Neutral Citation Number: [2009] IEHC 12

THE HIGH COURT

2004 1143 JR

BETWEEN

AHMED KHASHABA

APPLICANT

AND

MEDICAL COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Bryan McMahon delivered on the 20th day of January, 2009

The applicant is a British national with an Egyptian background. He took his medical degree in London and most of his subsequent medical experience and qualifications were gained while a resident in the United Kingdom. He is registered on the register for general practitioners in the United Kingdom, but he is not registered as a consultant there. He qualified as a consultant and has practiced as such in England because it is not necessary to be registered as a consultant in these circumstances unless one is on contract with the National Health Service.

In September, 2003 the applicant applied to the Medical Council in Ireland to be registered as a consultant in orthopaedics and trauma surgery. His application was based on a recognised certificate of registration issued by the appropriate medical authorities in Sweden. After enquiries, the Medical Council in Ireland was informed by the Swedish authorities that a decision had been made to remove the applicant from the register for medical specialists in Sweden for reasons that need not concern us here. The applicant did not challenge this removal in Sweden. It appears that the registration in Sweden was made on the basis of registration of the applicant as a consultant in Montserrat which is an overseas territory of the United Kingdom. Rather than reject the applicant outright, the Medical Council in Ireland decided to consider the application on the basis of his Montserrat registration and also to consider the training and experience which the applicant had obtained in Montserrat or elsewhere. The Medical Council eventually refused to register the applicant and suggested further training.

By order of McKechnie J. on 13th December, 2004, the applicant was granted leave to bring these proceedings to review the decision of the Medical Council refusing to place him on the register of medical specialists in Ireland.

The applicant now claims that he is entitled to automatic registration because of his prior registration in Montserrat. In effect he claims that he was a beneficiary under Article 43 (ex Article 52) of the Treaty of Rome and under Council Directive 93/16/E.E.C. of 5th April, 1993, to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, O.J. L165/1 7.7.1993 which provided for the free movement of doctors within the European Union, as well as under the Directives governing mutual recognition of qualifications in medicine.

The central questions for determination in this case are twofold:-

> (i) Does a certificate such as the applicant has from the overseas territory of Montserrat entitle him to be registered on the register for specialities maintained by the Medical Council in Ireland?
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> (ii) Does the applicant have other rights of registration in Ireland as a national of a member state with medical qualifications in the United Kingdom?

By way of preliminary point it is important to note that these proceedings were brought by the applicant when he was a lay litigant. He is now legally represented in court, and has been since January, 2005 but some of his pleadings and the statement of grounds in this case pre-date the appointment of his present legal team and lack the precision that one would expect from qualified lawyers. The court is minded to bear this in mind in its deliberations and present counsel for the applicant requested some leniency from the court in this regard. The court, however, cannot overindulge the applicant in this regard and certainly in view of the opposition from the respondent's counsel cannot allow the applicant to fundamentally amend his pleadings so as to disadvantage the respondents in a serious way. The court must be mindful that the respondents also have rights in this matter.

From the respondent's point of the view the only question which the court should address is whether there is a legal duty on the respondent to register the applicant in the specialist section of the register. In that regard all the applicant has sought is an order for *mandamus* and according to the respondent, the court should not entertain an application for *certiorari* which is nowhere mentioned in the applicant's pleadings to date. Counsel for the applicant on the other hand stated that some flexibility should be extended to the applicant and if the court is not minded to grant an order of *mandamus* then it might consider an order quashing the order of the respondent and remitting the matter for reconsideration to the respondent.

A fundamental plank of the applicant's case is that the right of establishment guaranteed under the Treaty of Rome extends to overseas territories such as Montserrat. That being so, according to the applicant, being a national of a member state, he is a beneficiary in this respect. Moreover, he argues that it is clearly provided under the relevant Directive that once he has an equivalent qualification from an Overseas Country and Territory (O.C.T.) such as Montserrat, the Medical Council in Ireland must "automatically" place him on its register. It does not have the right to look

behind the certificate and it certainly does not have the right to delegate the function of examining the adequacy of the certificate or of the applicant's qualifications to a third party, in this case the Royal College of Surgeons in Ireland.

The applicant's first argument
In relation to the applicant's first argument one must look at the outset at the status and the relationship of Montserrat with the European Community.

First, it must be clear that Montserrat is not and never was a full member state of the Community. Article 299 (ex Article 227) of the Treaty of Rome sets out that the Treaty shall apply to the member states specifically named at Article 299(1). Apart from naming the member states, the Article also provides that the Treaty shall apply to the French overseas departments, the Azores, Madeira and the Canary Islands (Article 299(2)) and "the European territories for whose external relations a Member State is responsible" (Article 299(4)). Montserrat is clearly not included in these latter two provisions. Article 299(3) makes it clear that the "special arrangements for association set out in Part Four of this Treaty shall apply to the overseas countries and territories listed in Annex II to this Treaty". Montserrat is listed in Annex II and this is the provision that relates to Montserrat's relationship with the Community.

As one of the overseas countries and territories of the Community which are specifically provided for in Part Four of the Treaty, at Articles 182 to 188 (ex Articles 131 to 136a), this is the only part of the Treaty that regulates Montserrat's relationship with the European Community. These overseas countries and territories are closely associated with the European Community and though constitutionally linked to a member state, they are not part of the Community as such. Based on a reading of Article 299(3) it is clear that the provisions of the Treaty do not in principle apply to the overseas countries and territories except for Part Four which specifically deals with the association of the overseas countries and territories with the Community. Article 183 (ex Article 132) sets out the objectives of the association in general. Article 183(5) provides:-

> "5. In relations between Member States and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in accordance with the provisions and procedures laid down in the Chapter relating to the right of establishment and on a non-discriminatory basis, subject to any special provisions laid down pursuant to Article 187."

Article 187 (*ex* Article 136) declares that the Council, acting unanimously, shall lay down the provisions as regards the detailed rules and the procedure for association of countries and territories with the Community, which provision shall be on the basis of the experience of the association and the principles set out in the Treaty. The Council has over the years adopted "Overseas Association Decisions" the most recent of which is Council Decision 2001/822/E.C. of 27th November, 2001, on the association of the overseas countries and territories with the European Community, O.J. L314/1 30.11.2001, amended now by Council Decision 2007/249/E.C. of 19th March, 2007, amending Decision 2001/82/E.C. on the association of the overseas countries and territories with the European Community, O.J. L109/33 26.4.2007.

The general provisions contained in Articles 182 to 188 of the Treaty are clearly future orientated as is Article 186 (ex Article 135) specifically, which relates to the free movement of workers. Even if it could be argued that Article 183(5) itself gives some rights to nationals of the overseas countries and territories, because they "shall be regulated in accordance with the provisions … laid down in the Chapter [of the Treaty] relating to the right of establishment", these rights could not be greater than those given to nationals of member states under the heading of the Treaty. It cannot be argued that Montserrat as an O.C.T. in relation to the freedom of establishment is more favoured than ordinary member states. The certificate which the applicant relies on from Montserrat, registering him as a doctor in specialist medicine there, even at its highest would still have to be subject to the relevant Directives on the registration of doctors under the right of establishment provisions of the Treaty itself which applies generally to the nationals of the Member States.

Council Directive 93/16/E.E.C. is the relevant Directive which we must consider next.

Chapter II of the Directive deals with qualifications in specialised medicine, and in particular, Articles 4 and 5, as amended by Parliament and Council Directive 2001/19/E.C. of 14th May, 2001, amending Council Directives 89/48/E.E.C. and 92/51/E.E.C. on the general system for the recognition of professional qualifications and Council Directives 77/452/E.E.C., 77/453/E.E.C., 78/686/E.E.C., 68/687/E.E.C., 78/1026/E.E.C., 80/154/E.E.C., 80/155/E.E.C., 85/432/E.E.C., 85/433/E.E.C. and 93/16/E.E.C. concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor, O.J. L206/1 31.7.2001, are relevant to the case before the court. Article 4, as amended, provides:-

> "Each Member State with provisions in this field laid down by law, regulation or administrative action shall recognise the diplomas, certificates and other evidence of formal qualifications in specialised medicine awarded to nationals of Member States by the other Member States in accordance with Articles 24, 25, 26 and 29 and which are listed in Annexes B and C, by giving such qualifications the same effect in its territory as those which the Member State itself awards."

Article 5, as amended, provides:-

> "The diplomas, certificates and other evidence of formal qualifications referred to in Article 4 shall be those which, having been awarded by the competent authority or bodies listed in Annex B, correspond, for the purposes of the specialised training in question, to the qualifications listed in Annex C in respect of those Member States where such training exists."

Articles 24, 25, 26 and 29 of Council Directive 93/16/E.E.C. set out the minimum standards and requirements including minimum duration, etc. Each member state must nominate a "competent authority" which is responsible for the awarding of such diplomas, certificates and other evidence of formal qualifications in specialised medicine. The Medical Council is the competent authority in this country and the Specialist Training Authority (S.T.A.) is the competent authority for specialist registration in the United Kingdom. When a person has undergone the appropriate specialist training in a speciality referred to in Annex C of the Directive, as inserted by Parliament and Council Directive 2001/19/E.C., in any given member state, as required by Articles 24, 25, 26 and 29, the competent authority in that state is entitled to issue a

certificate, as identified in Annex B to the Directive, as inserted by Parliament and Council Directive 2001/19/E.C. This certificate is called a "Certificate of Specialist [D]octor" (a C.S.D.) in Ireland and is called a "Certificate of Completion of [S]pecialist [T]raining" (a C.C.S.T.) in the United Kingdom. Once a doctor has such a certificate from one member state the competent authorities of the other member states must recognise it and give it the same effect as a qualification in specialised medicine in that member state. Nevertheless, in accordance with Article 22 of Council Directive 93/16/E.E.C., a member state may ask the competent authorities of another member state to confirm both the authenticity of a certificate and that the person concerned has fulfilled the training requirements laid down in Articles 24, 25, 26 and 29. (See *Tennah-Durez v. Conseil national de l'ordre des médecins (Case C 110/01)* [2003] E.C.R. I–6239). From this it can be seen that there are minimum requirements in respect of duration and type of training which apply to these specialities in each Member State by virtue of the requirements of the Directive.

The applicant argues that the certificate awarded to him in Montserrat entitles him to automatic registration in the register for medical specialists in Ireland. The certificate which was issued by the Registrar of the Supreme Court of Montserrat states as follows:-

> "It is hereby certified that Dr. Ahmed Mohammed Hosny Khashaba of Brades, has been duly registered and is entitled to practice as a Medical Practitioner and Trauma and Orthopaedic Specialist in the colony of Montserrat under provisions of the Medical Act."

The court does not accept this argument for the following reasons:-

> 1. Article 4 of the Directive only applies to Member States and certificates, etc., awarded by other Member States. For reasons already outlined, Montserrat is not a Member State of the European Community and accordingly the applicant does not come within the provisions of Article 4 of the Directive.
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> 2. Apart from the certificate not issuing from a Member State the certificate is not a "Certificate of Completion of [S]pecialist [T]raining", or a C.C.S.T., as listed in Annex B of the Directive which is the relevant certificate that issues from the competent authority in the United Kingdom. The registrar of the Supreme Court in Montserrat who provided the applicant with his certificate, is not the "competent authority" for the United Kingdom, the relevant Member State and cannot be used as a substitute for the authority nominated in the Directive. Only the S.T.A. can award a C.C.S.T. for the United Kingdom under Article 4.

Registration by a competent authority of a Member State also contemplates the successful completion of specialist training in accordance with Articles 24, 25, 26 and 29 of the Directive. It is clear from the affidavit of Dr. Joseph Hawes, the Chief Medical Officer of the Ministry of Health in Montserrat at the time, that the applicant did not receive any such training in Montserrat. From the same affidavit it is also clear that Montserrat has no specialist register and no system for the accreditation of specialists and no training programme for specialists in any discipline. Furthermore, Dr. Hawes states that he simply added the word "Trauma and Orthopaedic Surgeon" to the certificate because the applicant requested that he do so. It was not intended to be proof of anything in particular according to the deponent. Not having undergone any relevant training in Montserrat in accordance with the minimum requirements of the Directive the applicant is not entitled to claim the automatic recognition provisions of the Directive.

The applicant's submission as to his entitlements by virtue of his registration in Montserrat is furthermore unsustainable when Council Decision 2001/822/E.C. is considered. Council Decision 2001/822/E.C. makes the following provision for the association of the overseas countries and territories, and specifically referring to the recognition of medical diplomas, Article 45(4) provides:-

> "With regard to the professions of doctor, dentist, midwife, general nurse, pharmacist and veterinary surgeon, the Council, acting unanimously on a proposal from the Commission, shall adopt the list of professional qualifications specific to O.C.T. inhabitants which are to be recognised in the Member States."

Obviously, there would be no need for this provision if the Treaty provisions or Council Directive 93/16/E.E.C. allowed automatic recognition as suggested by the applicant in this case. It appears that the Council has not yet adopted such a list of professional qualification.

For the above reasons it is my conclusion that the applicant is not entitled to automatic registration by the Medical Council in Ireland by virtue of Montserrat's constitutional connection with the United Kingdom or by virtue of Directive 93/16/E.E.C. There is no justification to judicially review the decision of the Medical Council on these grounds.

The applicant's second argument
The applicant also advanced arguments at the hearing that the procedure and the decision of the Medical Council can be attacked by virtue of principles established by the European Court of Justice (E.C.J.) in its case law. I will now examine the merits of his case under this heading.

Before doing so, however, I would like to mention three matters relating to the pleadings in this case which featured somewhat at the hearing. The respondent objected to additional matters being canvassed by the applicant without these having been specifically pleaded. First, the respondent said that the applicant sought mandamus as a remedy in this case and that was the remedy which the respondents came to defend: other remedies should not be considered. Secondly, at the hearing the applicant advanced the argument that the Medical Council wrongly delegated a function to the Royal College of Surgeons when it asked the latter body to examine the training which the applicant received. Thirdly, the applicant also argued at the hearing that the Royal College of Surgeons when reporting back to the Medical Council failed to provide adequate reasons for their recommendation. Counsel for the applicant sought some flexibility from the court on these issues as the applicant was a litigant at the early stages of these proceedings. When it was pointed out, however, that the applicant was legally represented since January, 2005 and that no amendment had been sought to the grounds for judicial review and bearing in mind that these were not grounds for which leave was granted by McKechnie J., when he granted leave to bring these proceedings, the applicant's counsel was willing to concede the latter two grounds but insisted that the court should exercise some flexibility in relation to the relief sought. Even if counsel for the applicant had

not indicated that he was not going to pursue these extra grounds the court would not have allowed him to proceed to make those arguments, for to do so would be to ignore the rights of the respondent in this matter. I am of the view that a good deal of latitude has been granted to the applicant in the present case and to indulge the applicant further would not be fair to the respondent. I will now turn to the relevant case law cited by the applicant in support of his claim.

The principal cases on which the applicant relies in this context are *Vlassopoulou v. Ministerium für Justiz Case 340/89* [1991] E.C.R. I-2357 and *Hocsman v. Ministre de l'Emploi et de la Solidarité Case 238/98* [2000] E.C.R. I-6623. These cases relate to the right of establishment of a national of a Member State to establish himself in another Member State and this is an independent argument advanced by the applicant apart from his argument based on the certificate from Montserrat which I have dealt with above.

In *Vlassopoulou*, the applicant was a Greek lawyer practising in Germany who wished to become a German professional lawyer and practice as a Rechtsanwältin. Ms. Vlassopoulou had previously qualified as a Greek lawyer and had Greek diplomas in law but additionally had a doctorate from the German University of Tübingen (in German law which required not only a thesis but compulsory courses in German law) and had worked in a German firm of lawyers for five years prior to her application. The head note of the case correctly states the Court's position on the issues raised in the case, at pp. 2357 to 2358:-

> "Article 52 of the E.E.C. Treaty must be interpreted as requiring the national authorities of a Member State to which an application for admission to the profession of a lawyer is made by a Community subject who is already admitted to practice as a lawyer in his country of origin and who practices as a legal advisor in the first-mentioned Member State to examine to what extent the knowledge and qualifications attested by the diploma obtained by the person concerned in his country of origin correspond to those required by the rules of the host State. That examination must be carried out in accordance with a procedure which is in conformity with the requirements of Community law concerning the effective protection of the fundamental rights conferred by the Treaty on Community subjects. It follows that any decision taken must be capable of being made the subject of judicial proceedings in which it legality under Community law can be reviewed and that the person concerned must be able to ascertain the reasons for the decision taken in his regard.
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> If those diplomas correspond only partially, the national authorities in question are entitled to require the person concerned to prove that he has acquired the knowledge and qualifications which are lacking. In this regard the said authorities must assess whether the knowledge acquired in the host Member State, either during a course of study or by way of practical experience, is sufficient in order to prove possession of the knowledge which is lacking.
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> If the completion of a period of preparation or training for entry into the profession is required in the host Member State, the national authorities must decide whether professional experience acquired in the Member State of origin or in the host Member State may be regarded as satisfying that requirement in full or in part."

In *Hocsman*, a Community national who held an Argentine diploma, recognised by the authorities of one Member State as being equivalent in that state to a university degree in medicine and surgery, applied to another Member State for the right to practice medicine in its territory. In answer to a reference under Article 177 of the Treaty of Rome (now Article 234 of the Treaty), the court held, at p.6624, that:-

> "Article 52 of the Treaty (now, after amendment, Article 43 E.C.) is to be interpreted as meaning that where, in a situation not regulated by a directive on mutual recognition of diplomas, a Community national applies for authorisation to practice a profession access to which depends, under national law, on the possession of a diploma or professional qualification, or on periods of practical experience, the competent authorities of the Member State concerned must take into consideration all the diplomas, certificates and other evidence of formal qualifications of the person concerned and his relevant experience, by comparing the specialised knowledge and abilities certified by those diplomas and that experience with the knowledge and qualifications required by the national rules."

The decision of this Court is that the respondent did in fact conduct an assessment of the applicant's qualifications and training, and following advice from the Irish Surgical Postgraduate Training Authority found that the applicant's training was neither equivalent nor similar in duration and quality to that which would be obtained in structured Higher Surgical Training. The recommendation was that two further years as a special registrar at levels 5/6 would be required. In conducting this assessment the respondent in my view complied with its obligations under community law and in doing so clearly respected those provisions of Article 43 (ex Article 52) which are of direct effect.

Furthermore, the reasons given to the applicant although brief were clear and did not require further elaboration i.e. that his training was not equivalent or similar in duration and quality to that which would be obtained in structured Higher Surgical Training.

In the internal appeal from this decision at which the applicant was legally represented in 2005, and where his qualifications and training were discussed, the applicant was given a further opportunity to raise this issue but he failed to raise it. Neither did he invoke the statutory right of appeal against this decision which exists by virtue of s. 31(5) of the Medical Practitioners Act 1978.

At para. 33 of further written submissions of the respondent, the respondent makes the following additional point:-

> "It is only on the second day of this hearing that the applicant suggests that he did not understand the reasons. As his statement is not on affidavit, or in the statement of grounds, it is hard to establish what the applicant thought. This in itself illustrates the difficulty which the respondent faces in dealing with an allegation that is not supported by evidence or referred to in the statement of grounds. The applicant accepted that he would appeal to the internal appeals body, without prejudice to his right to have this Court determine his claim in relation to Montserrat. He now seeks to complain about reasons in circumstances where this ought to have been raised before the appeals body, and challenged specifically if there was thought to be a problem. In fact, as is clear, there was no problem."

For reasons already stated, I accept the respondent’s submissions in this matter.

In conclusion I am not prepared to grant the applicant the relief sought, or indeed any relief in the circumstances.