ORDER OF THE COURT (Fourth Chamber)
5 November 2002 *

In Case C-204/01,

REFERENCE to the Court under Article 234 of the EC Treaty by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Tilmann Klett

and

Bundesministerin für Bildung, Wissenschaft und Kultur,

on the interpretation of Article 12 EC, Article 39 EC, Article 19b of Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1978 L 233, p. 1), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the

* Language of the case: German.

adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1), and of Articles 3 and 9 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 the formal qualifications (OJ 1993 L 165, p. 1), as amended by the Act of Accession,

THE COURT (Fourth Chamber),

composed of: C.W.A. Timmermans (Rapporteur), President of the Chamber, D.A.O. Edward and S. von Bahr, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

the court making the reference having been informed that the Court proposes to give a decision by reasoned order pursuant to Article 104(3) of the Rules of Procedure,

the parties referred to by Article 20 of the EC Statute of the Court of Justice having been requested to submit their observations, if any, on that subject,

after hearing the Advocate General,

makes the following

Order

1 By order of 25 April 2001, received at the Court on 16 May 2001, the Verwaltungsgerichtshof (Higher Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 12 EC, Article 39 EC, Article 19b of Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1978 L 233, p. 1), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1, 'the Act of Accession'), and of Articles 3 and 9 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 the formal qualifications (OJ 1993 L 165, p. 1), as amended by the Act of Accession ('Directive 93/16').

2 This question has arisen in the context of proceedings between Mr Klett, a German national who has a certificate showing that he has completed general medical studies in Germany, and the Bundesministerin für Bildung, Wissenschaft und Kultur (Federal Minister for Education, Science and Culture) concerning the latter's decision refusing him admission to an Austrian postdoctoral training course in dentistry.

The legal context

3 Article 1 of Directive 78/686, as amended by the Act of Accession ('Directive 78/686'), provides as follows:

'This Directive shall apply to the activities of dental practitioners as defined in Article 5 of Directive 78/687/EEC pursued under the following titles:

...'

4 Under Article 2 of Directive 78/686:

'Each Member State shall recognise the diplomas, certificates and other evidence of formal qualifications in dentistry awarded to nationals of Member States by the other Member States in accordance with Article 1 of Directive 78/687/EEC and which are listed in Article 3 of this Directive, by giving such qualifications, as far as the right to take up and pursue the activities of a dental practitioner is concerned, the same effect in its territory as those which the Member State itself awards.'

5 Article 19b of Directive 78/686 reads as follows:

'From the date on which Austria takes the measures necessary to comply with this Directive, Member States shall recognise, for the purposes of carrying out the activities referred to in Article 1 of this Directive, the diplomas, certificates and other evidence of formal qualifications in medicine awarded in Austria to persons who had begun their university medical training before 1 January 1994, accompanied by a certificate issued by the competent Austrian authorities, certifying that these persons have effectively, lawfully and principally been engaged in Austria in the activities specified in Article 5 of Directive 78/687/EEC for at least three consecutive years during the five years prior to the issue of the certificate and that these persons are authorised to carry out the said activities under the same conditions as holders of the diploma, certificate or other evidence of formal qualifications referred to in Article 3(m) of this Directive.

The requirement of three years' experience referred to in the first subparagraph shall be waived in the case of persons who have successfully completed at least three years of study which are certified by the competent authorities as being equivalent to the training referred to in Article 1 of Directive 78/687/EEC.'

6 Under Article 1(2) of the Treaty concerning the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union (OJ 1994 C 241, p. 9):

'The conditions of admission and the adjustments to the Treaties on which the Union is founded, entailed by such admission, are set out in the Act annexed to this Treaty. The provisions of that Act shall form an integral part of this Treaty.'

7 Article 7 of Act of Accession states as follows:

'The provisions of this Act may not, unless otherwise provided herein, be suspended, amended or repealed other than by means of the procedure laid down in the original Treaties enabling those Treaties to be revised.'

8 Article 1 of Directive 93/16 provides as follows:

'This Directive shall apply to the activities of doctors working in a self-employed or employed capacity who are nationals of the Member States.'

9 Article 2 of the same directive reads as follows:

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

The main proceedings and the question referred

10 Mr Klett, a German national, completed medical studies in Germany and on 14 February 1974 received from the Bayerisches Staatsministerium des Inneren (Ministry of Internal Affairs of Bavaria) a certificate showing that he had passed his State examination in medicine. On 2 July 1975 he received a licence to practise as a doctor from the same ministry and thus became entitled to practise as a doctor on a self-employed basis. In addition, he gained a doctorate in medicine at the University of Hamburg (Germany) on 10 September 1980.

11 On 29 March 1995 Mr Klett applied for admission to a specialised course in dentistry at the University of Graz (Austria). He was informed by various means that he would not be accepted for this course, but no formal decision was taken on the matter. He brought two actions on the ground of failure to act, which were dismissed on the ground that the administrative authority designated by the initiator of the actions as the defendant authority had not failed to act. Following a third action, the Verwaltungsgerichtshof, by order of 30 January 2001, ordered the administrative authority responsible to take the decision in question within one week and to submit a copy thereof to the said court or to state why there had been no breach of the obligation to take a decision.

12 On 6 February 2001 the administrative authority responsible adopted an express decision rejecting Mr Klett's application, stating that, to be admitted to the dentistry course, under Austrian law he had to hold a degree in general medicine conferred by an Austrian university. The decision also referred to Article 19b of Directive 78/686 and to a letter of 10 October 2000 from the Commission's

Directorate-General for the Internal Market, in which the Commission stated that Article 19b did not confer rights on doctors from other Member States holding a degree in medicine obtained in a Member State where there was special training for dentists and where dentistry is an independent profession.

13 Mr Klett appealed against the decision of 6 February 2001 to the Verwaltungsgerichtshof and, in particular, he disputed the administrative authority's interpretation of Article 19b of Directive 78/686.

14 The Verwaltungsgerichtshof found that the outcome of the case depended on the interpretation of certain Community rules, in particular Article 12 EC, Article 39 EC, Article 19b of Directive 78/686 and Articles 3 and 9 of Directive 93/16, and consequently decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Are Article 19b of Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services..., Article 12 EC and Article 39 EC, and Article 1, read in conjunction with Articles 3 and 9, 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 the formal qualifications, to be interpreted as precluding legislation under which admission to a training course in dentistry covered by Article 19b of Directive 78/686/EEC requires a degree in medicine obtained at an Austrian university?'

The question referred

Observations submitted to the Court

15 Mr Klett considers that Article 19b of Directive 78/686 does not imply that it is necessary to have completed medical studies in Austria in order to take a specialised course in dentistry, in accordance with that provision, which was only a special rule for the recognition of Austrian qualifications by other Member States and was silent with regard to the admission of non-Austrian nationals of other Member States to such training and with regard to practising as a dentist in Austria. Therefore Article 19b did not apply in his case and it did not justify the refusal of his application.

16 Mr Klett contends further that Articles 1, 2, 3 and 9 of Directive 93/16 preclude a national provision under which admission to a specialised course in dentistry requires a degree in medicine to have been obtained from a university of the Member State in question.

17 He also contends that the course in dentistry, during which trainees in Austria receive remuneration, falls within the scope of Article 39 EC because trainees are, according to the case-law of the Court, deemed to be workers within the meaning of that article. Therefore, the discrimination which has occurred in the main proceedings against doctors who have qualified in another Member State is not justified and, as such, is prohibited by Article 39 EC.

18 Finally, Mr Klett submits that, even assuming that trainee dentists in Austria are not workers within the meaning of Article 39 EC, the discrimination in question is contrary to Article 12 EC, which is applicable in the main proceedings because access to vocational training is, according to the judgment in Case 293/83 *Gravier* [1985] ECR 593, paragraph 25, within the scope of application of the EC Treaty.

19 The Austrian Government considers that Article 19b of Directive 78/686 is a transitional provision intended to enable doctors specialising in dentistry and trained in Austria in accordance with the law in force prior to 1 January 1994 to exercise their fundamental freedoms in the other Member States. Furthermore, Article 19b allowed an exception in favour of doctors who began their training in Austria before the creation of the new dentistry specialisation programme.

20 The Austrian Government adds that Article 19b of Directive 78/686 does not enable general medical practitioners who have qualified in another Member State to acquire specialised training in dentistry in Austria, which in any case is to cease, by circumventing the provisions concerning such training in the Member State of origin. The government adds that any other interpretation of Article 19b would be contrary to the objective and purpose of the Community legislation on the training of dentists, which aims to provide separate training for dentists and general medical practitioners.

21 Regarding Article 12 EC and Article 39 EC, the Austrian Government submits that Directive 78/686 is a special provision applicable to the present situation in Austria. In addition, Article 19b thereof, as a provision appearing in the Act of

Accession, has the status of a provision of primary law. As Mr Klett was not covered by the directive, and even if the training in question were deemed to be an employment relationship, he could not rely on Article 39 EC in relation to possible activity as an employed dentist. Furthermore, since Article 19b of the directive was applicable to the main proceedings, Article 12 EC, which applied only in cases where Community law laid down no specific rule of non-discrimination, could not assist Mr Klett.

22 The Italian Government contends that Articles 19, 19a and 19b of Directive 78/686 aim to regulate the freedom of movement of Community nationals who have begun their medical training on the basis of the legislation previously in force in Italy, Spain and Austria respectively, which constituted a qualification for taking up the activity of dental practitioner referred to by Council Directive 78/687/EEC of 25 July 1978 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of dental practitioners (OJ 1978 L 233, p. 10), as amended by the Act of Accession ('Directive 78/687'). Moreover, even if Mr Klett, who had obtained a degree in medicine in Germany, had begun his training before 1 January 1994, he did not appear to belong to a category of persons whose rights might be protected by virtue of Article 19b.

23 The Italian Government also observes that the Court, ruling on the ambit of Article 19 of Directive 78/686, has stated that Member States may not create a category of dental practitioners which does not correspond to any category provided for by Directives 78/686 and 78/687 (Case C-40/93 *Commission* v *Italy* [1995] ECR I-1319, paragraph 24). The government adds that as this is a matter

entirely regulated by an appropriate Community provision, in particular Article 19b of Directive 78/686, application of Article 12 EC and Article 39 EC and of Directive 93/16 is excluded.

24 The Commission submits that the question to be considered in the main proceedings is whether Article 19b of Directive 78/686 requires only doctors who have obtained a degree in medicine from an Austrian university to be admitted to a training course in dentistry. If that were the case, Article 19b would not preclude the rejection of Mr Klett's application. The Commission considers that Article 19b contains more than a provision relating to the recognition of specialised training in dentistry by the other Member States and, rather, that it describes a particular category of dental practitioners. As Article 19b refers expressly to certificates and other qualifications awarded 'in Austria' to delimit that category, the article is a special provision in favour of a strictly limited category of dental practitioners.

25 Since this is an exception in favour of the category in question in relation to those covered by the general rule, it must be strictly construed. From its wording and internal logic, Article 19b of Directive 78/686 seeks to give an option to students taking a course in general medicine in Austria and who, under the system in force prior to Austria's accession to the European Union, have undertaken studies in general medicine in order to become dentists. According to the Commission, Article 19b likewise does not indicate that it is necessary to provide an opening allowing doctors from all the Member States to have access to specialised training in dentistry of less than the normal duration. The Commission also observes that

this interpretation of Article 19b as a *lex specialis* means that there is no need to make additional observations concerning other provisions of Community law.

The Court's reply

26 In substance, the national court's question is, firstly, whether Article 19b of Directive 78/686 must be interpreted as meaning that a person holding a degree in general medicine which was not conferred by an Austrian university can be admitted to a training course in dentistry in that Member State.

27 As the reply to the question could have been clearly deduced from the case-law (see, in particular, Joined Cases 31/86 and 35/86 *LAISA and CPC España* v *Council* [1988] ECR 2285; Case C-40/93 *Commission* v *Italy*, cited above; and Case C-202/99 *Commission* v *Italy* [2001] ECR I-9319), the Court, pursuant to Article 104(3) of the Rules of Procedure, informed the national court that it proposed to give a decision by reasoned order and requested the parties referred to by Article 20 of the EC Statute of the Court of Justice to submit any observations they might have on the subject.

28 Mr Klett alone submitted observations within the period allowed. In particular, he expressed doubts as to whether this procedure was appropriate in view of the fact that the case-law cited in the preceding paragraph of this order did not apply to the present case.

29 It must be observed that, prior to 1 August 1998, a dental practitioner's diploma could be obtained in Austria only on condition of holding a degree in general medicine and having completed a postdoctoral training course in dentistry.

30 As a result of accession to the European Union, Austria was required by Directives 78/686 and 78/687 to bring the conditions for specialised training as a dental practitioner into conformity with the European standard by establishing a new system for such training, which would be independent of the training for doctors. According to the information referred to in the Austrian Government's observations, the new system took effect on 1 August 1998 and specialised training courses in dentistry for qualified doctors ceased to exist in Austria at the end of the 2000/01 academic year.

31 Directives 78/686 and 78/687 provide that, in order to be entitled to pursue his activities, a dental practitioner must possess one of the formal qualifications referred to in Article 2 of Directive 78/686 (see Case C-40/93 *Commission* v *Italy*, cited above, paragraph 21). Article 19b of that directive constitutes an exception to Article 2 and, as a derogating provision, must be interpreted strictly (*idem*, paragraph 23, and the case-law cited therein).

32 On this point it must be observed that Article 19b of Directive 78/686 aims to make exceptions in favour of doctors who have already begun or completed the former specialised training as dental practitioners, so that they can complete it, if they have not already done so, and, if they were on the point of completing it or had already done so, could practise that profession in the other Member States

(see, to that effect, in relation to Article 19 of Directive 78/686, which is similar to Article 19b, Case C-202/99 *Commission* v *Italy*, cited above, paragraph 52).

33 It must also be observed that Member States may not create a category of dental practitioners which does not correspond to any category provided for by Directives 78/686 and 78/687 (see, in relation to Article 19 of Directive 78/686, Case C-40/93 *Commission* v *Italy*, cited above, paragraph 24).

34 It follows from what has been said that Article 19b of Directive 78/686 does not enable a national of a Member State, other than Austria, in which he has completed his studies of general medicine to be admitted to a postdoctoral course in dentistry in Austria. Such courses were to cease to exist and were to continue to be available only to enable persons who had already begun such training to complete it. Otherwise a new category of dental practitioners would be created, contrary to Directives 78/686 and 78/687.

35 Article 19b of Directive 78/686 permits, in the context of the special transitional regime established for Austria on accession to the European Union, only the recognition of a diploma in basic medicine combined with a diploma certifying a specialisation in the field of dentistry, for the purpose of practising as a dental practitioner in the other Member States. If the Community legislature had wished to allow, in a general way, the possibility of mutual recognition of such training, it would not have provided, for professionals who had undergone that training, for the mutual recognition of their qualification only exceptionally and temporarily (see, to that effect, in relation to Article 19 of Directive 78/686, Case C-202/99 *Commission* v *Italy*, cited above, paragraph 39).

36 In view of the foregoing, it is unnecessary to give a ruling on, secondly, the interpretation of Article 12 EC and Article 39 EC and of Articles 3 and 9 of Directive 93/16 because Article 19b of Directive 78/686 constitutes a *lex specialis* with the status of primary law.

37 The reason for this is that, under Article 1(2) of the Treaty concerning the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, the conditions of admission and the adjustments to the Treaties on which the Union is founded, entailed by such admission, are set out in the Act of Accession annexed to the Treaty and form an integral part of it.

38 The conditions of admission concern the application to the new Member States of the body of Community law in force at the time of accession and form the essential subject-matter of the Act concerning the accession of the three Member States mentioned in the previous paragraph (see, to that effect, in relation to the accession of Spain and Portugal, *LAISA and CPC España* v *Council*, cited above, paragraphs 9 and 10).

39 Under Article 29 of the Act of Accession, the acts set out in Annex I to the Act of Accession are thus the subject of the adjustments described in the said annex. Consequently, Article 19b of Directive 78/686, which appears in Annex I, Part XI, D, of the Act of Accession, is the subject of an agreement between the Member States and the applicant State. It does not constitute an act of the Council but is a provision of primary law which, according to Article 7 of that

Act and unless otherwise provided therein, may not be suspended, amended or repealed otherwise than by means of the procedure laid down for the revision of the original Treaties (*LAISA and CPC España* v *Council*, paragraph 12).

40 That interpretation is borne out by the fact that the provisions of the Act of Accession affirm the results of the accession negotiations which constitute a totality intended to resolve difficulties which accession entails either for the Community or for the applicant State (*LAISA and CPC España* v *Council*, paragraph 15).

41 Therefore the reply to the question referred must be that Article 19b of Directive 78/686 must be interpreted as meaning that a person whose degree in general medicine was not conferred by an Austrian university cannot be admitted to a training course in dentistry offered in that Member State.

Costs

42 The costs incurred by the Austrian and Italian Governments 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 (Fourth Chamber),

in answer to the question referred to it by the Verwaltungsgerichtshof by order of 25 April 2001, hereby orders:

Article 19b of Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, must be interpreted as meaning that a person whose degree in general medicine was not conferred by an Austrian university cannot be admitted to a training course in dentistry offered in that Member State.

Luxembourg, 5 November 2002.

R. Grass — Registrar

C.W.A. Timmermans — President of the Fourth Chamber