term, on its own initiative. For this reason, the Examination Appeals Board refrains from including an instruction to this effect in this decision.



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**The decision**

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The Examination Appeals Board of Leiden University,

- I. holds the appeal founded;
- II. annuls the decision of 2 September 2020,

in view of article 7.61 of the Higher Education and Academic Research Act.

Established by a chamber of the Examination Appeals Board, comprised of: O. van Loon, LL.M, (Chair), Dr A.M. Rademaker, Dr J.J. Hylkema, M.C. Klink M.Jur. BA, and E.L. Mendez Correa, LL.B. (members), in the presence of the Secretary of the Examination Appeals Board, I.L. Schretlen, LL.M.

O. van Loon, LL.M.,  
Chair

I.L. Schretlen, LL.M.,  
Secretary

Certified true copy,

Sent on: