



E-17/20-13

REPORT FOR THE HEARING

in Case E-17/20

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 Reykjavík District Court (*Héraðsdómur Reykjavíkur*), in the case between

Zvonimir Cogelja

and

the Directorate of Health (*Embætti landlæknis*),

concerning the interpretation of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, and in particular Article 25, in conjunction with Article 3(1)(c) and Articles 21 and 26 thereof.

I Introduction

1. By letter of 8 December 2020, registered at the Court on the same day, Reykjavík District Court requested an Advisory Opinion in the case pending before it between Zvonimir Cogelja and the Directorate of Health.

2. The case before the District Court concerns a claim for the annulment of the Directorate of Health's decision of 20 March 2018 in which Cogelja's application for the issuance of a Certificate of Current Professional Status (CCPS) was denied. Cogelja claims that the decision is based on an incorrect interpretation of the provisions of Directive 2005/36/EC.

II Legal background

EEA law

3. Article 28(1) and (2) of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) reads:

1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

4. Article 30 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.

5. Article 31(1) EEA reads:

1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

6. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22) (“the Directive”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 142/2007 (OJ 2008 L 100, p. 70, and EEA Supplement 2008 No 19, p. 70), which amended Annex VII (Mutual recognition of professional qualifications) and inserted the Directive as point 1 of that Annex. Constitutional requirements were indicated by

Norway, Iceland and Liechtenstein. The requirements were fulfilled on 14 May 2009 and the decision entered into force on 1 July 2009.

7. The Directive was amended by Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (OJ 2013 L 354, p. 132) ("Directive 2013/55") which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 94/2017 (OJ 2019 L 36, p. 52, and EEA Supplement 2019 No 11, p. 62). Constitutional requirements were indicated by Norway, Iceland and Liechtenstein. The requirements were fulfilled on 28 November 2018 and the decision entered into force on 1 January 2019.

8. Recitals 1, 3 and 19 of the Directive read:

(1) Pursuant to Article 3(1)(c) of the Treaty, the abolition, as between Member States, of obstacles to the free movement of persons and services is one of the objectives of the Community. For nationals of the Member States, this includes, in particular, the right to pursue a profession, in a self-employed or employed capacity, in a Member State other than the one in which they have obtained their professional qualifications. In addition, Article 47(1) of the Treaty lays down that directives shall be issued for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.

(3) The guarantee conferred by this Directive on persons having acquired their professional qualifications in a Member State to have access to the same profession and pursue it in another Member State with the same rights as nationals is without prejudice to compliance by the migrant professional with any non-discriminatory conditions of pursuit which might be laid down by the latter Member State, provided that these are objectively justified and proportionate.

(19) Freedom of movement and the mutual recognition of the evidence of formal qualifications of doctors, nurses responsible for general care, dental practitioners, veterinary surgeons, midwives, pharmacists and architects should be based on the fundamental principle of automatic recognition of the evidence of formal qualifications on the basis of coordinated minimum conditions for training. In addition, access in the Member States to the professions of doctor, nurse responsible for general care, dental practitioner, veterinary surgeon, midwife and pharmacist should be made conditional upon the possession of a given qualification ensuring that the person concerned has undergone training which meets the minimum conditions laid down. This system should be supplemented by a number of acquired rights from which qualified professionals benefit under certain conditions.

9. First paragraph of Article 1 of the Directive, entitled “Purpose”, reads:

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.

10. Article 3(1)(a) to (d) of the Directive, entitled “Definitions”, reads:

1. For the purposes of this Directive, the following definitions apply:

(a) ‘regulated profession’: a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit. Where the first sentence of this definition does not apply, a profession referred to in paragraph 2 shall be treated as a regulated profession;

(b) ‘professional qualifications’: qualifications attested by evidence of formal qualifications, an attestation of competence referred to in Article 11, point (a) (i) and/or professional experience;

(c) ‘evidence of formal qualifications’: diplomas, certificates and other evidence issued by an authority in a Member State designated pursuant to legislative, regulatory or administrative provisions of that Member State and certifying successful completion of professional training obtained mainly in the Community. Where the first sentence of this definition does not apply, evidence of formal qualifications referred to in paragraph 3 shall be treated as evidence of formal qualifications;

(d) ‘competent authority’: any authority or body empowered by a Member State specifically to issue or receive training diplomas and other documents or information and to receive the applications, and take the decisions, referred to in this Directive;

11. Prior to the entry into force of Directive 2013/55 in the EEA, Article 4(1) of the Directive, entitled “Effects of recognition”, read:

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.

12. Article 21(1) of the Directive, entitled “Principle of automatic recognition”, reads:

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, as nurse responsible for general care, as dental practitioner, as specialised dental practitioner, as veterinary surgeon, as pharmacist and as architect, listed in Annex V, points 5.1.1, 5.1.2, 5.2.2, 5.3.2, 5.3.3, 5.4.2, 5.6.2 and 5.7.1 respectively, which satisfy the minimum training conditions referred to in Articles 24, 25, 31, 34, 35, 38, 44 and 46 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, 5.2.2, 5.3.2, 5.3.3, 5.4.2, 5.6.2 and 5.7.1 respectively.

The provisions of the first and second subparagraphs do not affect the acquired rights referred to in Articles 23, 27, 33, 37, 39 and 49.

13. Prior to the entry into force of Directive 2013/55 in the EEA, Article 25(1) to (4) of the Directive, entitled “Specialist medical training”, read:

1. Admission to specialist medical training shall be contingent upon completion and validation of six years of study as part of a training programme referred to in Article 24 in the course of which the trainee has acquired the relevant knowledge of basic medicine.

2. Specialist medical training shall comprise theoretical and practical training at a university or medical teaching hospital or, where appropriate, a medical care establishment approved for that purpose by the competent authorities or bodies.

The Member States shall ensure that the minimum duration of specialist medical training courses referred to in Annex V, point 5.1.3 is not less than the duration provided for in that point. Training shall be given under the supervision of the competent authorities or bodies. It shall include personal participation of the

trainee specialised doctor in the activity and responsibilities entailed by the services in question.

3. *Training shall be given on a full-time basis at specific establishments which are recognised by the competent authorities. It shall entail participation in the full range of medical activities of the department where the training is given, including duty on call, in such a way that the trainee specialist devotes all his professional activity to his practical and theoretical training throughout the entire working week and throughout the year, in accordance with the procedures laid down by the competent authorities. Accordingly, these posts shall be the subject of appropriate remuneration.*

4. *The Member States shall make the issuance of evidence of specialist medical training contingent upon possession of evidence of basic medical training referred to in Annex V, point 5.1.1.*

14. Prior to the entry into force of Directive 2013/55 in the EEA, Article 26 of the Directive, entitled “Types of specialist medical training”, read:

Evidence of formal qualifications as a specialised doctor referred to in Article 21 is such evidence awarded by the competent authorities or bodies referred to in Annex V, point 5.1.2 as corresponds, for the specialised training in question, to the titles in use in the various Member States and referred to in Annex V, point 5.1.3.

The inclusion in Annex V, point 5.1.3 of new medical specialties common to at least two fifths of the Member States may be decided on in accordance with the procedure referred to in Article 58(2) with a view to updating this Directive in the light of changes in national legislation.

15. Article 50(1) to (3) of the Directive, entitled “Documentation and formalities”, reads:

1. *Where the competent authorities of the host Member State decide on an application for authorisation to pursue the regulated profession in question by virtue of this Title, those authorities may demand the documents and certificates listed in Annex VII.*

The documents referred to in Annex VII, point 1(d), (e) and (f), shall not be more than three months old by the date on which they are submitted.

The Member States, bodies and other legal persons shall guarantee the confidentiality of the information which they receive.

2. *In the event of justified doubts, the host Member State may require from the competent authorities of a Member State confirmation of the authenticity of the attestations and evidence of formal qualifications awarded in that other Member State, as well as, where applicable, confirmation of the fact that the beneficiary fulfils, for the professions referred to in Chapter III of this Title, the minimum training conditions set out respectively in Articles 24, 25, 28, 31, 34, 35, 38, 40, 44 and 46.*

3. *In cases of justified doubt, where evidence of formal qualifications, as defined in Article 3(1)(c), has been issued by a competent authority in a Member State and includes training received in whole or in part in an establishment legally established in the territory of another Member State, the host Member State shall be entitled to verify with the competent body in the Member State of origin of the award:*

(a) whether the training course at the establishment which gave the training has been formally certified by the educational establishment based in the Member State of origin of the award;

(b) whether the evidence of formal qualifications issued is the same as that which would have been awarded if the course had been followed entirely in the Member State of origin of the award; and

(c) whether the evidence of formal qualifications confers the same professional rights in the territory of the Member State of origin of the award.

16. Point 5.1.1 of Annex V to the Directive – Recognition on the basis of coordination of the minimum training conditions – lists the evidence of formal qualifications in basic medical training that is required for the EEA State to issue evidence of specialist medical training under Article 25 of the Directive.

17. Point 5.1.2 of Annex V to the Directive lists the titles adopted by the EEA States for evidence of formal qualifications of specialised doctors and the corresponding issuing body.

18. Point 5.1.3 of Annex V to the Directive provides the minimum period of training that is needed for specialised medicine. According to point 5.1.3, the minimum period of training for plastic surgery is five years.

III Facts and procedure

19. Cogelja is a Swedish doctor. He has never lived, studied or worked in Iceland. He completed his medical studies at Karolinska Institut in Stockholm, Sweden, in 2003. He

received a licence from the Swedish National Board of Health and Welfare (*Socialstyrelsen*) to practise as a physician on 16 November 2005. After receiving his licence, Cogelja began specialist studies in plastic surgery.

20. In the period 2005–2009, Cogelja worked for up to 41 months in general medicine at a hospital in Ystad, Sweden. According to the request, it is possible to conclude that this work was in a general surgical ward. In 2009, Cogelja worked for six months in plastic surgery at the Akademikliniken in Stockholm, Sweden. The same year, he also worked for four months in plastic surgery at the University Hospital in Linköping, Sweden.

21. In 2010, Cogelja worked for seven months in plastic surgery at the Telemark Hospital in Skien, Norway. From 2011 to 2012 he worked for 12 months in plastic surgery at the Centre for Plastic Surgery in Meggen, Switzerland.

22. In the period from 2012 to 2014, Cogelja worked for 25 months in Fachklinik Hornheide in Munster, Germany. According to the request, his employment in Munster seems to have consisted of work in a department dealing with plastic surgery (“department of reconstructive and aesthetic plastic surgery and hand surgery”).

23. Based on the practice mentioned above, Cogelja submits that he had pursued specialist training for a total of 95 months – seven years and eleven months – before he received a specialist licence in Iceland.

24. On 15 November 2013, the Directorate of Health granted Cogelja an unrestricted licence to practise as a doctor in Iceland, with reference to the licence he had received from the Swedish National Board of Health and Welfare.

25. On 2 October 2014, Cogelja received authorisation from the Directorate of Health to use the professional designation “specialist in plastic surgery” (*sérfræðingur í lýtalækningum*) and to practise as such in Iceland. This specialist licence was issued under Article 6 of the Healthcare Professionals Act No 34/2012.

26. According to the request, the evidence in the main proceedings suggests that, on 17 March 2014, prior to the issue of the authorisation in Iceland, a request by Cogelja for permission to use the designation “specialist in plastic surgery” in Sweden had been rejected on the grounds that he had not completed sufficient training. The request states further that these circumstances are detailed in the judgment of 29 May 2017 given by Copenhagen City Court (*Københavns Byret*) in Case BS 29C5250/2015, which is an exhibit in the main proceedings. The Copenhagen City Court judgment indicates that the action was brought by Cogelja before the Danish courts due to the refusal by the Danish authorities to accept the specialist licence issued to Cogelja by the Directorate of Health.

27. In an email of 20 January 2016, the Directorate of Health confirmed that the licence issued to Cogelja was the same as was specified in points 5.1.2 and 5.1.3 of Annex V to the Directive.

28. On 9 February 2018, Cogelja requested the Directorate of Health to issue a certificate attesting his professional qualifications, confirming that the training he had undergone met the requirements of the Directive, in other words a Certificate of Current Professional Status. He had previously received such certificates from the Directorate of Health on 17 February 2015 and 30 June 2015.

29. In an email of 20 March 2018, the Directorate of Health rejected Cogelja's request for a new certificate. The Directorate of Health considered that it could only confirm that Cogelja had received a licence to practise plastic surgery in Iceland, but that it was unable to attest that his training had been in accordance with the requirements of the Directive. Consequently, the Directorate was not able to issue a certificate to Cogelja. The Directorate of Health referred to changes in the working procedure regarding the granting of specialist medical licences following criticism by the EFTA Surveillance Authority ("ESA"). ESA had indicated that the procedure for issuing specialist licences in Iceland had, in certain individual cases, not been in conformity with the Directive. As a consequence, the Directorate of Health changed its practice on 14 December 2017 and published a press release to that effect on its website.

30. According to the request, the exhibits in the main proceedings include a letter from ESA to the Icelandic Ministry for Foreign Affairs, dated 24 August 2018. It follows from the request that this letter states, among other things, that the Directive does not authorise EEA States to issue specialist licences (such as evidence of formal qualifications) or "certificates of conformity" stating that the training is in conformity with the requirements of the Directive in the case of training courses which EEA States do not themselves organise in full. ESA took the view that where an EEA State had not organised the training, it could only grant individuals licences or authorisations to practice the profession on its own territory.

31. According to the request, the parties to the main proceedings do not dispute the fact that training in plastic surgery, as a specialist medical discipline, is not available in Iceland.

32. On 29 October 2018, Cogelja lodged an appeal with the Icelandic Ministry of Health challenging the rejection of his request by the Directorate of Health. The Ministry of Health upheld the decision by a ruling of 14 June 2019. Subsequently, Cogelja brought the present action in which he argues that the Directorate of Health's decision must be annulled.

33. Against this background, the District Court decided to stay the proceedings and refer the following question to the Court:

Does Article 25 of Directive 2005/36/EC on the recognition of professional qualifications (see also point (c) of the first paragraph of Article 3, and Articles 21 and 26 of that directive), require that an EEA State that issues evidence of qualifications (called a “specialist licence” (Icelandic: *sérfræðileyfi*)) for a doctor that enjoys automatic recognition in other EEA States must itself administer the training, recognition of which is sought through the issuance of such evidence, with the result that an EEA State is not to issue such evidence if the training did not take place in that State?

IV Written observations

34. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the Directorate of Health, represented by Mr Einar Karl Hallvarðsson, acting as Agent;
- the Norwegian Government, represented by Kaija Bjelland, Hilde Ruus, Kine Sverdrup Borge and Tone Hostvedt Aarhun, acting as Agents;
- the Austrian Government, represented by Albert Posch, Julia Schmoll and Elizaveta Samoilova, acting as Agents;
- the EFTA Surveillance Authority, represented by Romina Schobel, Catherine Howdle and Carsten Zatschler, acting as Agents; and
- the European Commission (“the Commission”), represented by Lorna Armati, Julie Samnadda and Hans Christian Støvlbæk, acting as Agents.

V Proposed answers submitted

The Directorate of Health

35. The Directorate of Health proposes that the question referred be answered as follows:

*... Article 25 of Directive 2005/36/EC on the recognition of professional qualifications (see also point (c) of the first paragraph of Article 3, and Article 21 and 26 of that directive), requires that an EEA State that issues evidence of qualifications (called a “specialist license” (Icelandic: *sérfræðileyfi*)) for a doctor that enjoys automatic recognition in other EEA States must itself administer the training, recognition of which is sought through the issuance of such evidence, with*

the result that an EEA State is not to issue such evidence if the training was not organised in that State and approved by the competent authorities or bodies.

The Norwegian Government

36. The Norwegian Government proposes that the question referred be answered as follows:

Directive 2005/36/EC requires that an EEA State that issues evidence of formal qualifications for a profession that enjoys automatic recognition in other EEA States must itself administer the training for that profession. An EEA State is not to issue such evidence if the training did not take place in that State.

The Austrian Government

37. The Austrian Government proposes that the question referred be answered as follows:

1. Article 25 of Directive 2005/36/EC, read in conjunction with Articles 3 (1) (c), 21 and 26 of Directive 2005/36/EC, must be interpreted as meaning that a Member State who did not award the evidence of a formal qualification may not attest that the requirements of Directive 2005/36/EC have been fully complied with.

2. Directive 2005/36/EC does not require that the training attested by an evidence of formal qualification must have taken place (solely) in the Member State awarding that evidence. It is for the competent authorities in the Member State awarding the evidence of formal qualification to validate parts of medical training received in other Member States and to verify whether the training requirements of Directive 2005/36/EC have been fully complied with.

3. Article 3 (1) (c) of Directive 2005/36/EC must be interpreted as meaning that only a Member state whose education system covers the education or training and in which either an examination or a professional experience has been acquired can award an evidence of formal qualifications pursuant to that provision. A certificate issued by a Member State which does not attest any education or training covered by the education system of that Member State and is not based on either an examination taken or professional experience acquired in that Member State does not constitute evidence of formal qualifications pursuant to Article 3 (1) (c) of Directive 2005/36/EC.

ESA

38. ESA proposes that the question referred be answered as follows:

Articles 21 and 25 of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications must be interpreted to the effect that the specialist medical training covered by those provisions must neither fully nor partially take place in the EEA State issuing evidence of formal qualifications as specialist doctor pursuant to Article 21 of that Directive. However, Article 3(1)(c) of the same Directive is to be interpreted as requiring the EEA State issuing such evidence of formal qualifications to have an education system in place covering the training according to its Article 25 and base any evidence of formal qualifications on examinations taken or professional experience acquired in said State and to oblige the EEA State to ensure compliance with the minimum training requirements in accordance with that same provision.

The Commission

39. The Commission proposes that the question referred be answered as follows:

Articles 25 and 26 of Directive 2005/36/EC on the recognition of professional qualifications do not require that an EEA State itself administers the training leading to the issuing of evidence of formal qualifications attesting to the successful completion of specialist medical training (sérfræðileyfi), provided that sufficient safeguards are in place in that State to ensure that the evidence of formal qualifications issued by the competent authority in relation to specialist medical is based on a national curriculum describing a comprehensive programme of education and training that complies with the requirements laid down in that respect in Directive 2005/36/EC.

Per Christiansen
Judge-Rapporteur