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Judgment

Title: Hussain -v- Health Service Executive

Neutral Citation: [2017] IESC 22

Supreme Court Record Number: 243/10

High Court Record Number: 2006 4432 P

Date of Delivery: 06/04/2017

Court: Supreme Court

Composition of Court: MacMenamin J., Laffoy J., Dunne J.

Judgment by: Dunne J.

Status: Approved

Result: Appeal dismissed



THE SUPREME COURT

[Appeal No. 243/2010]

MacMenamin J.

Laffoy J.

Dunne J.

BETWEEN

SYED HUSSAIN

PLAINTIFF/APPELLANT

AND

HEALTH SERVICE EXECUTIVE**DEFENDANT/RESPONDENT****Judgment of Ms. Justice Dunne delivered on the 6th day of April 2017**

The plaintiff/appellant in these proceedings (hereinafter called "the Plaintiff" or "Dr. Hussain") complained that he was not awarded a contract under the General Medical Services Scheme (hereinafter called "the GMS Scheme") for the position of principal general practitioner in Strokestown, County Roscommon. His complaint was primarily focused on a contention that the Health Service Executive (hereinafter called "the HSE") did not comply with the requirements of EU Directive 93/16/EEC in relation to the mutual recognition of qualifications. He also sought that certain questions should be referred to the European Court of Justice for a preliminary ruling. His claim was dismissed by the High Court (Murphy J.) and he has appealed from that decision.

Background

It is necessary to set out some details by way of background in order to understand the issues that arise on this appeal.

The Plaintiff is an Irish citizen and a general medical practitioner. He qualified as a doctor on the 11th August, 1990 in Bahauddin, Zakariya, Pakistan. He practised initially in Pakistan and in August 1995, he took up a position in Portlaoise General Hospital and subsequently in other hospitals until approximately 2002. In 2004, he left Ireland for the United Kingdom and commenced GP training there. In 2005, he returned here to complete his hospital training. On the 29th September, 2005 he obtained the Joint Committee on Postgraduate Training for General Practice Certificate (hereinafter called "the JCPTGP Certificate") in the United Kingdom.

In January 2006 he applied for two positions in Ireland. The first application was for a locum GP position in Strokestown, County Roscommon. He also applied that month for a permanent GP position in Strokestown. He was interviewed for the locum position on the 12th January, 2006 and was subsequently appointed as a locum GP on a three month contract. He was interviewed for the permanent GP position on the 15th March, 2006 but was not appointed. A letter of April 2006 from the Head of Regulation of the Irish Medical Council confirmed his entitlement to apply for entry to the GMS Scheme. On the 1st June, 2006 his locum GP contract was extended for a further four months. On the 29th June, 2006 he was interviewed again for a permanent GP contract in Strokestown in circumstances where that position had been re-advertised on the 15th April, 2006. It is relevant to note that although he was the only candidate interviewed in March 2006 for the permanent GP position in Strokestown, he was not appointed. Following the interview on the 29th June, 2006, he was placed third on the panel of interviewees. There were at that stage two positions available and thus having been placed third he was unsuccessful in obtaining the position. On the 1st July, 2006 Dr. Hussain was registered on the register of medical specialists in the division of general practice in this jurisdiction valid from the 1st July, 2006 to the 30th June, 2007. On the 1st May, 2007 he was elected to the Irish College of General Practitioners. Subsequently in 2007 he applied for and was appointed to a permanent GP post in Belmullet, County Mayo.

Circular 3/96

Circular 3/96 issued by the Department of Health on the 19th June, 1996 set out the criteria for entry to the GMS Scheme. The Circular provided, inter alia, guidelines for a marking system for interview boards (see Appendix 3 of Circular 3/96) which provided for candidates to be placed in order of merit and went on to provide:

"To be eligible for interview all candidates must have satisfactorily completed a recognised Vocational Training Scheme in General Practice or have acquired rights under the EU Directive on specific training in general practice."

Appendix 3 continued by providing that marks should be awarded for a variety of matters such as qualifications of an academic nature, suitable hospital experience, experience in general practice itself, experience in research, teaching and other compatible experience and general acceptability and suitability. Later on in the appendix it was indicated that:

"Membership of the Irish College of General Practitioners or other recognised colleges of general practice attracted sixty marks in the overall marking scheme."

Reference was also made to a category headed "General Suitability" which attracted one hundred marks. Only candidates who get more than fifty per cent in that category could be considered for appointment. Express reference was made in Appendix 5 to the European Union Directive 93/16 which stated:

"In accordance with the European Union (EU) Directive 93/16 on special training in general practice, doctors entering the GMS Scheme or equivalent schemes in the EU, with effect from 1/1 95, must have qualified from a recognised vocational training scheme or possess acquired rights in accordance with the terms of the Directive.

The terms of the EU Directive as they apply in Ireland, were set out in Circular 12/94 dated 22nd December, 1994."

Appendix 5, para. 2(c) also contained the following:

"Qualifications and/or certificates issued by other EU Member States.

Diplomas, certificates or other evidence of formal qualifications issued to nationals of Member States by other Member States in accordance with the Directive are recognised for the purpose of meeting the training requirements for entry to the GMS Scheme. Certificates of acquired rights under the Directive issued to nationals of Member States by other Member States are also recognised.

EU nationals who have qualifications, training and experience obtained outside the EU and which the Medical Council deems to be at least equivalent to the requirements set out at paragraphs (a) and (b) above are eligible to compete for entry to the GMS Scheme. (See, also, paragraph (e) below)."

EC Directive 93/16

It would be helpful to set out a number of provisions of the Directive. Article 2 provides:

"Each Member State shall recognize the diplomas, certificates and other evidence of formal qualifications awarded to nationals of Member States by the other Member States in accordance with Article 23 and which are listed in Article 3, by giving such qualifications, as far as the right to take up and pursue the activities of a doctor is concerned, the same effect in its territory as those which the Member State itself awards."

Article 3(1)(l) provides:

in the United Kingdom:

"a primary qualification granted in the United Kingdom after passing a qualifying examination held by a competent examining body and a certificate of experience granted by that body which give entitlement to registration as a fully registered medical practitioner."

Article 4 provides:

"Each Member State shall recognize the diplomas, certificates and other evidence of formal qualifications in specialized 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 Article 5, by giving such qualifications the same effect in its territory as those which the Member State itself awards." Title III of the EU Directive deals with

coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors.

Title IV deals with Specific training in General Medicine practice which is of relevance in this case. Article 36(1) in Title IV provides:

"From 1 January 1995, and subject to the acquired rights it has recognized, each Member State shall make the exercise of general medical practice under its national social security scheme conditional on possession of a diploma, certificate or other evidence of formal qualification as referred to in Article 30 . . ."

Article 36(2) provides:

"Each Member State shall specify the acquired rights that it recognizes. . . ."

Article 36(5) provides:

"Nothing in paragraph 1 shall prejudice the possibility, which is open to Member States, of granting, in accordance with their own rules and in respect of their own territory, the right to practise as general practitioners under a social security scheme to persons who do not possess diplomas, certificates or other formal evidence of medical training and of specific training in general medical practice obtained in both cases in a Member State, but who possess diplomas, certificates or other evidence of either or both of these types of training obtained in a non-member country."

It is also necessary to consider the provisions of Article 30 which provide that:

"Each Member State which dispenses the complete training referred to in Article 23 within its territory shall institute specific training in general medical practice meeting requirements at least as stringent as those laid down in Articles 31 and 32, in such a manner that the first diplomas, certificates or other evidence of formal qualifications awarded on completion of the course are issued not later than 1 January 1990."

Article 36 deals with doctors practising as general medical practitioners under the Member States National Social Security Scheme such as the NHS in the United Kingdom and the General Medical Scheme in this jurisdiction. Thus, as can be seen from the provisions of Article 36, Article 36(1) obliges the Member State in such circumstances to make the exercise of general medical practice conditional upon possession of a diploma, certificate or other evidence of formal qualification as referred to in Article 30 but, as is apparent, Article 36(5) creates an exception to Article 36(1) which allows for the possibility of a Member State granting in accordance with their own rules and in respect of their own territory the right to practise in the Article 36 circumstances to persons who do not possess diplomas, certificates, etc., obtained in a Member State but who possess diplomas, certificates, etc., obtained in a non-Member State.

Judgment of the High Court

In the course of the judgment of the High Court, delivered by Murphy J. on 20th May, 2010 ([\[2010\] IEHC 495](#)) reference was made to the marking scheme described above and to the EC Directive 93/16. Reference was also made to the letter of the 25th April, 2006 from the Head of Regulation of the Medical Council in Ireland which stated as follows:

"In accordance with Title IV of Directive 93/16/EEC, the Medical Council confirms that Dr. Syed Maqsood Hussain . . . has completed specialist training in general medical practice and is entitled to apply for entry to the General Medical Services Scheme in Ireland.

This letter is issued in accordance with Article 36 (5) of Directive 93/16/EEC."

It would be useful to refer briefly to part of the judgment of the Court in which Murphy J. stated at page 9 of the judgment as follows:

"The object of the interview, as was clear from the powers given to the Member State under Article 36(5) and to the Minister's Circular, was to place candidates in order of merit.

This was done in the case of the interview on 29th June, 2006. The evidence in relation to the March interview was that Dr. Hussain was the only candidate but, while he was awarded 49 marks for professional qualification and research, . . . , this mark was, as already indicated, just outside the satisfactory rating criteria for general suitability.

The Court also observes that, even if Dr. Hussain had obtained 49 for professional qualifications and research in the June interview or, indeed, a full 60 marks for membership or its equivalent of a college of general practitioners, he would still have ranked as third.

The Court is satisfied that the interview panel, in applying the ministerial circular, and having regard to Article 36(5), were correct in not awarding a score of 60 as Dr. Hussain had not, then, either the membership of the Royal College of General Practitioners or its equivalent."

It is also stated in the course of the judgment at page 7:

"Dr. Hussain acknowledged that at the time of the interviews in March and June 2006, he was not a member of the Royal College of General Practitioners, which, it was accepted, was the equivalent of membership of the Irish College of General Practitioners. The certificate of equivalent experience from the U.K. Joint Committee on Post Graduate Training for General Practice was not recognised and that Dr. Hussain did not get any score in relation thereto.

It is common case that the certificate of equivalent experience related only to NHS in the United Kingdom and did not refer to title 4 of Council Directive 93/16/EEC. However the certificate of eligibility in general medical practice issued by the Medical Council on 26th April, 2006 was issued for the purposes of and in compliance with Article 36(5) of the said Council Directive."

The learned trial judge went on to comment at page 8 as follows:

"The exercise of that right by a medical council appears to be co-extensive with the certificate of equivalent experience issued by the United Kingdom Joint Committee on Post Graduate Training for General Practice with the addition of a certificate of compliance with the Directive. It does not, of itself, equate with membership of the Irish College for General Practitioners.

Indeed, the evidence in relation to the certificate of equivalent experience of a third party doctor who was given a certificate under the National Health Service Acts and title 4 of the same Council Directive did not entitle her to receive any score in relation to professional qualifications and research."

Finally, I should observe that in the course of the High Court hearing issues were raised as to discrimination but no such issue was relied on by Dr. Hussain in the course of the appeal.

Discussion

At the heart of this case is the status of the JCPTGP certificate and the question as to whether or not it was afforded appropriate recognition by the HSE in the course of the allocation of marks in respect of the qualifications of Dr. Hussain. The case made on his behalf is that he was not afforded the appropriate recognition for that qualification. The HSE in its written submission stated that Article 36(5) allows Member States to grant, in accordance with their Rules and in respect of their own territory, the right to practise under a social security scheme to persons who do not possess diplomas, certificates or other evidence of training in a non-Member State. At paragraph 14 of the written submissions it was further stated that:

"To be eligible for interview all candidates must have satisfactorily completed a recognised vocational training scheme in general practice or have acquired rights under the EU Directive on specified training in general practice."

Murphy J. in the course of his judgment at page 6 noted that this was a threshold requirement. It should be said that in the course of oral submissions on behalf of the HSE it was suggested that it was on the basis of the JCPTGP certificate that Dr. Hussain was first interviewed by the HSE for a permanent GP position but that submission appears to be at odds with the written submissions on behalf of the HSE and more to the point, is at variance with the findings of facts by the learned trial judge.

It has to be said that there appears to have been an element of confusion as to the status of that certificate .but as was stated in the course of the passage from the judgment of Murphy J. set out above:

"It was common case that the certificate of equivalent experience related only to NHS in the United Kingdom . . ."

Mr. Richard Broderick (Manager of Primary Healthcare, West Galway-Mayo) who was a member of the interview panel in respect of Dr. Hussain in June 2006, in the course of his evidence on behalf of the HSE, commented on the JCPTGP certificate and his evidence in that regard is where, I think, some of the confusion arose. He referred to the certificate produced by Dr. Hussain and said that there is no reference in that to the EU Directive 93/16 whereas a second certificate produced in respect of a different candidate did make reference to EC Directive 93/16. Having made that reference Mr. Broderick went on to say:

"Now, had the certificate that Dr. Hussain produced from England, this particular certificate the equivalent of that, that he had, had the paragraph on it, 'Title IV of Council of Directive 93/16/DEC of 1993' that would have been sufficient to make him eligible under the EU Directive. But because it was not on the certificate that he produced from his training in the U.K., it was then up to the Irish Medical Council to grant him that, which they subsequently did but that only happened in April 2006.

He went on to point out that the HSE is not the competent authority to determine the eligibility of doctors qualifying outside Ireland or in an EU Member State.

This Court has had the opportunity to look at the JCPGTP certificate produced by Dr. Hussain and the certificate produced in the course of evidence in respect of a third party doctor referred to previously. The two certificates are in identical terms save for the addition of the reference to Title 4 of Council Directive 93/16/EEC in the case of the third party doctor who was a doctor with a qualification from the National University of Ireland. In each case, reference is made to the fact that the doctors concerned had submitted particulars of their medical experience, had satisfied the Joint Committee on Post Graduate Training for General Practice that they had acquired the necessary medical experience to meet the requirements of the National Health Service legislation in the United Kingdom. Therefore, they were both entitled to practise in the United Kingdom's National Health Service. In each case, reference is made to the date on which the relevant doctor completed their training and in the case of Dr. Hussain the relevant date is the 30th June, 2005 and in relation to the third party doctor the relevant training is stated to have been completed on the 6th August, 2002. It is relevant to note again, as Murphy J. had observed, that the parties and their legal representatives were of the view that the certificate obtained by Dr. Hussain limited his practice to the NHS in the United Kingdom. Therefore, the JCPTGP Certificate entitled him to practise in the territory of the United Kingdom, not in any other Member State.

It is clear from Circular 3/96 and the relevant provisions cited above from Appendix 5, para 2(c) that to be eligible for interview for entry to the GMS Scheme, it was necessary for a doctor who obtained his qualifications, training and experience in a non EU member State to have the Medical Council deem their qualifications training and experience to be at least equivalent to the requirements for doctors who obtained their qualifications from an EU Member State. Dr. Hussain obtained his Certificate of Eligibility pursuant to Article 35(6) of the Council Directive on the 26th April 2006. That

being so, it would appear that he was only eligible to apply for entry to the GMS Scheme from that date forward. It is therefore difficult to understand the basis on which he was, in fact, interviewed for a permanent GP position on the 15th March 2006. What happened at that interview and the marking given to Dr. Hussain in respect of his qualifications would therefore appear to be irrelevant.

The HSE then re-advertised the post and Dr. Hussain re-applied for the position and was interviewed with two other candidates. Dr. Hussain was placed third after the interview and was therefore not appointed to the post. In the case of that interview, given that Dr. Hussain was placed third on the panel, the point is made on behalf of the HSE that his qualification was given full recognition and the reason why he was not given the appointment was that he was placed third on the panel in respect of a process where only two appointments were available. It was submitted that having been placed third on the panel, had there been three permanent positions available, Dr. Hussain would have been appointed to the position.

As we know, Dr. Hussain was ultimately successful in obtaining a permanent position as a general practitioner following an interview in 2007 for a post in Belmullet, County Mayo. At that stage, he had been elected to the Irish College of General Practitioners. It is accepted that had Dr. Hussain been a member of the Royal College of General Practitioners, then, under the Directive that would be equivalent to membership of the Irish College of Irish Practitioners. Having such membership would have increased the marking under the heading of "Qualification" available to Dr. Hussain by 60 marks.

Looking at the history of these matters, it is patently clear that on the occasion of the first interview for a permanent position in March 2006, no matter what occurred in relation to the recognition of the JCPTGP certificate, the appellant, Dr. Hussain, was simply not eligible for entry to the GMS scheme because he did not have the Certificate of Eligibility from the Medical Council as required by Circular 3/96. On the second occasion that he was interviewed he was successful in being placed on the panel but in circumstances where there were two positions available and he was placed third, he simply could not get either of the two positions available. Had there been a third position available, counsel on behalf of the HSE maintained that he would have been successful in being appointed to that position.

I have already referred to the element of confusion as to the status of the JCPTGP Certificate. I have already referred to the evidence of Mr. Broderick and his observations as to the contents of that Certificate and how it might have been viewed had it had a reference to Art 36(5). Mr. Broderick went on to say:

"... but having the EU qualification did not do anything for him or for any other doctor either, other than qualifying them to be eligible for interview for posts in the HSE in the Republic of Ireland. It does not give them any marks....the authority in Ireland to deal with the EU issue is the Medical Council. Once, they issue the certificate, that means these doctors are eligible to apply for jobs in the Republic of Ireland. But when they come for interview, having got over that hurdle, it does not in any way give them any marks at interview...."

Murphy J. observed in the course of his judgment at para. 4.1:

"Indeed, the evidence in relation to the certificate of equivalent experience of a third party doctor who was given a certificate under the National Health Service Acts and title 4 of the same Council Directive did not entitle her to receive any score in relation to professional qualifications and research."

Thus it can be seen that his JCPTGP certificate was treated in exactly the same way as the third party doctor's equivalent certificate. The position is that under the marking scheme provided and set out in Circular 3/96 no marks are available under the scheme in respect of the primary qualification of the doctor. Marks are available for additional qualifications such as membership of the Irish College of General Practitioners or other colleges of general practice. The JCPTGP certificate is not a professional qualification. As appears from its terms it is a certificate of equivalent experience entitling an individual to practise in the National Health Service in the United Kingdom. As is clear from the evidence given by Dr. Hussain he subsequently became a member of the Irish College of General

Practitioners. That is a qualification specifically referred to in the Circular which entitled him to an additional 60 marks. That was taken into consideration at the time that he subsequently applied for a permanent position in Belmullet, an appointment which he achieved. As Murphy J. observed in para. 4.2 of his judgment:

"The object of the interview, as was clear from the powers given to the Member State under Article 36 (5) and to the Minister's Circular, was to place candidates in order of merit.

This was done in the case of the interview on 29th June, 2006. The evidence in relation to the March interview was that Dr. Hussain was the only candidate but, while he was awarded 49 marks for professional qualification and research, (possibly in error according to the evidence of Dr. Declan McKeown who was a member of the interview panel), this mark was, as already indicated, just outside the satisfactory rating criteria for general suitability.

The Court also observes that, even if Dr. Hussain had obtained 49 for professional qualifications and research in the June interview or, indeed, a full 60 marks for membership or its equivalent of a college of general practitioners, he would still have ranked as third."

The Court went on to conclude that the interview panel were correct in not awarding a score of 60 as Dr. Hussain was not then a member of the Royal College of General Practitioners or its equivalent.

Conclusion

I have already referred to the confusion in regard to the status of the JCPTGP certificate which is reflected in the HSE's written submissions in which it was contended at Para. 25 (i) that "Due recognition was given to the Appellant's U.K. JCPTGP qualification. The Applicant was invited to interview based upon his qualification obtained in the United Kingdom as this was a threshold requirement for interview."

Given that eligibility for interview under required the Certificate of Eligibility from the Medical Council which did not issue until the 26th April 2006, it is difficult to understand that submission. Yet, that position may explain why he was interviewed on the 15th March 2006. Nevertheless, he did not get the position following the interview in March 2006 for the reasons stated. He was placed third on the panel at the interview in June 2006 and, as was submitted, would have been appointed to a position on that occasion had three positions been available. Subsequently, when he made the application for the Belmullet position, he had obtained membership of the Irish College of General Practitioners and thus was entitled to additional marks under the Circular. At that stage he did obtain a permanent position having been placed second on the panel following the interview for that position. At that time there were two positions available.

It is clear that Dr. Hussain did not suffer any detriment by virtue of the status of his JCPTGP Certificate. It was treated in precisely the same way as that of the third party Irish doctor referred to above. As Murphy J. said in the passage previously referred to:

"It is common case that the certificate of equivalent experience related only to NHS in the United Kingdom and did not refer to title 4 of Council Directive 93/16/EEC. However the certificate of eligibility in general medical practice issued by the Medical Council on 26th April, 2006 was issued for the purposes of and in compliance with Article 36(5) of the said Council Directive."

Thus, there has been no failure on the part of the HSE to recognise the qualifications of Dr. Hussain. The JCPTGP Certificate is not a qualification as such. It is a certificate which is issued following an assessment of an individual's qualifications and certifies that those qualifications are entitled to be treated as equivalent to those required for doctors eligible to be employed in the NHS.

Although it was suggested that this might be an appropriate case in which to refer questions to the European Court of Justice pursuant to the provisions of Article 267 of the TFEU, it is quite clearly the

case that no issue arises on the interpretation of the Directive and for that reason the fact that Dr. Hussain failed to secure employment following the first two interviews could not in any shape or form require a preliminary reference.

In the circumstances, I would dismiss the appeal.

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