JUDGMENT OF THE COURT

9 September 2003 *

In Case C-25/02,

REFERENCE to the Court under Article 234 EC by the Bundesverwaltungsgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

Katharina Rinke

and

Ärztekammer Hamburg,

on the interpretation of Article 5 of Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice (OJ 1986 L 267, p. 26) and Article 34 of Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1), and on the compatibility of those provisions with the prohibition of indirect discrimination on grounds of sex as laid down in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40),

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet, R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur), V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: L.A. Geelhoed,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Ms Rinke, by D. Goergens, Rechtsanwältin,

— the Swedish Government, by A. Kruse, acting as Agent,

— the Council of the European Union, by A. Lo Monaco and J.-P. Hix, acting as Agents,

— the Commission of the European Communities, by M. Patakia, N. Yerrell and B. Martenczuk, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Rinke, the Council and the Commission at the hearing on 12 November 2002,

after hearing the Opinion of the Advocate General at the sitting on 6 February 2003,

gives the following

Judgment

1 By order of 8 November 2001, received at the Court on 31 January 2002, the Bundesverwaltungsgericht (Federal Administrative Court) referred two questions for a preliminary ruling under Article 234 EC on the interpretation of Article 5 of Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice (OJ 1986 L 267, p. 26) and Article 34 of Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1), and on the compatibility of those provisions with the prohibition of indirect discrimination on grounds of sex as laid down in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

2 Those questions have been raised in proceedings between Ms Rinke and the Ärztekammer Hamburg (Hamburg Chamber of Medical Practitioners) concerning the refusal by the latter to issue Ms Rinke with a certificate of 'specific training in general medical practice' and to confer on her the right to use the title 'General Medical Practitioner'.

Legal background

3 According to Article 1(1) of Directive 76/207, its purpose is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and vocational training and as regards working conditions and social security.

4 The principle of equal treatment, for the purpose of Article 2(1) of Directive 76/207, means that there must be no discrimination whatsoever on grounds of sex, whether directly or indirectly, by reference in particular to marital or family status.

5 Under Article 3 of Directive 76/207, the application of the principle of equal treatment means that there must be no discrimination whatsoever on grounds of sex with respect to the conditions of access to jobs or posts and to all levels of the occupational hierarchy.

6 That provision requires Member States to take the measures necessary to abolish any laws, regulations and administrative provisions that are contrary to the principle of equal treatment.

7 The same obligation is imposed on Member States by Article 4(a) of Directive 76/207 with regard to access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining.

8 Article 2(1)(b) of Directive 86/457 provides that specific training in general medical practice must last at least two years and must be full-time.

9 Article 5 of Directive 86/457 is worded as follows:

'1. Without prejudice to the principle of full-time training laid down in Article 2(1)(b), Member States may authorise specific part-time training in general medical practice in addition to full-time training where the following particular conditions are met:

— the total duration of training may not be shortened because it is being followed on a part-time basis,

— the weekly duration of part-time training may not be less than 60% of weekly full-time training,

— part-time training must include a certain number of full-time training periods, both for the training conducted at a hospital or clinic and for the training given in an approved medical practice or in an approved centre where doctors provide primary care. These full-time training periods shall be of sufficient number and duration as to provide adequate preparation for the effective exercise of general medical practice.

2. Part-time training must be of a level of quality equivalent to that of full-time training. It shall lead to a diploma, certificate or other evidence of formal qualification, as referred to in Article 1.'

10 Directive 86/457 has been incorporated into Directive 93/16.

11 Article 34 of Directive 93/16 has the same content as Article 5 of Directive 86/457.

12 Article 25 of Directive 93/16 allows Member States to authorise specialist training on a part-time basis under conditions approved by the competent national authorities when training on a full-time basis would not be practicable for well-founded individual reasons. In contrast to Article 34 of Directive 93/16, Article 25 does not require that a certain number of training periods must be full-time.

Dispute in the main proceedings and questions for a preliminary ruling

13 Ms Rinke is a doctor. During her specific training in general medicine she worked part-time in a general medical practice, in particular from 1 April 1994 to 31 March 1995, working more than 60% of normal working hours as a further training assistant.

14 On 4 May 1995 Ms Rinke applied to the respondent in the main proceedings for a certificate of 'specific training in general medical practice' and the right to use the title 'General Medical Practitioner'. By decision of 5 May 1995 the respondent in the main proceedings rejected that request on the ground that, in accordance with the first sentence of the second paragraph of Article 13b of the 'Hamburgische Ärztegesetz' (Hamburg Law on Medical Practitioners), the prescribed training had to be carried out in a general medical practice for at least six months on a full-time basis.

15 Ms Rinke brought an action before the Verwaltungsgericht (Administrative Court) against that decision, arguing that the rule in the Hamburgische Ärztegesetz is contrary to the principle of non-discrimination laid down in Community law by Directive 76/207. The requirement imposed by Article 5(1) of Directive 86/457 ought, she submitted, to be overridden by the fundamental principle of non-discrimination.

16 The Ärztekammer Hamburg contended that the full-time training required by that legislation was objectively justified.

17 The Verwaltungsgericht dismissed the action. On 18 February 1999 the Bundesverwaltungsgericht dismissed the appeal against the decision of the Verwaltungsgericht. It held that the rule adopted by the Hamburg legislature was in any event justified with regard to Community law by Article 34(1) of Directive 93/16, which corresponds to Article 5(1) of Directive 86/457. That rule, the Bundesverwaltungsgericht held, overrode Directive 76/207 on equal treatment because it was both more specific and more recent. It complied with the principle prohibiting arbitrary measures and with the principle of proportionality.

18 By decision of 9 January 2001 the Bundesverfassungsgericht (Federal Constitutional Court) set aside that judgment on appeal by Ms Rinke and referred the case back to the Bundesverwaltungsgericht. The latter, the Bundesverfassungs-

gericht held, had, in effect, infringed the applicant's right to a hearing before the proper statutory court by failing to refer the question of the relationship between Article 34(1) of Directive 93/16 and Directive 76/207 on equal treatment to the Court of Justice of the European Communities for a preliminary ruling. Nor was it clear that the principles that more specific and more recent legal rules take precedence were necessarily principles that could be applied in Community law. Further, the principle of non-discrimination might enjoy the status of a fundamental right in Community law and take precedence over Directive 93/16.

19 By order of 8 November 2001 the Bundesverwaltungsgericht decided to stay its proceedings. In its view there was no doubt that excluding the possibility of completing all training on a part-time basis affected women to a greater extent than men, as experience showed that a greater proportion of women take advantage of the opportunities offered by part-time work. However, it was not certain that Directive 76/207 applied in the present case. In contrast to the cases of discrimination of part-time workers compared with full-time workers which have been the subject of the Court's case-law, the present case did not relate to unfavourable consequences attached to certain employment conditions. On the contrary, the legislature precluded a certain form of activity — part-time work — for all workers concerned.

20 Further, the obligation to undertake full-time training in a general medical practice could be justified by factors which had nothing to do with discrimination on grounds of sex. On the other hand, Article 25 of Directive 93/16, which relates to specialist medical training in general medical practice, did not provide for periods of mandatory full-time training.

21 On the assumption that the requirement to undertake full-time training constituted an infringement of the principle of non-discrimination, the question then arose as to how to resolve such incompatibility of legal rules.

22 The Bundesverwaltungsgericht therefore decided to refer the following questions to the Court for a preliminary ruling:

'(1) Does the requirement laid down in Directives 86/457/EEC and 93/16/EEC, to the effect that certain components of the specific training in general medical practice — completion of which confers the right to use the title "general medical practitioner" — must be undertaken full-time, constitute indirect discrimination on grounds of sex within the meaning of Directive 76/207/EEC?

(2) If the answer to Question 1 is yes:

(a) How is the incompatibility of Directive 76/207/EEC, on the one hand, with Directives 86/457/EEC and 93/16/EEC, on the other, to be resolved?

(b) Does the prohibition of indirect discrimination on grounds of sex constitute a basic unwritten right under Community law that overrides any conflicting rule in secondary Community legislation?'

The questions submitted for preliminary ruling

23 It is appropriate to begin by considering Question 2.

Question 2

24 As the Commission rightly pointed out in its written observations, Directive 76/207 is addressed to the Member States, and not to the Community institutions. The provisions of Directive 76/207 cannot, therefore, be treated, as such, as imposing any obligations on the Council in the exercise of its legislative powers.

25 However, as all the parties who presented observations in the present case have stated, the elimination of discrimination on grounds of sex forms part of the fundamental rights the observance of which, as general principles of Community law, the Court has a duty to ensure (Case 149/77 *Defrenne III* [1978] ECR 1365, paragraphs 26 and 27, and Case C-13/94 *P.* v *S. and Cornwall County Council* [1996] ECR I-2143, paragraph 19).

26 It is also common ground that the respect of fundamental rights is a condition of the legality of Community acts (Opinion 2/94 [1996] ECR I-1759, paragraph 34, and Case C-249/96 *Grant* [1998] ECR I-621, paragraph 45).

27 It follows that a provision of a directive adopted by the Council in disregard of the principle of equal treatment for men and women is vitiated by illegality.

28 The answer to Question 2 must therefore be that compliance with the prohibition of indirect discrimination on grounds of sex is a condition governing the legality of all measures adopted by the Community institutions.

Question 1

Observations of the parties

29 Ms Rinke and the Swedish Government argue that the provisions which require part-time training in general medicine to include a certain number of full-time training periods place considerably more women at a disadvantage than men. Therefore, there is indirect discrimination on grounds of sex unless those provisions can be justified by objective factors independent of sex. However, in this case, such a justification does not exist, as is demonstrated by the fact that all other specialist medical training can be undertaken on a wholly part-time basis. The presumed aim of the provisions in question, namely to improve the protection of public health, may be achieved by other measures that are not discriminatory.

30 The Council and the Commission take the contrary view that the principle of equal treatment is not infringed. According to the Council, the provisions in question do not place part-time trainee doctors at a greater disadvantage than their full-time colleagues — the conditions governing access to the profession are the same, practical training and periods of full-time training being compulsory for both categories of trainee doctors. The Commission argues that the question whether that requirement affects a larger proportion of women than men must be decided by the national courts, which must refer for that purpose to the available statistical information. The very general findings in the order for reference are not sufficient to satisfy the requirements for a finding of indirect discrimination.

31 In any event, the Council and the Commission submit that Article 5(1) of Directive 86/457 and Article 34(1) of Directive 93/16 are justified by objective

reasons which are unrelated to any discrimination on grounds of sex. The provisions seek to ensure training of a high quality to allow the free movement of general medical practitioners and to guarantee a high level of health protection. Part-time training in general medical practice poses a number of problems which can be overcome only by certain periods of full-time training. As to the possibility for specialist practitioners to undertake all of their training on a part-time basis, the Commission takes the view that the latter do not occupy the same central position in the health care system as general practitioners.

Findings of the Court

32 First, the rule that part-time training must include a certain number of periods of full-time training does not constitute direct discrimination, since it applies to male and female workers alike. It is thus necessary to examine whether it can constitute indirect discrimination.

33 According to settled case-law, a provision involves indirect discrimination against female workers when, although worded in neutral terms, it works to the disadvantage of a much higher percentage of women than men, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex (see, to that effect, Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 29).

34 It is therefore necessary to examine whether the requirement that general medical training must include a certain number of periods of full-time training does in fact work to the disadvantage of a much higher percentage of women than men.

35 It is clear from the statistical data referred to by the Advocate General at points 36 and 37 of his Opinion that the percentage of women working part-time is much higher than that of men working on a part-time basis. That fact, which can be explained in particular by the unequal division of domestic tasks between women and men, shows that a much higher percentage of women than men wishing to train in general medicine have difficulties in working full-time during part of their training. Thus, such a requirement does in fact place women at a particular disadvantage as compared with men.

36 In those circumstances, it is necessary to examine whether such a requirement is justified by objective factors unrelated to discrimination on grounds of sex.

37 It must be observed in this regard that, according to the third recital in the preamble to Directive 86/457 and the 16th recital in the preamble to Directive 93/16, specific training for a general medical practitioner must prepare him better to fulfil his particular function, which depends to a great extent on his personal knowledge of his patients' environment and consists in giving advice on the prevention of illness, protecting the patient's general health and providing appropriate treatment.

38 As the Council and the Commission rightly state, the harmonisation at Community level of that training not only facilitates the free movement of doctors but also contributes to a high level of public health protection in the Community.

39 In the pursuit of those objectives, the Community legislature must be allowed a wide margin of discretion, which cannot, however, render meaningless the

implementation of a fundamental principle of Community law such as the elimination of indirect discrimination on grounds of sex.

40 In Article 5(1) of Directive 86/457 and Article 34(1) of Directive 93/16 the Community legislature considered that adequate preparation for the effective exercise of general medical practice requires a certain number of periods of full-time training, both for students in hospitals or clinics and for those in approved medical practices or in approved centres where doctors provide primary care. That measure can be considered as being appropriate to achieve the objectives pursued. It was reasonable for the legislature to take the view that that requirement enables doctors to acquire the experience necessary, by following patients' pathological conditions as they may evolve over time, and to obtain sufficient experience in the various situations likely to arise more particularly in general medical practice.

41 The Community legislature has left to the national legislatures the task of fixing the number and duration of full-time training periods. It has simply stated that those periods must be of such a number and duration as adequately to prepare for the effective exercise of general medical practice. In view of the margin of discretion which the Community legislature has in the matter in question, such a measure may be regarded as not exceeding what is necessary to achieve the objectives set out in paragraph 38.

42 It follows that the requirement in question must be regarded as justified by objective factors independent of any discrimination on grounds of sex.

43 The answer must therefore be that examination of Question 1 has failed to disclose any factor capable of affecting the validity of the provision contained in Article 5(1) of Directive 86/457 and Article 34(1) of Directive 93/16, according to which part-time training in general medical practice must include a certain number of periods of full-time training.

Costs

44 The costs incurred by the Swedish Government, the Council and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesverwaltungsgericht by order of 8 November 2001, hereby rules:

1. **Compliance with the prohibition of indirect discrimination on grounds of sex is a condition governing the legality of all measures adopted by the Community institutions.**

2. **Examination of Question 1 has failed to disclose any factor capable of affecting the validity of the provision contained in Article 5(1) of Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice and Article 34(1) of Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, according to which part-time training in general medical practice must include a certain number of periods of full-time training.**

Rodríguez Iglesias	Puissochet	Wathelet
Schintgen	Timmermans	Gulmann
Edward	La Pergola	Jann
Skouris	Macken	Colneric
von Bahr	Cunha Rodrigues	Rosas

Delivered in open court in Luxembourg on 9 September 2003.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President