JUDGMENT OF THE COURT

15 December 2011*

(Free movement of persons – Directive 2005/36/EC – Recognition of professional qualifications – Protection of public health – Non-discrimination - Proportionality)

In Case E-1/11,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Norwegian Appeal Board for Health Personnel (Statens helsepersonellnemnd) in the case of

Dr A

concerning the interpretation of Directive 2005/36/EC and other EEA law.

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur) Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

- the Czech Government, represented by Martin Smolek and David Hadroušek, acting as Agents,

- the Polish Government, represented by Maciej Szpunar, Undersecretary in the Ministry of Foreign Affairs, acting as Agent,

- the Spanish Government, represented by Juan Manuel Rodríguez Cárcamo, State Advocate (Abogado del Estado), acting as Agent,

* Language of the request: Norwegian.

- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Markus Schneider, Officer, Department of Legal & Executive Affairs, acting as Agents, and

- the European Commission ("the Commission"), represented by Hans Stovlbaek and Nicola Yerell, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Norwegian Government, represented by Fanny Platou Amble, the Czech Government, represented by David Hadroušek, the Polish Government, represented by Dorota Lutostańska, ESA, represented by Markus Schneider, and the Commission, represented by Nicola Yerrell, at the hearing on 20 September 2011,

gives the following

Judgment

I Facts and Procedure

1 By a decision of 25 January 2011, the Norwegian Appeal Board for Health Personnel ("the Appeal Board") made a request for an Advisory Opinion, registered at the Court on 31 January 2011, in a case pending before it concerning Dr A ("the Complainant").

2 The question referred has arisen in appeal proceedings before the Appeal Board concerning the refusal of the Norwegian Registration Authority for Health Personnel ("Registration Authority") to grant the Complainant licence to practise as a medical doctor in Norway.

3 According to the request, the Complainant was trained as a medical doctor in Bulgaria and has an additional specialisation in psychiatry. She has extensive professional experience as a psychiatrist in Bulgaria.

4 On 25 January 2007 and on 19 August 2008, the Complainant applied to the Registration Authority for a licence to practise as a medical doctor. The Complainant was given a practical training licence for medical practice in Norway ("turnus"). The licence granted a right to work as a medical candidate under professional guidance and the supervision of a responsible medical doctor. It did not grant a right to independently practise medicine, perform second-call night duties, or participate in the municipal emergency medical services scheme.

5 On 15 February 2008 the Complainant started practical training at a Norwegian hospital, but the training was not approved. After 10 days the Complainant was not allowed to continue working by the hospital. In a letter dated 5 June 2008 to the Registration Authority, the hospital noted that the Complainant "at the present time and with the level of assistance the employer can provide, would not be able to complete and obtain an approval of the practical training". It was further remarked that the Complainant had insufficient understanding of Norwegian which was incompatible with the requirement of due care in the treatment of patients. Moreover, it was noted, the Complainant lacked theoretical knowledge and had shown signs of insufficient insight in her own professional evaluation. On the basis of the information provided by the hospital, the Complainant was removed from practical training and her practical training licence was revoked by a decision of the Registration Authority dated 17 June 2008. As a consequence, the hospital terminated the Complainant's employment as a medical doctor in training on 27 June 2008.

6 Between 18 August 2008 and 30 April 2009, the Complainant carried out pre-practical training at the renal and hormonal diseases department of another hospital. The chief physician at that hospital certificated on 23 April 2009 that the Complainant had demonstrated professional progress in addition to an improved ability to converse in Norwegian with patients, their relatives and colleagues, but that it was still recommended that she continue pre-practical training. The chief physician detailed the evaluation of Dr A's training period in a conference call with representatives from the Registration Authority. He stated that the Complainant needed to acquire more professional experience before she would be ready to commence the practical training with the objective of achieving full authorisation. In his opinion, she was not yet able to begin in a practical training post.

7 On 23 February 2009 the Complainant applied for authorisation as a medical doctor in Norway. By decision of 2 March 2009 the Registration Authority only granted the Complainant an extension of her licence. On 15 May 2009 the Complainant applied once more for authorisation to practise as a medical doctor in Norway. This time, a statement from the Bulgarian authorities was attached to the application confirming that the Complainant, on the basis of her education and professional experience as a medical doctor in Bulgaria, was covered by Directive 2005/36/EC.

8 By decision of 12 August 2009, the Registration Authority rejected the Complainant's application. It recognised that although, in principle, the Complainant had a right to authorisation on the basis of acquired rights under Article 23 of Directive 2005/36/EC, in its assessment, the Complainant lacked the necessary aptitude required under Article 48(3)(c) of the Norwegian Health Personnel Act. In support of that conclusion, the Registration Authority noted that the Complainant had previously been refused approval of her practical training in Norway due to language and communication problems, insufficient theoretical skills and signs of poor insight in her own functioning. However, the Registration Authority considered that there were grounds to grant the

Complainant a one-year licence to work as a subordinate medical doctor in accordance with Article 49 of the Health Personnel Act.

9 On 11 September 2009, Dr A brought an appeal against that decision. The matter was eventually brought before the Appeal Board on 22 June 2010.

10 The Appeal Board referred the following question to the Court:

> *Does Directive 2005/36/EC or other EEA law allow the authorities of Member States to apply national rules providing for a right to deny an authorisation as a medical doctor or only to grant a limited authorisation as a medical doctor to applicants with insufficient professional qualifications, to a migrant applicant from another Member State who formally fulfils requirements under Directive 2005/36/EC for a right to mutual recognition of professional qualifications (authorisation as a medical doctor without limitations), when the professional experience of the applicant in Norway has unveiled insufficient professional qualifications?*

II Legal background

EEA law

11 Article 30 of the EEA Agreement ("EEA") reads:

> *In order to make it easier for persons to take up and pursue activities as workers and self-employed persons, the Contracting Parties shall take the necessary measures, as contained in Annex VII, concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications, and the coordination of the provisions laid down by law, regulation or administrative action in the Contracting Parties concerning the taking up and pursuit of activities by workers and self-employed persons.*

12 Decision 142/2007 of 26 October 2007 of the EEA Joint Committee amended Annex VII to the EEA Agreement by adding Directive 2005/36/EC ("the Directive") to point 1 of that Annex (OJ 2005 L 255, p. 22). The Decision entered into force on 1 July 2009. The Directive was subsequently amended in Commission Regulation (EC) 1430/2007 of 5 December 2007 and in Commission Regulation (EC) 755/2008 of 31 July 2008, which were incorporated into the EEA Agreement by Joint Committee Decisions 50/2008 and 127/2008 respectively.

13 Article 1 of the Directive states:

> *This Directive establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications*

(referred to hereinafter as the host Member State) shall recognise professional qualifications obtained in one or more other Member States (referred to hereinafter as the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession.

14 Article 2 of the Directive reads:

Scope

1. This Directive shall apply to all nationals of a Member State wishing to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis.

2. Each Member State may permit Member State nationals in possession of evidence of professional qualifications not obtained in a Member State to pursue a regulated profession within the meaning of Article 3(1)(a) on its territory in accordance with its rules. In the case of professions covered by Title III, Chapter III, this initial recognition shall respect the minimum training conditions laid down in that Chapter.

...

15 Article 4 of the Directive reads:

Effects of recognition

1. The recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.

2. For the purposes of this Directive, the profession which the applicant wishes to pursue in the host Member State is the same as that for which he is qualified in his home Member State if the activities covered are comparable.

16 In Title III of Directive 2005/36, which is entitled ‘Freedom of Establishment’, Article 21 provides:

1. Each Member State shall recognise evidence of formal qualifications as doctor giving access to the professional activities of doctor with basic training and specialised doctor…. listed in Annex V, points 5.1.1, 5.1.2,…. respectively, which satisfy the minimum training conditions referred to in Articles 24, 25,…. respectively, and shall, for the purposes of access to and pursuit of the professional activities, give such evidence the same

effect on its territory as the evidence of formal qualifications which it itself issues.

Such evidence of formal qualifications must be issued by the competent bodies in the Member States and accompanied, where appropriate, by the certificates listed in Annex V, points 5.1.1, 5.1.2…. respectively.

The provisions of the first and second subparagraphs do not affect the acquired rights referred to in Articles 23, 27….

…

17 Article 23 of the Directive reads:

Acquired rights

1. Without prejudice to the acquired rights specific to the professions concerned, in cases where the evidence of formal qualifications as doctor giving access to the professional activities of doctor with basic training and specialised doctor, as nurse responsible for general care, as dental practitioner, as specialised dental practitioner, as veterinary surgeon, as midwife and as pharmacist held by Member States nationals does not satisfy all the training requirements referred to in Articles 24, 25,...., each Member State shall recognise as sufficient proof evidence of formal qualifications issued by those Member States insofar as such evidence attests successful completion of training which began before the reference dates laid down in Annex V, points 5.1.1, 5.1.2,.... and is accompanied by a certificate stating that the holders have been effectively and lawfully engaged in the activities in question for at least three consecutive years during the five years preceding the award of the certificate.

...

6. Each Member State shall recognise as sufficient proof for Member State nationals whose evidence of formal qualifications as a doctor,.... does not correspond to the titles given for that Member State in Annex V, points 5.1.1, 5.1.2,.... evidence of formal qualifications issued by those Member States accompanied by a certificate issued by the competent authorities or bodies.

The certificate referred to in the first subparagraph shall state that the evidence of formal qualifications certifies successful completion of training in accordance with Articles 24, 25, 28.... respectively and is treated by the Member State which issued it in the same way as the qualifications whose titles are listed in Annex V, points 5.1.1, 5.1.2...

18 Under Title IV Detailed rules for pursuing the profession, Article 53 of the Directive reads:

Knowledge of languages

Persons benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State.

National law

19 Article 48 of the Health Personnel Act - authorisation – reads as follows:

(1) Authorisation pursuant to this act is granted to the following categories of health personnell:

…

n) Medical Practitioner (Lege)

…

(2) The right to be granted an authorisation following an application belongs to anyone who:

a) has passed an examination in the relevant subject at a Norwegian university or college or through occupational training at a secondary level,

b) has completed practical training in accordance with regulations laid down by the Ministry,

c) is under 75 years of age and

d) is not considered to be unfit for the profession.

…

(3) The right to be granted an authorisation following an application also belongs to anyone who:

…

b) has passed an examination which is recognised in accordance with agreement on mutual recognition pursuant to section 52, …

20 Article 52 of the Health Personel Act – International agreements – reads as follows:

(1) Based on agreements with other countries relating to mutual recognition, authorisation, licence and certificates of completion of specialist training may be granted to aliens.

(2) The Ministry may in regulations stipulate further provisions to supplement the first paragraph, and may among them stipulate special requirements for recognition that are necessary in order to comply with international agreements.

21 The Directive is implemented in Norwegian law through Regulation No 1130 of 8 October 2008 on the authorisation, license and certification of the completion of specialist training of health personnel for professional qualifications from other EEA countries ("the Regulation").

22 Article 6 of the Regulation which transposes Article 23 of the Directive on acquired rights essentially sets out that an applicant who fulfils the requirements of Article 23 of the Directive, "is entitled to authorisation or licence as a medical doctor".

23 According to Article 24 of the Regulation which transposes Article 53 of the Directive health professionals who receive authorisation to practice in accordance with the Regulation, shall possess the language skills necessary for practicing the profession.

24 Under Article 53(2) of the Health Personnel Act, Norwegian authorities may deny an applicant: the authorisation; licence; the right to temporarily exercise as a member of the health personnel in Norway without Norwegian authorisation; or licence or certificate of having completed specialist training if there are circumstances which constitute grounds for a revocation pursuant to Article 57 of the Health Personnel Act.

25 Under Article 57 of the Health Personnel Act, a decision of revocation may be adopted where, for instance, the holder is unfit to practise medicine in a responsible manner for reasons of gross lack of professional insight or lack of due care.

26 Pursuant to Article 22 of the Regulation, the possibility of denying authorisation, license or specialist approval on the basis of circumstances which would have led to revocation of such a right, applies also to persons benefiting from mutual recognition in accordance with the Regulation.

27 The Appeal Board is established pursuant to Article 68 of the Health Personnel Act. Its competence, organisation and procedure are laid down in Articles 69 to 71 of the Act and in Regulation No 1383 of 21 December 2000.

28 According to Article 68(2) of the Health Personnel Act, the Appeal Board is competent to adopt decisions in appeal cases brought by health personnel concerning the refusal of applications for an authorisation, a licence or a certificate of completion of specialist training; concerning warnings and revocations and suspensions of an authorisation, a licence or a certificate of completion of specialist training and the right of requisition; and concerning

limitation of an authorisation and refusals of applications for a new authorisation and a new right to prescribe medication.

29 The composition of the Appeal Board is laid down in further detail in Article 69 of the Health Personnel Act. According to Article 69(1) the Appeal Board shall be an independent body with a high level of expertise in the fields of health and law. It follows from Article 71 of the Act that decisions by the Appeal Board may only be reviewed by the courts.

30 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III The question

Admissibility

31 It must first be determined whether the Appeal Board is a court or tribunal for the purposes of Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") and, accordingly, whether the request for an Advisory Opinion is admissible.

32 Under Article 34 SCA any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers it necessary to enable it to give judgment.

33 The Norwegian Government has contested the admissibility of the request and argued that the Appeal Board does not qualify as a court or tribunal under Article 34 SCA. To this effect, the Norwegian Government contends that the Appeal Board lacks the necessary independence, due to its status as a party in national judicial proceedings and organisational links to other administrative authorities, demonstrated by its power to order other authorities to conduct a further examination of a case. Further, it is submitted that the lack of *inter partes* procedure is manifest, in that the private party in question is the sole party in the review proceedings before the Appeal Board and that the Appeal Board itself handles the investigation of cases brought.

34 The purpose of Article 34 SCA is to establish co-operation between the Court and the national courts and tribunals. It is intended as a means of ensuring a homogenous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 25). Accordingly, the purpose of this procedure does not require a strict interpretation of the terms court and tribunal.

35 In order to determine whether a referring body qualifies as a court or tribunal within the meaning of Article 34 SCA the Court takes account of a number of factors. These include, in particular, whether the referring body is established by law, has a permanent existence, exercises binding jurisdiction, applies rules of law, is independent and, as the case may be, whether its procedure is *inter partes* and similar to the procedure in court (see Case E-4/09 *Inconsult Anstalt*, [2009-2010] EFTA Ct. Rep 86, at paragraph 23 and case-law cited).

36 The composition and powers of the Appeal Board are defined in the legislative provisions described in paragraphs 27 to 29 above. According to those provisions, the Appeal Board is established by law and has a permanent character. It is not readily apparent from the case-file and the description of the national rules provided whether the procedure before the Appeal Board is, in fact, *inter partes.* It must, however, be noted that the requirement that the procedure be *inter partes*, is not an absolute criterion under Article 34 SCA (see *Restamark*, cited above, paragraphs 27 to 31).

37 The concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision.

38 There are two aspects to that concept. The first aspect, which is external, entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them.

39 The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings (see, for comparison, Case C-517/09 *RTL Belgium SA*, judgment of 22 December 2010, not yet reported, paragraphs 38 to 40, and case-law cited).

40 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (compare Case C-506/04 *Wilson* [2006] ECR I-8613, paragraph 53).

41 In relation to the referring body in the current proceedings, it must be observed first of all that, according to Article 69(1) of the Health Personnel Act, mentioned at paragraph 29 of this judgment, the Appeal Board carries out its task independently. The respective provisions demonstrate that the Appeal Board gives rulings on appeal cases brought by health personnel, including cases concerning the refusal of applications for an authorisation or a licence or a certificate of completion of specialist training, without receiving any external instructions and with total impartiality. Furthermore, the Appeal Board is

established as a specialist body for reviewing the decisions of the Registration Authority and is the final arbiter in the administrative procedure.

42 The Appeal Board has a status that is sufficiently separate and independent from the authority which adopted the decision under appeal. Thus, the Court finds that the Appeal Board exercises a judicial or semi-judicial function and as such qualifies as a court or tribunal within the meaning of Article 34 SCA.

Substance

43 By its question, the Appeal Board essentially asks whether the Directive or any other provision of EEA law precludes an EEA State from denying an authorisation to practise as a medical doctor or to grant limited authorisation to an applicant with insufficient professional qualifications if that person fulfils the requirements provided for in the Directive.

44 According to the information provided by the referring body, the Registration Authority has recognised that the Complainant, in principle, had a right to an authorisation on the basis of acquired rights under Article 23 of the Directive. However, the Registration Authority found that given her lack of necessary aptitude, "due to language and communication problems, insufficient theoretical skills and signs of poor insight in her own functioning", she should only be granted a one year licence which would allow her to work as a subordinate medical doctor under Article 49 of the Health Personnel Act.

45 It follows from the provisions of national law referred to and the description of facts in the request that recognition of professional qualifications is a condition that a migrant applicant must fulfil in order to acquire an authorisation to practise medicine in Norway. Thus, the Norwegian legislation appears to make a distinction between the recognition of the professional qualifications of doctors listed in the Directive and subsequent authorisation to practise the profession. In any event, it is clear that the legislation gives the national authorities the right to deny authorisation if there are circumstances which would have led to revocation of authorisation to practise.

46 In light of the above, the Court finds it appropriate to first examine whether an authorisation to practise medicine, such as the one in the case at hand, can be made subject to further requirements regarding the pursuit of the profession as a doctor, such as knowledge of language. Moreover, the question must be addressed as to whether and to what extent, concerns regarding the Complainant's alleged lack of necessary aptitude as referred to in paragraph 44 of this judgment, may constitute a legitimate reason for not granting full authorisation, even though she appears to meet the conditions of the Directive for recognition of her professional qualifications.

Observations submitted to the Court

47 The Governments of the Czech Republic and Poland argue that if Dr A has been able to produce evidence of formal qualifications issued by Bulgaria, her professional qualifications must be recognised directly on the basis of the Directive. This is without prejudice to Article 53 of the Directive, according to which persons benefiting from the recognition of professional qualifications shall have knowledge of languages necessary for practising the profession in the host EEA State.

48 In this regard, the Government of the Czech Republic contends that the recognition of professional qualifications cannot, as such, be subject to linguistic knowledge unless such knowledge is linked to the qualifications, as in the case of speech therapists. Although Article 53 of the Directive provides national authorities with a certain margin of discretion, this discretion cannot be used to deny the recognition of professional qualifications. It follows that insufficient linguistic knowledge can influence a person's right to exercise a profession, but generally not the right to have professional qualifications recognised.

49 In contrast, the Government of Spain contends that Article 53 of the Directive allows EEA States to refuse the recognition when the person concerned does not have the necessary linguistic knowledge. It is submitted that under a literal interpretation of Article 53 of the Directive, all rights recognised by the Directive to the persons concerned are conditional on their linguistic knowledge.

50 However, the Government of Spain also argues that language requirements constitute an obstacle to the exercise of the fundamental freedoms, which can only be justified by overriding reasons of general interest, such as the reliability of communication with patients as well as administrative authorities and professional bodies.

51 As regards the level of knowledge which may be required, national courts will need to apply the principle of proportionality. Accordingly, the linguistic knowledge demanded should not exceed the level objectively required to ensure that patients' interests are protected. In cases where a person has already been practising in the host EEA State for a number of years without displaying any linguistic inadequacy, a language test on the sole basis of which he could be disqualified might well infringe the principle of proportionality. In the view of the Spanish Government, the practical training used by the Norwegian authorities appears to be a proportionate method of determining the linguistic knowledge of persons who have the right, under Article 23 of the Directive, to the recognition of their qualifications as doctors.

52 The Government of Spain submits further that the Directive does not provide for a refusal of recognition on the basis of a lack of sufficient professional qualifications revealed by the professional experience of an applicant. A distinction ought to be made between the recognition of qualifications and the granting or revoking of an authorisation. While the first of these matters is covered by the Directive, the second aspect would fall within the field of application of the fundamental freedoms. It is argued that while an EEA State has

the obligation to recognise the qualifications of other EEA nationals under the Directive, it does not have the obligation to allow these nationals to develop their activity without supervision, when its own nationals are subject to such supervision. In this regard, the Government of Spain recalls that the question of the national court refers specifically to the granting of an authorisation, and not to the recognition of a qualification.

53 It is submitted that, according to case-law, national measures which restrict the exercise of fundamental freedoms can be justified only if they fulfil four conditions: they must be applied in a non-discriminatory manner; be justified by overriding reasons in the general interest; be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective. In the view of the Government of Spain, the Norwegian system meets all these requirements.

54 ESA contends that it is important to distinguish between the two separate steps of the recognition procedure, i.e. that relating to the access to the profession and that relating to the pursuit of that profession. The minimum requirements on education and training to qualify for those professions listed in the Directive are harmonised. The minimum harmonisation guarantees an agreed level of quality, and that the host State neither needs, nor is supposed to individually assess qualifications of migrant medical doctors. Thus, if a given diploma is listed in Annex V to the Directive, the minimum requirements under Articles 24, 25 and 28 are deemed to be fulfilled, and the recognition of a professional qualification shall not be refused by the host State. In cases that fall within the remit of Article 23 of the Directive, which concerns acquired rights, ESA submits that no substantive assessment of individual applications may be carried out by the competent authorities of the host State, but only a formal check of authenticity of the documents that have been submitted.

55 As regards the pursuit of the profession of medical doctor in the host State, ESA notes that once a person has been recognised and authorised to practise in another EEA State, that individual is subject to the national rules governing the profession, including those on professional conduct, consumer protection and safety. Knowledge of the host State‘s language or languages falls under the aspect of pursuit of profession, as long as that proficiency does not form part of the qualification itself, as it does for speech therapists or language teachers.

56 Nonetheless, the host State authorities may, in ESA’s view, examine whether the applicant fulfils all the requirements regarding the pursuit of the profession. As regards Dr A’s alleged lack of language skills, Article 53 of the Directive allows EEA States to require that applicants have certain language skills in order to be allowed to practise as part of a regulated profession. How this linguistic knowledge is assessed is left to the individual interpretation of the EEA States. However, the linguistic requirements cannot go beyond the objectives striven for. The principle of proportionality implies that EEA States cannot demand systematic language exams.

57 Moreover, the authorities may indicate to applicants that they may be subject to disciplinary sanctions in the event of fault or negligence due to insufficient grasp of a language. In ESA's view, it follows that the Directive lays down provisions which allow a State to refuse the pursuit of a profession, even where the recognition of the qualification itself must automatically occur.

58 In the event that after the automatic recognition, it turns out that an individual lacks substantive knowledge of the profession while pursuing the profession in the host State, the competent national authorities may, in ESA's view, apply their national rules, *inter alia* requiring additional training, limiting the authorisation or, in case of professional fault, applying disciplinary sanctions, which may ultimately lead to withdrawal of the authorisation to practise. However, these are matters for national rules subject to the respect of the principle of non-discrimination.

59 If the authorities of the host state learn of a lack of competence of an applicant prior to the automatic recognition, ESA submits that they must still grant recognition.

60 The Commission essentially concurs with ESA on the effect of Articles 21 and 23 of the Directive. Although the principle of mutual recognition ensures that a doctor qualified in Bulgaria, and fulfilling the requirements of Articles 21 or 23 of the Directive, must automatically be recognised in Norway, he or she remains subject to the same obligations as Norwegian doctors in carrying out that profession. By way of example, it appears that Article 57 of the Norwegian Health Personnel Act envisages that authorisation to practise as a doctor may be revoked in cases of misconduct or gross lack of professional insight. Similarly, it should be emphasised that the recognition of medical qualifications does not create a right to be recruited to a particular post.

61 The Commission contends that it follows from the express wording of Article 53 of the Directive that a language requirement cannot be applied as a pre-condition for the recognition of qualifications or for access to the profession in the host EEA State. It is only once automatic recognition of professional qualifications has been granted pursuant to the Directive, that national authorities entrusted with the supervision of medical doctors are permitted to take, at any time, the necessary measures available under national law to address any lack of aptitude to properly perform the duties of a medical doctor provided that any such measures are applied in the same way regardless of where the medical doctors obtained their qualifications or completed their training.

Findings of the Court

62 Directive 2005/36/EC is part of the legal framework designed to facilitate professional mobility of doctors who are EEA nationals and have undergone medical training. The aim of the Directive is to establish rules on the recognition of professional qualifications in order to allow holders of those qualifications to pursue a regulated profession whether on a self-employed or employed basis.

According to recital 19 of the preamble to the Directive, the profession of doctor is subject to a special system for the automatic recognition of professional qualifications, which also concerns the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, and pharmacist.

63 It follows from recital 3 of the preamble that in the case of professions covered by this system, an EEA State retains the right to lay down non-discriminatory conditions to ensure the quality of services provided on its territory. However, an EEA State may not require qualifications, which are generally laid down only in terms of the diplomas awarded under its national educational system, where the person concerned has already obtained all or part of those qualifications in another EEA State. An EEA State in which a profession is regulated must therefore take account of the qualifications obtained in another EEA State and assess whether they correspond to those which it requires.

64 Moreover, according to recital 44 of the preamble the scheme for the recognition of professional qualifications provided for by the Directive, including the special system for automatic recognition, does not prevent an EEA State from making a person pursuing a profession on its territory subject to national measures necessary to ensure a high level of health and consumer protection.

65 The Directive operates on the premise that the free movement and mutual recognition of doctors' formal qualifications shall be based on the fundamental principle of automatic recognition of the respective evidence on the basis of coordinated minimum conditions for training. Accordingly, access in the EEA States to the professions of doctor, is made conditional upon the possession of a given qualification ensuring that the person concerned has undergone training which meets the minimum conditions laid down in the Directive.

66 An EEA State is not permitted to make the recognition of professional qualifications of doctors meeting the criteria of the Directive subject to any further conditions. The system of automatic recognition would be jeopardised if it were open to EEA States at their discretion to question the merits of a decision taken by the competent authority of another EEA State to award the formal evidence of qualification (concerning Council Directive 93/16/EEC see, for comparison, Case C-110/01, *Tennah-Durez* [2003] ECR I-6239, paragraph 75).

67 Accordingly, since the Directive is based on automatic recognition, the Court finds that it, in principle, precludes the authorities of the host EEA State from applying national rules providing for a right to deny an authorisation as a medical doctor to an applicant who fulfils the requirements under the Directive.

68 In relation to requirements that may be made in relation to A's linguistic skills, Article 53 of the Directive stipulates that persons benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for the practice of the profession in the host EEA State.

69 A doctor's ability to communicate with patients, administrative authorities, colleagues and professional bodies constitutes a general public interest. It is therefore justified to make the authorisation to practise as a doctor subject to language requirements. Dialogue with patients, compliance with rules of professional conduct and law specific to doctors in an EEA State of establishment and performance of administrative tasks require an appropriate knowledge of the language or languages of that State (see for comparison, *mutatis mutandis* Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 59). Accordingly, an EEA State may make an authorisation to practise medicine conditional upon linguistic knowledge which is necessary for the exercise of the profession in the EEA State of establishment.

70 Requirements regarding linguistic skills shall ensure, in particular, that the doctor will be able to communicate effectively with patients, whose mother tongue is that of the EEA State concerned. However, such requirements should not go beyond what is necessary to attain that objective.

71 Moreover, any assessment of linguistic abilities which requires performance that is not normally part of a doctor's work, would risk being discriminatory or disproportionate (see, for comparison, Opinion of Advocate General Jacobs in Case C-238/98 *Hocsman* [2000] ECR I-6623, point 57). It also follows from the principle of proportionality that the authorities of EEA States are to ensure that applicants found lacking in necessary language skills have the opportunity to acquire these missing skills.

72 As for other factors concerning personal aptitude of a migrant applicant, it is important to note that it follows from Article 4(1) of the Directive that the effect of recognition of professional qualifications by the host EEA State is that the beneficiary is allowed to gain access to the same profession as that for which he is qualified in the home EEA State, and to pursue it in the host EEA State under the same conditions as its nationals. Thus, the rights conferred on individuals under the Directive are without prejudice to compliance by the migrant professional with any non-discriminatory conditions of pursuit which might be laid down by the authorities of the host State provided that these are objectively justified and proportionate, *inter alia*, with regard to ensuring a high level of health and consumer protection (see also paragraphs 63 and 64 of this judgment).

73 Accordingly, the EEA States retain the competence to take disciplinary action and impose criminal sanctions against migrant medical professionals and, where appropriate, to suspend or withdraw the authorisation to practise if the respective conditions under national law are fulfilled, provided that the general principles of EEA law are respected.

74 However, the requirements on the pursuit of a profession must reflect objective criteria known in advance. They must adequately circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily, thereby eliminating discretionary conduct liable to deprive the Directive of its full effectiveness.

75 Furthermore, the requirements which an EEA State may impose must be non-discriminatory, able to ensure achievement of the objective of protecting public health and not go beyond what is necessary for that purpose. This is for the EEA State concerned to demonstrate.

76 In the present case, it was not an existing authorisation that was suspended or withdrawn. Rather, it was Dr A's application for an authorisation that was rejected. The rejection was based on the ground that relevant information regarding the applicant was available to the Registration Authority at the time of the assessment of the application. This may be an exceptional circumstance with regard to recognition of professional qualifications under the Directive. However, provided that the relevant information would have given grounds for a suspension or withdrawal of an existing authorisation in compliance with EEA law, national authorities cannot be obliged to grant an authorisation when there is a necessity to revoke it. Under such circumstances, national authorities must be entitled to deny an authorisation outright.

77 The Court cannot on the basis of the case-file make an informed assessment regarding whether the deficiencies ascribed to Dr A in the proceedings before the national authorities, may constitute objective and therefore legitimate grounds for denying an authorisation. It is thus for the Appeal Board to decide on the basis of the facts, along with the criteria described in paragraphs 74 to 76 of this judgment.

78 However, the Court notes that as for the premise in the decision of the Registration Authority that Dr A has insufficient theoretical skills, it should be recalled that the automatic recognition of the evidence of formal qualifications is based on coordinated minimum conditions for training. Moreover, the conclusion by the Registration Authority that Dr A showed signs of poor insight in her own functioning seems to contain a discretionary assessment which is incompatible with the purpose of the Directive, unless this ground is given more substance.

79 A part of the question is related to the grant of a limited authorisation to Dr A as a medical doctor. If sufficient and valid reasons exist for the Registration Authority to lawfully suspend or withdraw an authorisation, it follows from the spirit of the Directive, which leaves the EEA States the freedom to strive for a high level of health and consumer protection, that a limited authorisation is granted rather than that the authorisation is suspended or revoked altogether.

IV Costs

80 The costs incurred by the Czech Government, the Norwegian Government, the Polish Government, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Appeal Board, any decision on costs for Dr A, who is a party to those proceedings, is a matter for that body.

On those grounds,

THE COURT

in answer to the question referred to it by the Appeal Board hereby gives the following Advisory Opinion:

- **In principle, Directive 2005/36/EC precludes the authorities of EEA States from applying national rules providing for a right to deny an authorisation as a medical doctor to a migrant applicant from another EEA State who fulfils the requirements under the Directive for a right to mutual recognition of professional qualifications.**

- **However, an EEA State may make an authorisation conditional upon the applicant having a knowledge of languages necessary for practising the profession on its territory.**

- **Moreover, an EEA State may suspend or withdraw an authorisation to pursue the profession of medical doctor based on information concerning the personal aptitude of a migrant doctor relating to the professional qualification other than language skills, such as the ones in question, only if such requirements are objectively justified and proportionate to achieve the objective of protecting public health and if the same information would also entail a suspension or withdrawal of authorisation for a national doctor. If such grounds for suspension or withdrawal are available to the competent authorities at the time of assessment, the authorisation may be denied.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 15 December 2011.

Moritz Am Ende
Acting Registrar

Carl Baudenbacher
President