

OPINION OF ADVOCATE GENERAL JACOBS

delivered on 26 February 1992 *

My Lords,

1. This case is a companion to Joined Cases C-330 and 331/90 *López Brea and Hidalgo Palacios*, in which judgment was given on 28 January 1992. Once again the background to the case is a criminal prosecution against persons who have acted as estate agents in Spain notwithstanding that they do not hold the professional qualifications required by Spanish law. This case differs from the earlier cases inasmuch as one of the persons involved is a national of another Member State and holds a relevant qualification awarded in that Member State.

2. On 2 January 1990 the Colegio Oficial de Agentes de la Propiedad edad Inmobiliaria (Official Association of Estate Agents, hereafter 'the Colegio Oficial') initiated criminal proceedings in the Juzgado de Instrucción No 20, Madrid, against Aguirre Newman SA, which is presumably a company governed by Spanish law. The executive directors of the company are Mr Santiago Aguirre Gil de Biedma and Mr Stephen Kenneth Newman. The latter is a British national. The Colegio Oficial claims that the company is acting as an intermediary in the buying and selling of real property. Under Spanish law such activities may only be engaged in by persons who hold a specific qualification awarded by the State and have been enrolled

as members of the Colegio Oficial. It is also argued that only natural persons, as opposed to bodies corporate, may act as estate agents. In that respect the case resembles Case C-76/90 *Säger v Denmemeyer* (judgment of 25 July 1991) but no question has been put to the Court regarding that aspect of the case.

3. In the proceedings before the Spanish court Mr Newman stated that he was a national of the United Kingdom and that in 1981 he obtained a British qualification described as a 'Degree in Urban Estate Management'. He also stated that he was an Associate of the Royal Institution of Chartered Surveyors. These statements are confirmed by documents contained in the case-file. Mr Newman informed the Juzgado de Instrucción that he had applied for enrolment as a member of the Colegio Oficial but had received no reply. According to the Order for reference, the Colegio Oficial informed the Spanish court that it had refused to admit Mr Newman, 'account having been taken of the fact that he had set up the company Aguirre Newman SA, operating as an intermediary in real-estate matters'.

4. The Spanish court decided in those circumstances to refer the following questions to the Court of Justice for a preliminary ruling:

* Original language: English.

1. Must the Community rules on freedom of establishment in Article 52 et seq. of the EEC Treaty and Directive 67/43/EEC and the current state of implementation of Article 57(1) of the Treaty be interpreted as meaning that it is possible that in a Member State a citizen of another Member State who holds a qualification validly issued in his country of origin which has not been recognized in the country where he wishes to establish himself and carry on the occupation of estate agent is liable to criminal penalties?

2. Must the aforesaid Community legislation be interpreted as meaning that Article 57(1) of the Treaty, which imposes on the Council the obligation to issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications within a reasonable time, and the absence of any action to that end in so far as concerns estate agents in 24 years, permit the maintenance in a Member State of the requirement for a person who wishes to carry on that occupation and holds the requisite qualification in his country of origin to pass an examination?

5. The Commission and the Spanish Government rightly deal with those questions in reverse order, since logically the question whether a Member State may require the holder of a qualification awarded in another Member State to obtain further qualifications must precede the question whether he can be subject to criminal penalties if he pursues the profession in question without obtaining the requisite qualifications. I shall therefore follow the same approach and deal with question 2 first.

Question 2

6. Before dealing with the substantive issues raised by question 2, I shall briefly examine the legislation governing the profession of estate agent in Spain and the United Kingdom respectively.

7. Two instruments governing the profession of estate agent in Spain have been cited in these proceedings, namely Decree No 3248/69 of 4 December 1969 and Royal Decree No 1464/88 of 2 December 1988. The purpose of the latter was to implement Council Directive 67/43/EEC of 12 January 1967 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons concerned with *inter alia* real estate (OJ, English Special Edition 1967, p. 3). The requirements laid down by those decrees were summarized at the hearing by counsel for the Colegio Oficial. They are three in number: the prospective estate agent must have completed at least three years of university-level education; he must have passed an examination organized by the Ministry of Public Works and Transport; and he must be enrolled as a member of the appropriate Colegio Oficial. In addition, Article 3 of Decree No 3248/69 precludes bodies corporate from acting as estate agents.

8. The activities reserved to estate agents are defined by Article 1 of Decree

No 3248/69 as mediation and brokerage in the following operations:

- (a) the buying, selling and exchange of rural and urban property, (b) the granting of loans secured by mortgages on rural and urban property, (c) the letting of rural and urban property and the assignment of leases and (d) the provision of valuations in relation to immovable property.

9. Although the question formulated by the national court speaks of a person who 'holds the requisite qualification in his country of origin', it should be noted that English law does not prescribe any compulsory qualifications for estate agents. It is true that section 22 of the Estate Agents Act 1979 empowers the Secretary of State to make regulations prescribing *inter alia* professional or academic qualifications as well as a minimum period of practical experience. However, it appears that no such regulations have yet been made. At the hearing it was stated by counsel for the Colegio Oficial that the only country in the Community to have regulated access to the profession of estate agent, apart from Spain, is France. He also noted that legislation is being contemplated in Belgium.

10. The fact that qualifications are not required by law in the United Kingdom does not of course mean that relevant qualifications do not exist in the United Kingdom. In fact, Mr Newman holds such a qualification, namely his Degree in Urban Estate Management, which is recognized by the Royal Institution of Chartered Surveyors.

11. According to the observations submitted by the Colegio Oficial and by the Public Prosecutor (the Ministerio Fiscal), the relevant provisions of Community law merely require Member States to abolish discrimination and to accord to nationals of other Member States the same treatment as their own nationals receive. Spain has complied with that obligation by adopting Royal Decree No 1464/88 of 2 December 1988, Article 1 of which allows nationals of other Member States to provide services and establish themselves in Spain as estate agents on the same terms as Spanish nationals. Since the Council has not yet adopted a directive on the mutual recognition of qualifications of estate agents, under Article 57(1) of the Treaty, or a directive coordinating the conditions of access to the profession, under Article 57(2), each Member State remains free to lay down the terms under which persons will be allowed to act as estate agents and to require the nationals of other Member States to comply with its legislation, regardless of any qualifications they may have obtained in another Member State.

12. The Commission and the French Government paint a rather different picture of the current state of Community law in relation to freedom of establishment. They cite the judgments of the Court in Case 71/76 *Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765, Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097 and Case C-340/89 *Vlassopoulou* [1991] ECR I-2357. They deduce from those judgments that where a Community national, qualified to pursue the profession of estate agent in one Member State, applies to the authorities of another Member State for permission to pursue that profession in the second Member State, those authorities must examine to what extent the qualifications

obtained in the first Member State are equivalent to those required in the second Member State. Where the equivalence is only partial, the person in question may be required to demonstrate that he has acquired the knowledge not attested to by his foreign qualifications. A decision refusing to regard the foreign qualifications as equivalent must state the reasons on which it is based and must be amenable to judicial review.

'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 the second paragraph of Article 58, 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 the Chapter relating to capital.'

13. The Spanish Government cites the three cases mentioned above, but does not accept that the practice of the Spanish authorities is at variance with that case-law. It emphasizes that the individual concerned must, before requesting admission to the relevant professional association, forward the necessary documentation to the administrative authorities so that they can rule on the issue of equivalence. The Spanish Government also points out that the question of equivalence may be affected by the different legal environments in which estate agents work. The Spanish Government proposes an affirmative answer to question 2.

Aware that one of the main obstacles to freedom of establishment lay in the disparities between national legislation regarding the requirements for admission to certain professions, the authors of the Treaty required the Council, by Article 57(1) of the Treaty, to issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications. By Article 57(2), the Council was required to issue directives, before the end of the transitional period, for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons.

14. I will briefly summarize the relevant Treaty provisions, legislation and case-law.

15. Article 52, first paragraph, of the Treaty required restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State to be abolished by progressive stages in the course of the transitional period. Article 52, second paragraph, provides that:

16. It appears that in relation to the profession of estate agent no specific directives have been issued by the Council either to ensure mutual recognition of qualifications, under Article 57(1), or to coordinate national legislation governing access to the profession, under Article 57(2). It is true that Council Directive 89/48 may be applicable to estate agents. However, the period for transposing the directive into national law did not expire until 4 January 1991. The events out of which the prosecution of Mr Newman arose occurred before that date. It may also be noted that Council Directive

67/43 is of no assistance to Mr Newman, since it merely requires Member States to accord nationals of other Member States the same treatment as their own nationals. Admittedly, Article 1 of that directive, in conjunction with point B of Title III of the General Programme for the Abolition of Restrictions on Freedom of Establishment, requires the abolition of covert, as well as overt, discrimination, since it enjoins Member States to eliminate 'any requirements imposed ... in respect of the taking up or pursuit of an activity as a self-employed person where, although applicable irrespective of nationality, their effect is exclusively or principally, to hinder the taking up or pursuit of such activity by foreign nationals'. However, I do not think it can be said that the Spanish legislation in issue has such an effect.

17. The Council's failure to implement fully Article 57(1) and (2) of the Treaty has to some extent been offset by several decisions of the Court. In the *Thieffry* case the Court held that, where Community law has made no specific provision to implement freedom of establishment, that Treaty objective may be attained by measures enacted by the Member States, which under Article 5 of the Treaty are bound to take all appropriate measures to ensure fulfilment of the objectives arising out of the Treaty and to abstain from any measure that might jeopardize the attainment of the objectives of the Treaty. Where the person concerned has obtained a diploma in his country of origin which has been recognized as equivalent by the competent authority in the country of establishment, he cannot be denied access to the profession in question on the ground that he does not hold the national diploma pre-

scribed by the legislation of the country of establishment. That principle was confirmed in Case 11/77 *Patrick v Ministre des Affaires Culturelles* [1977] ECR 1199.

18. In *Thieffry* and *Patrick* the Court simply required Member States which had of their own initiative recognized the equivalence of qualifications obtained in another Member State to give effect to such recognition. In *Heylens*, which concerned the free movement of workers under Article 48 of the Treaty, to which the same principles apply, and in *Vlassopoulou* the Court went a step further and held that the authorities of the Member State in which the holder of qualifications awarded in another Member State wishes to work or establish himself are under a positive duty to examine whether the qualifications correspond to those required under its own legislation (see, in particular, paragraphs 16 and 17 of the *Vlassopoulou* judgment). In the course of that examination the competent authorities may take into account objective differences relating in particular to the legal context in which the profession is pursued and to the range of activities covered by the profession. In the case of the legal profession they may take into account differences between the legal systems concerned. If the qualifications are only partially equivalent, the person concerned may be required to demonstrate that he has acquired the knowledge not attested to by the qualifications obtained in his country of origin. In that regard, the competent authorities must consider whether he has acquired the necessary knowledge by means of a course of studies or practical experience.

19. In *Heylens* and *Vlassopoulou* the Court also laid down important procedural rules regarding the host Member State's duty to have regard to qualifications obtained in another Member State. The decision taken by the national authorities must be subject to judicial review, so that its conformity with Community law may be tested, and the person concerned must be able to obtain a statement of the reasons for the decision.

20. The answer to question 2 can be derived from the case-law summarized above, in particular paragraphs 15 to 22 of the *Vlassopoulou* judgment. That case-law establishes that, where a person who has the required qualifications to pursue a profession in one Member State wishes to pursue that profession in another Member State, the authorities in the second Member State must examine whether the respective qualifications are equivalent, having regard to the legal context in which the profession is pursued and the range of activities covered by the profession. The same must apply where no specific qualifications are required in the first Member State but where a national of that State has obtained qualifications which may be equivalent to those required in the second Member State. Where the qualifications are only partially equivalent, the person concerned may be required to demonstrate that he has obtained the knowledge not attested to by his qualifications. The decision of the authorities must state the reasons on which it is based and must be open to judicial review, so that its conformity with Community law may be tested.

Question 1

21. In the Commission's view, it is clear that the Spanish authorities have failed to estab-

lish a procedure for recognizing the qualifications of estate agents who are entitled to pursue their profession in other Member States or at least that they have failed to establish the type of procedure required by Community law. The Commission deduces from that supposed failure that the Spanish authorities are precluded from imposing criminal penalties on such persons for acting as estate agents without obtaining the qualifications prescribed by Spanish law.

22. At the hearing, the Spanish Government challenged the view that no proper procedure exists for recognizing the equivalence of qualifications acquired in other Member States. Although it does not contend that specific instructions have been issued to the competent government departments requiring them to institute a procedure for that purpose, it maintains that the general procedures available under the *Ley de Procedimiento Administrativo* (Law of Administrative Procedure) are sufficient. Thus, under Article 70 of that Law any natural or legal person may submit a request to the authorities and organs of the public administration, within their field of competence, and the latter are obliged to decide upon the request. According to the Spanish Government, such a decision must state the reasons on which it is based and is subject to judicial review. If the administration fails to take a decision on the request within three months the applicant may formally protest and if within a further three months no decision is taken, the request may be deemed to have been dismissed and an appeal may be lodged (Article 94 of the aforesaid Law). The Spanish Gov-

ernment emphasizes that in the present case Mr Newman never requested the competent authority to recognize his British qualifications; he simply commenced practising as an estate agent and a year later applied for membership of the Colegio Oficial. The Spanish Government contends that its authorities cannot be faulted for failing to recognize the qualifications of someone who never applied for recognition.

23. According to the well-established principle of procedural autonomy, it is for the Member States to determine by what authorities and according to what procedures rights and obligations arising under Community law are enforced, provided only that the rules thus established are not less favourable than the rules governing similar claims of a domestic nature and that the effective exercise of rights arising under Community law is guaranteed. In relation to the freedom of establishment and the free movement of workers the effective exercise of rights implies compliance with the procedural guarantees laid down in *Heylens* and *Vlassopoulos*, namely a reasoned decision and the possibility of judicial review. It also implies, in my opinion, that persons who wish to exercise the fundamental freedoms in question must be able to obtain a definitive ruling on the equivalence of their qualifications within a reasonable period of time. It is clear from the observations of the Spanish Government that, if no specific instructions have been given to the competent administrative authorities about the way in which requests for recognition are to be dealt with, six months may elapse before a negative decision is deemed to have been adopted by virtue of the administration's silence and a further, lengthy period may elapse before a judicial review of such a decision can be

obtained. Throughout that period, which may well exceed one year, the person concerned will be prevented from pursuing his profession in Spain and, more seriously perhaps, he will be unable to ascertain what further studies he must undertake in the event that his foreign qualifications are ultimately held to be only partially equivalent. The result is a substantial barrier to freedom of establishment and is not, in my view, consistent with a Member State's duty under Article 5 of the Treaty to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty.

24. The Commission infers from Spain's failure to establish a proper procedure for recognizing qualifications acquired in other Member States that the Spanish authorities are precluded from imposing criminal penalties on Mr Newman in the circumstances of the present case. The Spanish Government contends that, quite apart from the question whether its procedures are adequate, Mr Newman may still be prosecuted because he never applied for recognition of the British qualifications.

25. It is for the national court to decide whether Mr Newman took such steps as were open to him to obtain recognition of his Degree in Urban Estate Management. It is clear however from the Order for reference and from the documents supplied by the national court that Mr Newman submitted a formal application for membership to the Colegio Oficial and informed it of his British qualifications. It is equally clear that the Colegio Oficial made no proper response to that request.

26. What then are the responsibilities of the Colegio Oficial? At the hearing the Agent for the Spanish Government stressed that it is a body governed by private law and is not integrated into the Spanish administration. Formally, that may be correct but the fact remains that the Colegio Oficial has been entrusted by the Spanish State with certain tasks and privileges and it has the power, since membership is compulsory, to determine whether individuals, including citizens of other Member States, may work as estate agents in Spain. When exercising that power, it performs quasi-governmental regulatory functions and must therefore be subject to the same obligations, under Article 5 as well as Article 52 of the Treaty, as an ordinary department of the Spanish administration. It follows that, when it receives a request for membership, supported by documentation, from a national of another Member State who holds a relevant qualification, it cannot simply ignore that request. It must respond promptly and advise the person concerned of the requirements laid down in its country for admission to the profession of estate agent and it must direct him towards the authority competent to decide whether his qualifications should be recognized.

27. Does that mean therefore that the Spanish authorities are precluded from prosecuting Mr Newman in the circumstances of the present case? The Commission considers that they are so precluded, simply because they have failed to establish an adequate procedure for recognizing qualifications acquired in other Member States. At the hearing the Commission cited Case 271/82 *Auer v Ministère Public* ('*Auer II*') [1983] ECR 2727, in which the Court held that legislation which provided for criminal or administrative proceedings against a veterinary surgeon who practised his profession

without being registered with the appropriate professional society was incompatible with Community law in so far as registration had been refused in contravention of Community law (paragraph 19).

28. It seems to me, however, that the Commission is going too far when it suggests that the national authorities are barred from prosecuting in the circumstances of the present case. There is an important difference between *Auer* and the present case. In *Auer* it was established that the qualifications obtained in another Member State were equivalent to the qualifications required in France and should have been recognized on the basis of a directive that had direct effect. In the present case there is no directive on the recognition of qualifications and it is by no means certain that Mr Newman's qualifications are fully equivalent to the qualifications required in Spain.

29. Of course Mr Newman may be entitled to have his qualifications recognized on the basis of Article 52 of the Treaty, even in the absence of a directive. But the practical difficulties should not be ignored. There is an objective difference between the profession of veterinary surgeon and that of estate agent. An Italian dog or horse does not differ physiologically from a French dog or horse, with the result that a veterinary surgeon who has graduated from the University of Parma may be expected to treat their ailments as competently as one who has trained at a

French school of veterinary medicine. With estate agents it is a little different.

sufficient knowledge of the legal and professional environment in which estate agents operate in Spain.

30. The buying and selling of interests in immovable property involves complex transactions that take place against a background of widely differing national law. In particular, the law governing the acquisition of title, or concerning mortgages and other land charges, varies considerably from one Member State to another. A British estate agent, even if he does not himself carry out the transactions, may be expected to have some familiarity with the relevant domestic laws. But he would not necessarily, without further training, be competent to assist individuals in the sale and purchase of immovable property in Spain. In addition to differences in the relevant national laws there are no doubt differences in the structure of the property market and in local customs and practices. The interests of the individual who wishes to exercise his freedom of establishment must be balanced against the interests of his potential clients who are entitled to expect that their professional advisers possess the necessary knowledge, including knowledge of local law. If an estate agent from another Member State were given an automatic right to act as an estate agent in Spain simply because the Spanish authorities had neglected to institute the necessary procedures for recognizing qualifications obtained in other Member States, as required by the *Heylens* and *Vlassopoulou* decisions, there would be too great a danger that individuals would suffer damage as a result of being advised by an estate agent who lacked

31. On the other hand, there would be no such danger if it subsequently transpired that the estate agent possessed all the requisite knowledge inasmuch as his qualifications acquired in another Member State were fully equivalent to those required in Spain. It seems to me therefore that the appropriate solution is that the national court in which the prosecution is brought cannot convict the accused estate agent unless the prosecuting authority satisfies it that the qualifications obtained by that person in another Member State do not correspond fully to those required under its national law. That solution, rather than the solution proposed by the Commission, seems consistent with *Auer II*.

32. I would say furthermore that, if the national court arrives at the conclusion that the qualifications are partially equivalent, the degree of equivalence is a matter that should be taken into account when assessing any penalty. In my view, it would be contrary to the principle of proportionality if, for example, the national court treated with equal rigour a person who holds no relevant qualifications and a person who has acquired in another Member State qualifications that are substantially equivalent to those required under its national law.

Conclusion

33. Accordingly, I am of the opinion that the questions referred to the Court by the Juzgado de Instrucción No 20, Madrid, should be answered as follows:

- (1) Where a national of a Member State wishes to pursue the profession of estate agent in another Member State in which that profession is reserved to the holders of specific qualifications, the competent authorities of the second Member State must examine whether and to what extent any qualifications obtained by the person concerned in the first Member State are equivalent to the qualifications required in the second Member State. In the course of that examination the competent authorities may take into account objective differences relating to the legal and commercial context in which the profession is pursued and to the range of activities covered by the profession in the respective Member States. Where the examination leads to the conclusion that the qualifications obtained in the first Member State do not correspond fully to the qualifications required in the second Member State, the person concerned may be required to demonstrate, in particular by means of an examination, that he has acquired the knowledge and abilities not attested to by the qualifications obtained in the first Member State. Where the full equivalence of the qualifications obtained in the first Member State is not recognized, the person concerned is entitled to be informed of the reasons for such a decision and must be able to challenge the decision in judicial proceedings, so that its conformity with Community law may be tested.
- (2) Where the competent authorities in the second Member State have not established appropriate administrative procedures for examining the equivalence of qualifications acquired in other Member States and where the person concerned has applied to a professional association which has statutory power to regulate admission to the profession and, having failed to obtain a properly reasoned reply, commences acting as an estate agent, no penalty may be imposed on him for pursuing that profession without holding the necessary qualifications, unless it is established that the qualifications obtained in the first Member State are not fully equivalent to those required in the second Member State. If the qualifications do not correspond fully, the degree of equivalence must be taken into account in assessing any penalty.