

JUDGMENT OF THE COURT (First Chamber)

18 November 2004^{*}

In Joined Cases C-10/02 and C-11/02,

REFERENCES for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Puglia (Italy), made by decisions of 10 October 2001, received at the Court on 15 January 2002, in the proceedings

Anna Fascicolo and Others,

Enzo De Benedictis and Others,

v

Regione Puglia,

Maria Paciolla,

Assessorato alla Sanità e Servizi Sociali della Regione Puglia,

Coordinatore del Settore Sanità,

^{*} Language of the case: Italian.

Azienda Unità Sanitaria Locale BR/1,

Felicia Galietti and Others,

Azienda Unità Sanitaria Locale BA/4,

Madia Evangelina Magrì,

Azienda Unità Sanitaria Locale BA/1,

Azienda Unità Sanitaria Locale BA/3 (C-10/02),

and

Grazia Berardi and Others,

Lucia Vaira and Others,

v

Azienda Unità Sanitaria Locale BA/4,

Angelo Michele Cea,

Scipione De Mola,

Francesco d'Argento,

Azienda Unità Sanitaria Locale FG/2,

Antonella Battista and Others,

Nicola Brunetti and Others,

Azienda Unità Sanitaria Locale BA/3,

Azienda Unità Sanitaria Locale FG/3,

Erasmus Fiorentino (C-11/02),

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, R. Silva de Lapuerta, K. Lenaerts, S. von Bahr and K. Schiemann (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 March 2004,

after considering the observations submitted on behalf of:

- Anna Fascicolo and Others, by G. Monacis, avvocato,
- Enzo De Benedictis and Others, by A. Loiodice, I. Lagrotta and N. Grasso, avvocati,
- Grazia Berardi and Others, by M. Langiulli, avvocato,
- Lucia Vaira and Others, by L. d'Ambrosio et L. Ferrara, avvocati,
- the Regione Puglia, by A. Sisto, avvocato,
- Azienda Unità Sanitaria Locale BA/1, by D. Caruso, avvocato,
- l'Azienda Unità Sanitaria Locale BA/3, by G. D'Innella, V. A. Pappalepore and M. de Stasio, avvocati,
- the Commission of the European Communities, by A. Aresu and M. Patakia, acting as Agents,

having heard the Opinion of the Advocate General at the sitting on 1 April 2004,

gives the following

Judgment

- 1 The two references for a preliminary ruling concern the interpretation of 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 (OJ 1993 L 165, p. 1), as most recently amended by Commission Directive 1999/46/EC of 21 May 1999 (OJ 1999 L 139, p. 25, 'Directive 93/16'), a provision which replaced Article 7(2) 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 two references were made in connection with two sets of disputes between, first, Ms Berardi and Others and Ms Vaira and Others and the Azienda Unità Sanitaria locale BA/4 and Others (Case C-11/02) and, second, Ms Fascicolo and Others and Mr De Benedictis and Others and the Regione Puglia (region of Apulia) and Others (Case C-10/02), concerning decisions made by various administrative authorities of that region for the years 1998 and 1999 respectively with regard to the allocation under the national health system of posts for general practitioner posts in under-served areas.

The legal framework

The relevant provisions of Community law

- 3 Directive 93/16 consolidates various directives on the qualifications of doctors, including Directive 86/457.
- 4 According to Article 2 of Directive 93/16, every Member State is to 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 of that directive, by giving such qualifications, so far as the right to take up and pursue the activity of a doctor is concerned, the same effect in its territory as those that the Member State itself awards.
- 5 Article 9(1) of Directive 93/16 lays down the general rule that, in the case of nationals of Member States whose diplomas, certificates and other evidence of formal qualifications do not satisfy all the minimum training requirements laid down in Article 23 of that directive, each Member State is to recognise, as being sufficient proof, the diplomas, certificates and other evidence of formal qualifications in medicine awarded by those Member States when they attest to training which began before the dates mentioned in Article 9(1), accompanied by a certificate stating that those nationals have actually and lawfully been engaged in the activities in question for at least three consecutive years during the five years prior to the date of issue of the certificate.

6 Article 30 of Directive 93/16 provides that each Member State which dispenses within its territory the complete training governing access to the activities of a doctor and to their practice pursuant to Article 23 of that directive is to institute specific training in general medical practice meeting requirements at least as stringent as those laid down in Articles 31 and 32 of that directive, in such a manner that the first diplomas, certificates or other evidence of formal qualifications awarded on completion of the course are issued no later than 1 January 1990.

7 The first paragraph of Article 36(1) Directive 93/16, which provision replaced Article 7(1) of Directive 86/457, recapitulating its terms, states that:

'From 1 January 1995, and subject to the acquired rights it has recognised, 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.'

8 Article 36(2), which replaced Article 7(2) of Directive 86/457, while in substance repeating its content, provides:

'Each Member State shall specify the acquired rights that it recognises. However, it shall recognise 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).'

The relevant provisions of national law

- 9 Directive 86/457 was transposed into the Italian legal order by Legislative Decree No 256 of 8 August 1991 (GURI No 191 of 16 August 1991, 'Legislative Decree No 256/91'). The first paragraph of Article 2 thereof lays down, as a general rule, that as from 1 January 1995 it is possession of the certificate of specific training in general medicine that constitutes the qualification necessary for the purposes of practising the corresponding activity in the national health system.
- 10 Nevertheless, according to Article 6 of Legislative Decree No 256/91, the right to practise general medicine is also extended to doctors who, as at 31 December 1994, had the right under the national health system to practise as general medical practitioners, that is to say, they held authorisation recognised to be equivalent to that certificate ('equivalent qualification').
- 11 In Italy, practice of the profession of general medical practitioner officially recognised by the national health service is regulated, pursuant to Article 8(1) of Legislative Decree No 502 of 30 December 1992 (GURI No 305 of 30 December 1992), as amended by Legislative Decree No 517 of 7 December 1993 (GURI No 293 of 15 December 1993), by national collective agreements falling to be reviewed every three years.
- 12 The national collective agreement in force at the time of the facts in the case in the main proceedings ('the collective agreement') was brought into force by Presidential Decree No 484 of 22 July 1996 (GURI No 220 of 19 September 1996, p. 1). According to that agreement:

- the procedure for filling empty posts is to begin with the publication, by region, of the regional single list of doctors classified according to a system of points computed pursuant to Article 3 of that agreement (Article 2 of the agreement);

- for the purposes of drawing up the lists and classifying the doctors, 12 points are to be allocated for the certificate of training in general medicine as an academic qualification. In addition, by way of service qualifications, the persons concerned are awarded 0.20 points for every month of practice as a health service doctor in charge of primary care. Extra points may be acquired by reason of certain special activities performed as a general practitioner (Article 3(1) of the collective agreement).

- 13 So far as the allocation of posts in under-served areas in primary health care and medical cover is concerned, the collective agreement provides also that:

- the Aziende Sanitarie Locali (local public health authorities) reserve a variable percentage of 20 to 40% of posts for doctors holding the certificate of training in general medicine referred to in Article 2 of Legislative Decree No 256/91 and a corresponding variable percentage of 80 to 60% for doctors holding the equivalent qualification (Article 3(6) of the collective agreement). If the agreement should not be renewed in good time, provision is made for a quota equal to 50% of the posts to be filled to be allocated to each of the two categories of doctors for the following year (final provision No 5 of that agreement);

- the list of posts to be filled, establishment by establishment, is drawn up by adding to the number of points obtained by the candidate on the regional list mentioned in Article 2 of Legislative Decree No 256/91 the number of points awarded on account of living in the region and the number of points awarded on account of the candidate's living in the under-served territory (Article 20(6) of the collective agreement).

- 14 By resolution No 1245 of its regional council of 29 April 1998 (BURP (Official Gazette of the Region of Apulia) No 46 of 15 May 1998) the Regione Puglia decided that in 1998 40% of the posts intended to guarantee cover for under-served areas and of the unfilled posts should be allocated to doctors holding the certificate of training in general medicine and 60% of the posts should be allocated to doctors holding the equivalent qualification. For 1999 the percentages of posts reserved for doctors in those two categories were altered so that the percentage of posts allocated for each was 50%.

The disputes in the main proceedings and the questions referred for a preliminary ruling

- 15 The disputes in the main proceedings arise out of the fact that, with regard to the posts to be filled in the under-served areas, certain doctors who, while in possession of the certificate of specific training in general medicine mentioned in Article 2 of Legislative Decree No 256/91, were entitled also on 31 December 1994 to practise medicine under the national social security scheme tried to apply both for posts reserved for doctors possessing that certificate and for those reserved for doctors holding the equivalent qualification. Those doctors sought moreover to obtain the 12 points awarded to holders of the certificate, even when they were competing for the quota of posts reserved to those who held the abovementioned qualification.

- 16 The Regione Puglia at first decided that, although the doctors possessing both the certificate of specific training in general medicine and the right on 31 December 1994 to practise medicine under the national social security scheme could take part in both quotas, they none the less were not entitled, if they chose to compete for the quota of posts reserved to doctors holding the equivalent qualification, to claim the 12 points awarded for possession of the certificate. The Regione therefore ordered its local public health authorities to deduct the 12 points which had previously been awarded to those doctors.
- 17 Acting in accordance with the instructions of the Regione Puglia, those authorities therefore refused to award, in connection with the quotas reserved to doctors holding the equivalent qualification, to doctors holding both the qualifications mentioned above, the 12 points attributed to holders of the training certificate.
- 18 It was to challenge the decisions of certain of those authorities, including the Azienda Unità Sanitaria Locale BA/4, that Ms Berardi and Others and Ms Vaira and Others brought actions before the Tribunale amministrativo regionale per la Puglia (regional administrative court for Apulia), maintaining that those decisions were unlawful because adopted contrary to and as a result of misapplication of Articles 2, 3 and 20 of the collective agreement.
- 19 Called upon to rule on the lawfulness of the position taken by the Regione Puglia, the national court originally concluded that doctors possessing both qualifications were entitled to compete for all reserved posts, but that they could not be awarded

the 12 points awarded to holders of the training certificate when they competed for posts kept for holders of the equivalent qualification.

- 20 Now, in the meantime the Consiglio di Stato (Council of State) (Italy) held, in decision No 1407 of 15 March 2000 ('the decision of the Consiglio di Stato'), on an appeal against the judgment of another regional administrative court, that doctors to be chosen to fill posts in under-served areas must be drawn from a single regional list, even if it is laid down that, for the purposes of allocating those posts, two separate quotas must be reserved for doctors holding the certificate of specific training in general medicine and doctors holding the equivalent qualification, respectively, and that, as a result, doctors in the first of those categories who also had the right to practise, on 31 December 1994, general medicine under the national health system, could compete for both quotas of posts, with the result that, according to the Consiglio di Stato, it was in that case necessary to award them all the 12 points provided for under Article 3(1) of the collective agreement, for the legislation in force did not draw any distinction in this respect between the two qualifications.
- 21 Having taken cognisance of that decision, the Regione Puglia resolved to change its earlier policy and no longer to refuse to take into account the 12 points awarded to holders of the certificate of specific training in general medical practice in respect of the procedures for 1999. The public health authorities of that region therefore adopted that new way of allocating posts for doctors in under-served areas. Nevertheless, the procedure for 1998 remained unaltered.
- 22 It was to challenge that new position taken up by the Regione Puglia and the measures adopted in consequence by its local public health authorities that Ms Fascicolo and Others and Mr De Benedictis and Others, doctors in possession of the equivalent qualification only, also brought an action before the court making the

reference. They argue, essentially, that if doctors authorised before 1 January 1995 and holding the certificate of specific training in general medical practice, and, what is more, obtaining the number of points awarded for acquisition of that certificate, were to compete for the two quotas of reserved posts, the result would be to render it quite impossible to apply the principle of equivalence introduced by Directives 86/457 and 93/16.

- 23 In relation to the two sets of proceedings brought before it, the court making the reference agrees with the Consiglio di Stato's view that doctors in possession of the certificate of training in general medical practice may apply for all the reserved posts to be filled in under-served areas. Nevertheless, it cannot accept the Consiglio's reasoning concerning the allocation of the 12 points to those doctors when they compete for the quota of posts reserved to doctors holding the equivalent qualification. On that last point, the national court believes that the Consiglio di Stato's decision seems to ignore the fact that, in Directives 86/457 and 93/16, the Community legislature considered worthy of protection the acquired right to practise general medicine possessed by doctors with no diploma, certificate or other evidence of formal qualifications, who enjoyed that right on 31 December 1994, thus making it impossible to draw any hierarchical distinction between the two classes of doctors.

- 24 In those circumstances, the Tribunale amministrativo regionale per la Puglia has decided to stay proceedings and to refer to the Court for a preliminary ruling the three following questions, which have the same wording in each of the two orders for reference:

'(1) Under Article 7(2) of Directive 86/457/EEC and Article 36(2) of Directive 96/13/EEC, for the purposes of practising as a general medical practitioner, is authorisation to practise obtained on or before 31 December 1994 to be

regarded as equivalent to the acquisition of the certificate of specific training in general medical practice?

- (2) In accordance with those provisions of Community law, does the acquisition of the certificate of specific training in general medical practice allow the Member States, as from 1 January 1995, to grant to doctors in possession also of authorisation to practise acquired on or before 31 December 1994, more favourable terms with regard to access to a wider range of reserved posts than the access granted to the holders of one or other of the qualifications respectively?
- (3) If the answer given to the previous question should be “Yes”, then, in view of the rules on acquired rights, does the condition set out above permit the Member States to afford those doctors further special treatment by the award in every case of a number of additional points on account of their having obtained the certificate of training in general medical practice?

25 By order of the President of the Court of 12 February 2002, Cases C-10/02 and C-11/02 were joined for the purposes of the written and oral procedures and of the judgment.

On the questions referred for a preliminary ruling

On the first question

26 By its first question the national court asks whether authorisation, obtained before 1 January 1995, to carry on the profession of general medical practitioner under the

national health system has, pursuant to Article 36(2) of Directive 93/16, to be considered for the purposes of practising that profession to be equivalent to obtaining the certificate of specific training in general medical practice.

- 27 It is not in dispute that possession of one or the other of the two qualifications mentioned in the previous paragraph is a minimum condition for the practice of the profession of general practitioner. It is clear from the orders for reference that that question seeks in essence to ascertain whether the national system applicable in the circumstances of this case in order to fill posts for doctors in the national health system is compatible with Article 36(2) of Directive 93/16, having regard to the fact that under that national health system candidates in possession of the certificate of specific training in general medical practice and those in possession of the equivalent qualification only do not necessarily, so far as allocation of the posts in question is concerned, have the same chance of success.
- 28 It is advisable at the outset to state that Articles 30 to 41 of Directive 93/16 are intended to harmonise the minimum conditions for the issuing of diplomas, certificates and other evidence of formal qualifications awarded on completion of specific training in general medical practice, with a view to facilitating the free movement of doctors (see recitals 20 to 23 in the preamble to that directive). In accordance with that objective, the first paragraph of Article 36(1) requires, subject to acquired rights, that the exercise of general medical practice under a national social security scheme should be conditional on possession of such a diploma, certificate or other evidence of formal qualifications awarded on completion of that specific training.
- 29 It is in that context that Article 36(2) of Directive 93/16 states that '[e]ach Member State shall specify the acquired rights that it recognises. However, it shall recognise the right to exercise the activities of general medical practitioner under its national social security scheme ... 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)'.

30 That provision confers on every Member State discretion to specify acquired rights, a discretion subject to only one condition, namely, that each Member State should recognise the acquired rights of those doctors who do not hold a general medical practitioner's diploma but who, before 1 January 1995, were recognised 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 (Joined Cases C-69/96 to C-79/96 *Garofalo and Others* [1997] ECR I-5603, paragraphs 29 and 30).

31 In order to answer the first question, it ought first to be noted that, as is made clear by its wording, Article 36(2) of Directive 93/16 does not require that the Member States should accord the same weight to acquired rights as to the obtaining of the certificate of specific training in general medical practice. The minimum condition referred to in that provision, concerning the category of doctors who must be recognised as having acquired rights, does not attempt to specify the extent of the protection to be afforded those rights by the Member State concerned.

32 Second, that 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 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 (see *Garofalo and Others*, paragraph 31).

- 33 It is therefore sufficient to observe that, even if that condition may, given such a cross-border aspect, require more extensive protection to be given to acquired rights, in the present case, as was confirmed at the hearing, the actions brought before the national court concern purely internal situations.
- 34 In those circumstances it is to be remarked that the mere fact that, on account of the features of the applicable national scheme for the filling of posts for doctors in under-served areas, holders of the certificate of specific training in general medical practice, on the one hand, and persons in possession of the equivalent qualification only, on the other, did not, with regard to the allocation of those posts, enjoy an equal chance of success is not contrary to Article 36(2) of Directive 93/16.
- 35 In the light of the foregoing, the reply to be given to the first question has to be that Article 36(2) of Directive 93/16 does not require the Member States to consider authorisation obtained before 1 January 1995 to carry on the profession of general medical practitioner under the national health system to be equivalent to obtaining the certificate of specific training in general medical practice for the purposes of access to general practitioner posts.

On the second and third questions

- 36 By its second and third questions, which may appropriately be examined together, the national court asks, in substance, whether it is contrary to Article 36(2) of Directive 93/16 for Member States to provide for doctors in possession of both the

certificate of specific training in general medical practice and authorisation on 31 December 1994 to practise as general practitioners under the national health system:

- a pool of reserved posts more extensive than that provided either for doctors in possession of that certificate or for doctors who have been granted authorisation, by permitting them to compete in those two categories of reserved posts simultaneously;
- yet more advantageous treatment by awarding them, when they compete for the quota of posts reserved to doctors authorised on 31 December 1994 to practise the profession, the number of additional points attributed on account of their having obtained that certificate.

37 According to Ms Berardi and Others and to Ms Vaira and Others, the obligation referred to in Article 36(2) of Directive 93/16, viz., to recognise that doctors from other Member States, established in the host Member State and authorised before 1 January 1995 to practise as general practitioners, are entitled to practise the profession of general practitioner, is not compromised by the system of reserved posts.

38 Those applicants maintain, moreover, that it is legitimate for candidates ‘with dual qualifications’ to be offered a quota of posts of wider range. All the effort dedicated to obtaining the certificate is justification for the certificate’s being accorded greater weight than that given to the equivalent period of medical practice. In addition, if the 12 additional points were not awarded for acquiring the certificate, those in possession of it would be placed at a disadvantage in comparison to those who, instead of undertaking the required two years’ training, have practised medicine and thus accumulated additional points for experience.

- 39 To the same effect, the Commission of the European Communities considers that, having regard to the Member States' discretion in the specifying of acquired rights, neither the detailed rules for the participation in open competitions for access to a Member State's social security scheme of doctors in possession only of authorisation to practise the profession granted before 1 January 1995, nor any quotas reserved to them or the points awarded them in selection procedures, fall within the ambit of Directive 93/16.
- 40 By contrast, Mr De Benedictis and Others argue that, as from 1 January 1995, the Member States cannot grant doctors in possession of the certificate of training in general medicine who also obtained authorisation on or before 31 December 1994 to practise the profession of general practitioner favourable terms with regard to access to a wider range of reserved posts than those allocated to the holders of one or other of the qualifications respectively.
- 41 As has been stated in paragraph 30 above, the discretion given to the Member States by Article 36(2) of Directive 93/16 to specify acquired rights is subject to one condition only, which affects solely those doctors who, having made use of their right to freedom of movement, have acquired the right to practise the profession of general practitioner under the host Member State's social security scheme. In keeping with the objective pursued by the Community legislature (see paragraph 28 above), that condition cannot, therefore, concern situations that have no cross-border feature.
- 42 In consequence, in purely internal situations such as those at issue in the main proceedings, the host Member State remains free to determine the extent of acquired rights.

43 In this respect, it is true that — inasmuch as the national authorities' reasons for drawing up, in these cases, two separate quotas for posts, one for holders of the certificate of training in general medical practice and the other for holders of the equivalent qualification, are based on the wish to protect that second category of doctors' acquired rights — to allow a category of doctors to apply for the two quotas of posts simultaneously would lead to a reduction of the protection afforded to those who hold the equivalent qualification alone. Such rules cannot, however, in themselves be contrary to Article 36(2) of Directive 93/16, a provision which, in purely internal situations, leaves the Member States free to specify acquired rights.

44 In addition, it is necessary to make it clear that the fact of granting to doctors, when they compete for posts reserved for those who were, on 31 December 1994, authorised to practise as general practitioners under the national social security scheme, the additional points awarded on account of having obtained the certificate of training in general medical practice is not contrary to Article 36(2) of Directive 93/16 either.

45 In the light of the foregoing, the answer to be given to the second and third questions has to be that it is not contrary to Article 36(2) of Directive 93/16 for Member States to provide for doctors in possession of both the certificate of specific training in general medical practice and authorisation on 31 December 1994 to practise as general practitioners under the national health system:

- a pool of reserved posts more extensive than that provided either for doctors in possession of that certificate or for doctors who have been granted authorisation, by permitting them to compete in those two classes of reserved posts simultaneously;

- yet more advantageous treatment by awarding them, when they compete for the quota of posts reserved to doctors authorised on 31 December 1994 to practise the profession, the number of additional points attributed on account of their having obtained that certificate.

Costs

- ⁴⁶ Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) rules as follows:

1. 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 does not require the Member States to consider authorisation obtained before 1 January 1995 to carry on the profession of general medical practitioner under the national health system to be equivalent to obtaining the certificate of specific training in general medical practice for the purpose of access to general practitioner posts.

2. It is not contrary to Article 36(2) of Directive 93/16 for Member States to provide for doctors in possession of both the certificate of specific training in general medical practice and authorisation on 31 December 1994 to practise as general practitioners under the national health system:

- a pool of reserved posts more extensive than that provided either for doctors in possession of that certificate or for doctors who have been granted authorisation, by permitting them to compete in those two classes of reserved posts simultaneously;**
- yet more advantageous treatment by awarding them, when they compete for the quota of posts reserved to doctors authorised on 31 December 1994 to practise the profession, the number of additional points attributed on account of their having obtained that certificate.**

Signatures.