JUDGMENT OF THE COURT (Fifth Chamber)
16 October 1997 *

In Joined Cases C-69/96 to C-79/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Consiglio di Stato (Italy) for a preliminary ruling in the proceedings pending before that court between

Maria Antonella Garofalo (C-69/96),

Giovanni Pagano (C-70/96),

Rosa Bruna Vitale (C-71/96),

Francesca Nuccio (C-72/96),

Giacomo Cangialosi (C-73/96),

Giacoma D'Amico (C-74/96),

Giulia Lombardo (C-75/96),

* Language of the case: Italian.

Emanuela Giovenco (C-76/96),

Caterina Lo Gaglio (C-77/96),

Daniela Guerrera (C-78/96),

Cesare Di Marco (C-79/96)

and

Ministero della Sanità

Unità Sanitaria Locale (USL) n° 58 di Palermo

on the interpretation of Article 177 of the EC Treaty and Article 7 of Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice (OJ 1986 L 267, p. 26),

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, D. A. O. Edward (Rapporteur), J.-P. Puissochet and J. C. Moitinho de Almeida, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the Italian Government, by Professor Umberto Leanza, Head of the Contentious Diplomatic Affairs Department of the Ministry of Foreign Affairs, acting as Agent, and by Pier Giorgio Ferri, Avvocato dello Stato,

— the Commission of the European Communities, by Berend Jan Drijber and Laura Pignataro, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 26 June 1997,

gives the following

Judgment

1 By 11 orders of 6 December 1995, received at the Court on 14 March 1996 in Cases C-69/96 to C-73/96 and on 15 March 1996 in Cases C-74/96 to C-79/96, the Consiglio di Stato (Council of State) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of that article and of Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice (OJ 1986 L 267, p. 26).

2 Those questions have been raised in a number of extraordinary petitions to the President of the Italian Republic by Maria Antonella Garofalo and ten other

doctors (hereinafter 'the petitioners') concerning Decision No 1495 of 4 April 1995 of the Special Commissioner of Unità Sanitaria Locale (Local Health Unit) No 58, Palermo (hereinafter 'the USL'), establishing the list of general medical practitioners entitled to practise under the Italian social security scheme and the Order of the Minister for Health of 15 December 1994 (GURI No 303 of 29 December 1994) on which it is based.

3 The twenty-fourth recital in the preamble to 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), states that doctors exercising general medical practice under social security schemes who are established in practice under Council Directive 75/362/EEC of 16 June 1975, concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1975 L 167, p. 1), before 1 January 1995 must have an acquired right to practise as general medical practitioners under the national social security scheme of the host country even if they have not completed specific training in general medical practice.

4 Article 36 of Directive 93/16 provides:

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

However, Member States may exempt from this condition persons who are undergoing specific training in general medical practice.

2. Each Member State shall specify the acquired rights that it recognizes. However, it shall recognize the right to exercise the activities of general medical practitioner under its national social security scheme without the diploma, certificate or other evidence of formal qualification referred to in Article 30 as having been acquired by all those doctors who on 31 December 1994 possess such a right pursuant to Articles 1 to 20 and who are established on its territory on that date by virtue of Article 2 or 9(1).'

5 That recital and Article 36 are drafted in identical terms to the eleventh recital in the preamble to and Article 7(1) and (2) of Directive 86/457, which was replaced and incorporated in Directive 93/16.

6 In Italy, Legislative Decree No 256 of 8 August 1991 (GURI No 191 of 16 August 1991, hereinafter 'Decree No 256/91') amended national legislation to give effect to Directive 86/457.

7 Article 2 of that decree provides that, as from 1 January 1995, a person must have a certificate of specific training in general medical practice in order to practise general medicine in the national health service, without prejudice to acquired rights.

8 Article 6 of Decree No 256/91, which deals with acquired rights, provides that 'doctors in a contractual relationship' are to be entitled to engage in general medical practice within the national health service and it lists the categories of doctors so entitled: doctors already working in the national health service under contract, doctors working in the duty-doctor service, casualty doctors specializing in internal medicine, and so on. In all cases, the 'contractual relationship' must have been established before 31 December 1994.

9 The decree also grants the Minister for Health power to determine 'further categories' of doctors who may be recognized as having an acquired right to engage in general medical practice in the national health service.

10 The Minister for Health used that power to adopt a decree of 15 December 1994, which extended the benefit of the acquired right to all doctors who had obtained a certificate of entitlement to practise medicine before 1 January 1995.

11 The petitioners are all doctors who have a medical degree, a certificate of entitlement to practise medicine and a certificate evidencing specific training in general medicine. Following publication of a vacancy notice, they applied to be included on the list of persons seeking posts as general medical practitioners under contract to the USL. That list, incorporating their names, was approved by the administrator of the USL by a decision of 4 April 1995.

12 The petitioners none the less addressed an extraordinary petition to the President of the Republic (hereinafter 'the extraordinary petition') challenging that list on the ground that some doctors who did not hold a special certificate evidencing specific training in general medicine had been included in the list in positions above them.

13 In their petition, the petitioners submit that Decree No 256/91 makes possession of a certificate evidencing training in general medicine compulsory as from 1 January 1995 — without prejudice to acquired rights — in order to practise as a doctor under contract in the national health service. Consequently, they consider that the scope of the decree of the Minister for Health of 15 December 1994 is too broad since it recognizes the right of all doctors authorized to practise before 1 January 1995 to pursue the activity of general medical practitioners in the national health service.

14 The Ministry of Health, to which the petition was referred, sought the opinion of the Consiglio di Stato on 27 October 1995.

15 The latter considered that, in order to give its opinion, it had to refer a question to the Court of Justice on the interpretation of Article 7(2) of Directive 86/457, now Article 36(2) of Directive 93/16. Being also uncertain as to whether it was entitled to make such a reference, it raised a preliminary question concerning the concept of 'court or tribunal' within the meaning of Article 177 of the Treaty. It therefore postponed delivery of its opinion in order to refer the following questions to the Court for a preliminary ruling:

'1. Must the term "court or tribunal" in Article 177 of the Treaty be interpreted extensively so as to include not only judicial bodies specifically defined as such in national law but also bodies hearing contentious administrative proceedings characterized not only by impartiality, full exchange of argument and evidence between the parties and so forth but also by the fact that the decision cannot be revoked, amended or challenged by any other administrative or judicial authority?

2. Do the words "all those doctors who on 31 December 1994 possess such a right" in Article 7(2) of Directive 86/457/EEC refer to those who had theoretically obtained entitlement to enter into a service relationship (as employees, under contractual arrangements, as members of temporary staff, and so forth) with the national health service, or only to those who had already in fact entered into such a relationship?

3. If the last question is answered in accordance with the second possibility, is the directive to be interpreted as meaning that the national authority is in any event entitled to extend the term "acquired rights" so as to include all those who, on the date indicated, had acquired an ordinary certificate of entitlement to practise medicine, or as meaning that an "acquired right" must be taken to refer to a higher qualification than an ordinary certificate of entitlement to practise medicine?'

16 By order of the President of the Court of 29 April 1996, Cases C-69/96 to C-79/96 were joined for the purposes of the written procedure, the oral procedure and the judgment.

The first question

17 It is common ground that the Consiglio di Stato satisfies the conditions for being treated as a 'court or tribunal' for the purposes of Article 177 of the Treaty when it rules in second and final instance on appeals against judgments of regional administrative courts in proceedings concerning administrative acts.

18 The first question submitted by the Consiglio di Stato is essentially whether that body also constitutes a 'court or tribunal' within the meaning of Article 177 of the Treaty when it issues an opinion in relation to an extraordinary petition.

19 In order to answer that question, it is necessary to consider the conditions governing the function of the Consiglio di Stato when it acts in the context of that particular procedure, having regard to the criteria which this Court has laid down for interpreting the concept of 'court or tribunal' for the purposes of Article 177 of the Treaty, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether procedure before it is *inter partes*, whether it applies rules of law, and whether it is independent (see, most recently, Case C-54/96 *Dorsch Consult* v *Bundesbaugesellschaft Berlin* [1997] ECR I-4961, paragraph 23).

20 Extraordinary petitions are direct administrative actions introduced in 1971 by Decree No 1199 of the President of the Republic.

21 According to the documents before the Court, a person seeking annulment of an Italian administrative act may choose between two legal remedies — an extraordinary petition and an application to the Tribunale Amministrativo Regionale (Regional Administrative Court): both have the same basic legal characteristics and are mutually exclusive.

22 First, apart from time-limits and certain secondary aspects, the conditions for bringing the two types of action are the same. The purpose of the application is also the same, namely the annulment of an administrative act adversely affecting a legitimate interest. Finally, the grounds on which the application may be based are the same in both cases.

23 Furthermore, the procedures relating to both extraordinary petitions and ordinary applications to the administrative court are conducted *inter partes* and require the principles of impartiality and equality between the parties to be observed.

24 As far as extraordinary petitions are concerned, it appears from the file that reference to the Consiglio di Stato is compulsory and that its opinion, based solely on the application of rules of law, forms the basis for a decision which will be formally adopted by the President of the Italian Republic. Such an opinion, which comprises both reasoning and an operative part, is an integral part of a procedure, which, at this stage, is the only one capable of resolving a dispute between private individuals and the administration. A decision which does not conform with the opinion of the Consiglio di Stato can be adopted only after deliberation within the Council of Ministers and must be duly reasoned.

25 Finally, as the Advocate General explains at point 25 of his Opinion, the Consiglio di Stato is a permanent, impartial and independent body whose members must satisfy the legal requirements of independence and impartiality, whether they are part of the advisory section or of the judicial section, and may not belong to both sections at the same time.

26 In a similar situation, the Court has held that the Nederlandse Raad van State is a court or tribunal within the meaning of Article 177 of the Treaty (judgment in Case 36/73 *Nederlandse Spoorwegen* v *Netherlands Minister of Transport and Waterways* [1973] ECR 1299).

27 It follows from the foregoing that, when it issues an opinion in the context of an extraordinary petition, the Consiglio di Stato constitutes a court or tribunal for the purposes of Article 177 of the Treaty.

Second and third questions

28 By its second and third questions, the Consiglio di Stato seeks to ascertain whether Article 36(2) of Directive 93/16 — which replaced Article 7(2) of Directive 86/457 — is to be interpreted as meaning that, in order to be able to practise under the social security scheme of a Member State without a general medical practitioner's diploma, a doctor must have entered into a service relationship with that State's national health service before 1 January 1995 and, if so, whether the national competent authority may extend that right to doctors who did not establish such a relationship before that date.

29 Article 36(2) of Directive 93/16 grants each Member State discretion in determining acquired rights.

30 It is clear from the wording of that provision that this discretion is subject to only one condition, namely that each Member State must recognize the acquired rights of those doctors who do not hold a general medical practitioner's diploma but who, before 1 January 1995, were recognized in that Member State as having a diploma, certificate or other evidence of formal qualification issued to them in another Member State and who, also before that date, obtained the right to exercise the activities of general medical practitioner under the national social security scheme.

31 That minimum requirement is intended to avoid situations in which doctors who have enjoyed the freedom of establishment guaranteed by the Community directives and, before 1 January 1995, acquired a right, albeit only theoretical, to practise general medicine under the social security scheme of a Member State, are deprived of that right because they do not hold the new diplomas, certificates or other evidence of qualification provided for by Directive 93/16, which replaces Directive 86/457.

32 The fact that they have not actually entered into a service relationship with the national social security scheme does not prevent doctors who have acquired the right to enter into such a relationship from subsequently establishing one. In order for the acquired right to be recognized, Article 36(2) of Directive 93/16 does not require that the doctor should have entered into a service relationship by 31 December 1994 but provides only that the right is acquired if, on that date, the doctor is entitled to engage in general practice under the national social security scheme.

33 It follows that the host Member State must recognize the right of doctors established in practice on its territory under Directive 75/362 before 1 January 1995 to practise general medicine under its social security scheme, even if those doctors have no specific training in general medical practice.

34 Apart from that minimum requirement, Article 36(2) permits Member States to extend the acquired rights to other situations.

35 The answer to the second and third questions submitted by the Consiglio di Stato must therefore be that Article 36(2) of Directive 93/16 — which replaced Article 7(2) of Directive 86/457 — is to be interpreted as meaning that a Member State

may determine the acquired rights of practitioners of general medicine as regards situations prior to 1 January 1995, provided only that it recognizes the right of doctors established in practice there, under Directive 75/362, before 1 January 1995 to practise general medicine under its national social security scheme, even if they have no specific training in general medical practice and have not established a service relationship with that State's social security scheme.

Costs

36 The costs incurred by the Italian Government and by the Commission of the European Communities, 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 (Fifth Chamber)

in answer to the questions referred to it by the Consiglio di Stato by 11 orders of 6 December 1995, hereby rules:

1. **When it issues an opinion in the context of an extraordinary petition, the Consiglio di Stato constitutes a court or tribunal for the purposes of Article 177 of the EC Treaty.**

2. **Article 36(2) 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 — which replaced Article 7(2) of Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice — is to be interpreted as meaning that a Member State may determine the acquired rights of practitioners of general medicine as regards situations prior to 1 January 1995, provided only that it recognizes the right of doctors established in practice there, under Council Directive 75/362/EEC of 16 June 1975 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, before 1 January 1995 to practise general medicine under its national social security scheme, even if they have no specific training in general medical practice and have not established a service relationship with that State's social security scheme.**

Gulmann Wathelet Edward

Puissochet Moitinho de Almeida

Delivered in open court in Luxembourg on 16 October 1997.

R. Grass C. Gulmann

Registrar For the President of the Fifth Chamber