Lambiris v. The Specialist Training Authority (Sta) of the Medical Royal Colleges (the General Medical Council and the Secretary of State for Health, Interested Parties)
[2002] EWHC (Admin.) 1621

Before the English High Court (Queen's Bench Division, Administrative Court)

QBD (Admin)

(Scott Baker J.)

31 July 2002

H1 Claim for judicial review.

H2 Establishment--services--professions--doctors--Greek qualified dermato-venereology specialist denied specialist dermatology status in the UK--appeal-- refused by professional appeal body--claim for judicial review--blanket prohibitions on freedom of establishment untenable under Article 43 EC (ex Article 52)--but need for harmonisation--specialisms not mutual--so Article 6 of the Doctors Directive 93/16 inapplicable--account of training in home State required under Article 8(2) of the Directive--but not pursued by claimant--so to be ignored--judicial review refused.

H3 The appeal panel of the defendant STA had rejected L's appeal against the STA's decision for him to be recognised as an eligible specialist in dermatology in the UK and accordingly have his name entered on the specialist register kept by the UK General Medical Council. The plaintiff was a Greek national, subsequently also gaining British nationality, and had been resident in the UK for some time. He held Greek primary and specialist medical qualifications as well as a specialist doctorate in dermato-venereology. While this specialism was common to 13 of the 15 Member States, in the UK and Ireland the analogous specialism was classed as dermatology. Moreover, the appellant's experience leading to his Greek qualification arose in the UK and he relied on that to practise as a specialist in the UK. The question arose as to whether the Doctors Directive 93/16 applied.
*460 **Held**:
Need for harmonisation to effect right of establishment
H4 Unless there was harmonisation of the criteria for obtaining a qualification there was no basis for achieving the right of establishment. While the blanket prohibition under Article 43 (ex Article 52) prevented unjustified restrictions the next step was to harmonise the basis on which a qualification was granted. Otherwise it was impossible to compare like with like. [6]-[7]
Lack of match between specialities in Greece and the UK
H5 The case was not covered by Article 6 of the Doctors Directive 93/16 because the specialities concerned were not the same in the UK and Greece. In the UK it was dermatology and in Greece dermato-venereology. Article 6 of the Directive covered recognition of matching specialities. There was no obligation under that Article for the UK to recognise the Greek qualification of dermato-venereology. [12]

Account to be taken of training in Greece under Article 8 of Directive 93/16
H6 Given Article 6 of the Doctors Directive 93/16 did not apply, under Article 8(2), the host Member State was required to take into account training certified by another Member State. However the claimant had not chosen to proceed on that basis, thus by-passing the requirements imposed by the Directive. Accordingly the express terms of the Directive had to be ignored under the EC Treaty [13]-[19]
EC Commission v. Spain (C-232/99), not yet reported, applied.

H7 Representation

Tom de la Mare, instructed by Daveport Lyons, for Dr Lambiris, the claimant.
Paul Lasok Q.C., instructed by Carter Lemon Camerons, for the Specialist Training Authority of the Medical Royal Colleges, the defendant.
James Flynn, instructed by Field Fisher Waterhouse, for The General Medical Council, the first interested party.
Jemima Stratford, instructed by the Treasury Solicitor, for the Secretary of State, the second interested party.

H8 Cases referred to in the judgment:
1. Criminal Proceedings against Macquen and Others (C-108/96), 1 February 2001: [2001] E.C.R. I-1837; [2002] 1 C.M.L.R. 853.
2. EC Commission v. Spain (C-232/99), 16 May 2002: not yet reported.
3. Hocsman v. Ministre de l'Emploi et de la Solidarité (C-238/98), 14 September 2000: [2000] E.C.R. I-6623; [2000] 3 C.M.L.R. 1025. *461
4. Conseil National de L'Ordre des Architectes v. Dreessen (C-31/00), 22 January 2002: not yet reported.
5. Ministre de la Santé v. Erpelding (C-16/99), 14 September 2000: [2000] E.C.R. I-6821.
6. R. v. Ministry of Agriculture, Fisheries and Food, Ex parte Hedley Lomas (Ireland) Ltd (C-5/94), 23 May 1996: [1996] E.C.R. I-2553; [1996] 2 C.M.L.R. 391.

JUDGMENT

Mr Justice Scott Baker:
1 This case is about the right of a doctor from another European Community Member State to be registered in this country as a specialist. The Appeal Panel of the Specialist Training Authority of the Medical Royal Colleges ("the STA") on 23 October 2001 rejected the Claimant's appeal against the STA's rejection of his application to be recognised as an eligible specialist and accordingly have his name entered on the specialist register kept by the General Medical Council ("the GMC"). The Claimant seeks judicial review of that decision.
2 The Claimant's area of expertise is dermatology. He is a Greek national and now also a British national. He has for some time been resident in the United Kingdom. He holds Greek primary and specialist medical qualifications as well as a specialist doctorate. His specialist qualification is in dermato-venereology. This is a specialism that is common to 13 out of 15 EC Member States. In the United Kingdom and Ireland, however, the

analogous specialism is dermatology.
3 In 1995 the Claimant moved from Greece to the United Kingdom to continue his specialist training here. Between May 1995 and January 1999 he undertook various different posts. On the basis of his Greek specialist training, the training that he had undertaken in the United Kingdom (as certified by his supervisors) and a rigorous exit examination he was awarded the Greek specialist qualification in dermato-venereology. He then sought to obtain recognition for his Greek specialist qualification by applying on 16 March 1999 to the GMC to be entered onto the specialist register. The GMC made an unfortunate error and entered his name on the specialist register pursuant to Article 9(1) of the European Specialist Medical Qualifications Order 1995 (SI 1995/3208) ("the ESMQO"). This was apparently due to a mistranslation of the Claimant's Greek qualification which had been prepared by the Consulate General of Greece in London and referred to his qualification as in dermatology rather than in dermato-venereology. The mistake was discovered when he applied for a fellowship in dermatological (cutaneous) surgery at the University Hospital of Wales in Cardiff. There is little doubt that he would have been accepted for this post, and indeed other consultancy posts, had his name remained on the specialist register.
4 *462 There followed lengthy correspondence between the Claimant, the GMC, the STA and Joint Committee on Higher Medical Training ("the JCHMT") who are the agents of the STA. In my judgment neither the tenor of the correspondence nor the time taken reflects very well on the authorities. I would have expected, in ordinary circumstances, these bodies to do their best to assist someone in the Claimant's shoes by explaining to him precisely what was required, any difficulties that had to be overcome and what steps he might consider taking to overcome them. However, this is immaterial to the issues that I have to decide which are issues of law. These issues are essentially as follows. Does Article 8 of Directive 93/16 [FN1] as amended apply and did the appeal panel make an error of law in its approach?

FN1 Council Directive 93/16 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, [1993] O.J. L165/1.

The Community law background

5 Article 43 of the EC Treaty provides:
Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
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 48, under 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.
Article 47.3 provides:

In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon co-ordination of the conditions for their exercise in the various Member States.

6 When Article 43 (formerly Article 52) was incorporated into the Treaty establishing the European Community there was a transitional period during which it was envisaged the four freedoms would become fully operational. This, however, did not happen in reality because many things required positive action (see e.g. Article 47.3). Unless there is harmonisation of the criteria for obtaining a qualification there is no basis for achieving the right of establishment.

7 The blanket prohibition in Article 43 will prevent unjustified restrictions such as "French doctors cannot practise in the United Kingdom", but the next step is to harmonise the basis on which the qualification is granted; otherwise it becomes impossible to compare like with like.

8 *463 The provision that lies at the heart of this case is Directive 93/16. The Directive does not set out an exhaustive code because there is also the blanket prohibition in Article 43. The blanket prohibition is, however, of limited effect when taken in isolation. The Directive, it should be noted, is directed at the general rather than the particular. The target is to enable a national of a Member State to do the same as a national of the country to which he is going (the host Member State).

9 Mr Paul Lasok Q.C., for the STA, referred to Case C-108/96, Criminal Proceedings against Macquen and Others, [FN2] as an illustration of the principles. The court said at paragraphs 25/26:

The second paragraph of Article (43) of the Treaty provides that freedom of establishment is to be exercised under the conditions which the legislation of the country of establishment lays down for its own nationals. It follows that, where the taking up or pursuit of a specific activity is subject to such conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with those conditions ...

FN2 [2001] E.C.R. I-1837; [2002] 1 C.M.L.R. 853.

According to the Court's case law, however, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty can be justified only if they fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective ...

Thus, it is possible to restrict the freedom of establishment provided for in Article 43 but only in the event that the four conditions are satisfied. In fact United Kingdom legislation goes further than required by the Directive and I shall come to that shortly.

10 Mr Lasok makes the point that underlying this area of legislation lies the important objective of the maintenance of public health and of public confidence in medical treatment. This explains why the Directive is phrased in the way that it is. It is necessary to have confidence that a qualification elsewhere has been properly awarded. Also, it is important that Member States should in fact be doing what they are supposed to be doing.

11 I turn therefore to the detailed provisions of the Directive. Article 2 provides for the

basic qualification. It says:
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.
Article 3 refers in the United Kingdom to a primary qualification leading to registration as a fully registered medical practitioner.
Article 4 deals with cross-recognition between Member States of *464 diplomas, certificates and other evidence of formal qualifications in specialised medicine. In the United Kingdom this is, per Article 5.2, a certificate of completion of specialist training ("CCST") issued by the competent authority recognised for this purpose. That authority is the STA.
Article 6, which is in the Chapter of the Directive dealing with specialised medicine, provides:
Each Member State with provisions on this matter laid down by law, regulation or administrative action shall recognise the diplomas, certificates and other evidence of formal qualifications in specialised medicine awarded to nationals of Member States by the other Member States in accordance with Articles 24, 25, 27 and 29 and which are listed in Article 7, by giving such qualifications the same effect in its territory as those which the Member State itelf awards.
Article 7 shows dermato-venereology as common to Greece and 12 other Member States whereas dermatology is common only to the United Kingdom and Ireland.
Article 8 provides:
1. Nationals of Member States wishing to acquire one of the diplomas, certificates or other evidence of formal qualifications of specialist doctors not referred to in Articles 4 and 6, or which, although referred to in Article 6, are not awarded in the Member State of origin or the Member State from which the foreign national comes, may be required by a host Member State to fulfil the conditions of training laid down in respect of the specialty by its own law, regulation or administrative action.
2. The host Member State shall, however, take into account, in whole or in part, the training periods completed by the nationals referred to in paragraph 1 and attested by the award of a diploma, certificate or other evidence of formal training by the competent authorities of the Member State of origin or the Member State from which the foreign national comes provided such training periods correspond to those required in the host Member State for the specialised training in question.
3. The competent authorities or bodies of the host Member State, having verified the content and duration of the specialist training of the person concerned on the basis of the diplomas, certificates and other evidence of formal qualifications submitted, shall inform him of the period of additional training required and of the fields to be covered by it.
12 It is unnecessary at this stage to recite any of the other articles. The present case is not covered by Article 6 because the specialities are not the same in the United Kingdom and Greece. In the United Kingdom it is dermatology and in Greece dermato-venereology. Article 6 covers recognition of matching specialties. There is no obligation under this Article for the United Kingdom to recognise the Greek qualification of dermato-venereology.

13 This case is concerned with Article 8. This Article is the next step down the line, as it were, in the mutual recognition of specialties. This is the provision that lies at the heart of this case. Article 8.1 makes clear that where the Article 6 route is not open because the two countries do not have matching specialities an applicant may be required to meet *465 the host Member State's own training requirements. However, Article 8.2 requires the host Member State to take into account relevant corresponding training periods that have been certified by the competent authorities of the Member State of origin or Member State from which the applicant comes. Article 8.3 requires the applicant to be told of any further training required. Thus, where someone in the shoes of the Claimant wants to obtain a specialist qualification in the United Kingdom, he cannot be told he must qualify from scratch. He is entitled to have periods of training taken into account provided they are attested and correspond, *etc*.
14 Article 8.2 does not expressly say that the training periods must have been completed in the attesting State. It does not say that Greek certified periods must have been carried out in Greece. But that is how it has been interpreted by the European Court, see Case C-232/99, EC Commission v. Spain [FN3] and there is obvious good sense and practicality for such an approach. The problem in the present case arises because some of the Claimant's experience leading to his Greek qualification arose in the United Kingdom and he now wishes to rely on that experience to practise as a specialist in the United Kingdom. A host State rather than another Member State is likely to be better equipped to evaluate training and experience that took place in its own country. EC Commission v. Spain arose because in order to gain access to the profession of specialist doctor in Spain a migrant doctor whose diploma, certificate or other evidence of specialist training did not benefit from automatic and unconditional recognition in accordance with Directive 93/16 had to take part in the national competition procedure for the Medico Interno Residente. The Court, after pointing out that Article 8 was part of the framework of Community legal measures designed to facilitate professional mobility of doctors who are Community nationals and have undergone specialist medical training, went on:
20. Article 8(1) of Directive 93/16 thus provides that the person concerned will receive a new diploma in the host Member State after having, if necessary, undergone additional training. It is on the basis of that diploma that he will subsequently be entitled to practise the medical specialty in question in that State. Article 8(2) requires the host Member State to take into account, when determining what additional training is needed, the relevant professional qualification of the person concerned according to principles analogous to those developed in the case law of the Court on the mutual recognition of professional qualifications.

FN3 Not yet reported.

21. According to that case law, the principles of which were set out in the judgment in Case C-340/89, Vlassopoulou [1991] E.C.R. I-2357, paragraph 16, the authorities of a Member State, when considering a request by a national of another Member State for authorisation to exercise a regulated profession, must take into consideration the professional qualification of the person concerned by making a comparison between the qualifications certified by his diplomas, *466 certificates and other formal qualifications and the professional qualifications required by the national rules for the exercise of the

profession in question (see, most recently, judgment of 22 January 2002 in Case C-31/00, Dreessen [[2002] 2 C.M.L.R. 62], paragraph 31).
22. That obligation extends to all diplomas, certificates and other evidence of formal qualifications as well as to the relevant experience of the person concerned, irrespective of whether they were acquired in a Member State or in a third country, and it does not cease to exist as a result of the adoption of directives on the mutual recognition of diplomas (see judgment of 14 September 2000 in Case C-238/98, Hocsman [2000] E.C.R. I-6623, paragraphs 23 and 31).
23. In that context, the principal aim of directives such as Directive 93/16 is to establish a system of automatic and unconditional recognition for a certain number of diplomas, certificates and the other forms of evidence of formal qualifications.
24. Thus, with respect to the medical profession, Directive 93/16 provides that each Member State is to recognise the diplomas, certificates and other evidence of formal qualifications awarded to Community nationals by other Member States in accordance with the conditions laid down in that directive, by giving such qualifications, so far as the right to take up and pursue the activities of doctor is concerned, the same effect in its territory as the diplomas, certificates and other evidence of formal qualifications which it itself awards.
25. As a result of the automatic and unconditional effect of those systems of mutual recognition, and of the fact that they make it possible to know precisely and in advance if a particular diploma gives the right to take up and pursue the corresponding profession in other Member States, those systems are generally more advantageous for the persons concerned than is the application of the principles set out in the case law referred to in paragraphs 21 and 22 above. Nevertheless, that case law certainly remains relevant in situations not covered by the directives providing for the mutual recognition of diplomas (see Hocsman, cited above, paragraph 34).
The court then went on to refer to three separate situations covered by Articles 4, 6 and 8 namely:
. qualification certifying a medical specialty common to all Member States (Article 4).
. qualification certifying a medical speciality not common to all Member States but which appears in the list in Article 7(2) as peculiar to one or more common Member States (Article 6).
. the Article 8 situation.
It said of the Article 8 situation:
29. The third situation concerns the migrant doctor who wishes to practise a medical specialty in a Member State and has undergone a course of medical training in another Member State leading to a diploma, certificate or other evidence of a formal qualification that does not provide access to the practise of the medical speciality in question in the first Member State under Article 4 or Article 6 of Directive 93/16. In such a case, Article 8 aims to facilitate the free movement of that doctor by allowing him in the host Member State, and in accordance with its domestic legislation, to complete the training needed to practise that medical specialty.
*467 30. Article 8 of Directive 93/16 thus applies, first, to medical specialties that exist both in the host Member State and in the Member State of origin or the Member State from which the foreign national comes but which, for whatever reason, do not appear in the lists in Articles 5 and 7 of that directive.

31. Secondly, Article 8 of Directive 93/16 applies to specialised training which, in the Member State of origin or the Member State from which the foreign national comes, is not regarded as giving rise to a medical specialty but does give access in that Member State to the pursuit of a medical activity which, in the host Member State, constitutes a medical specialty.
32. Such a situation exists, for example, in the case of cardiology, which, while constituting a medical specialty in most Member States, is in some other Member States considered to be a specialised branch of internal medicine, so that a diploma of "specialist doctor in internal medicine--cardiology" cannot be the subject of the automatic and unconditional recognition prescribed in Articles 4 and 6 of Directive 93/16 (see, to that effect, Case C-16/99, Erpelding [2000] E.C.R. I-6821, paragraph 27).
33. Thirdly, Article 8 of Directive 93/16 applies where the migrant doctor holds a diploma in respect of a medical specialty for which there is no equivalent in the host Member State, but rather a related specialty, so that the practice of that specialty in the host Member State requires additional prior training.
34. Article 8 of Directive 93/16 must therefore be construed as applying to the situation where a migrant doctor holds a diploma, certificate or other evidence of training in specialised medicine which is not covered by the system of automatic and unconditional recognition established by Directive 93/16 but which makes it possible for that doctor to pursue in the Member State of origin or from which he comes a medical activity that to some extent, albeit not formally, corresponds to the medical specialty he wishes to pursue in the host Member State.
It continued at paragraph 39:
Admittedly, in cases where Article 8 of Directive 93/16 applies, the host Member State may in principle make the award of the diploma sought by the migrant doctor subject to completion of additional training. However, paragraph 3 of that article makes it clear that such additional training may relate only to fields which, according to the domestic legislation of the host Member State, are not already covered by diplomas, certificates and other evidence of formal qualifications held by the migrant doctor.
40. The host Member State is thus not free either to include other fields in the additional training it requires of migrant doctors or to subject those doctors to the same conditions of access as apply to a doctor wishing to undergo training for the first time in order to obtain a diploma, certificate or other evidence of a formal qualification in specialised medicine.
15 It can thus be seen that the scheme of Article 8 is to create the ability of someone in the shoes of the Claimant to practise on the basis of his new diploma and not on the basis of his Greek qualification. The structure of Article 8.2 is to require the host Member State to take into account training certified by another Member State.
16 Were the Claimant applying under Article 8, which he is not, he would, if successful, be awarded a CCST, *i.e.* the qualification to show that he has undergone equivalent training to that of dermatologist in the United Kingdom. I referred to this during the hearing as route one *468 of the two routes open to the Claimant. In my judgment Community law requires nothing more than that route one should be open to the Claimant.
17 Mr Lasok submits that Article 8 does not apply in the present case for two reasons. First because it is concerned with obtaining a CCST, which is not what the Claimant was

seeking, and second that Article 8.2 is concerned with training periods outside the host Member State. [FN4]

FN4 See EC Commission v. Spain, para. 29.

18 Route one was open to the Claimant in this case, and indeed still is. In accordance with Article 8.2 of the Directive in assessing an application under Article 8.1 the STA would be obliged to take into account, in whole or in part, completed training periods attested by a certificate awarded by a Member of State of origin (Greece). This training would include practical experience. [FN5] But there is an important qualification in Article 8.2 that provides that the United Kingdom is only obliged to take into account training periods attested by a certificate, *etc. if* the training periods correspond to the training periods required in the United Kingdom for the specialist training in question. As is clear from Article 8.3 the test of correspondence must have regard to the substantive content as well as the period of training. Accordingly, in order to obtain a CCST in dermatology the Claimant would need to make an application for a CCST in dermatology, have his training, qualifications and practical experience assessed in accordance with Article 8.2 and the ECJ's case law on free movement and then undertake any additional training required by the STA. This would be undertaken under Article 6 of the ESMQO.

FN5 See Case C-238/98, Hocsman v. Ministre de l'Emploi et de la Solidarité: [2000] E.C.R. I-6623; [2000] 3 C.M.L.R. 1025.

19 It seems to me clear that the Claimant has chosen not to proceed by route one to obtain a CCST in dermatology as provided by Article 8 of the Directive but has instead sought entry onto the specialist register through route two as an "eligible specialist". This is an additional route not required by Community law but provided by the domestic legislation to which I shall come shortly. I should make it clear that no party alleges any bad faith on the part of the Claimant. However, he did expressly choose to follow a route not laid down by the Directive, thus by-passing the requirements there imposed. This is an important distinction between this case and cases such as Hocsman and Dreessen. [FN6] In those cases the situation at issue was not covered by the Directive and the general principles of free movement applied. The logical consequence of the Claimant's argument is that even where the Directive applies to the situation at issue and lays down the requirements which Member States may impose, nevertheless the Treaty requires that the express terms of the Directive should be ignored.

FN6 Case C-31/00, Conseil National de L'Ordre des Architects v. Dreesen: [2002] 2 C.M.L.R. 62 *469 .

Domestic law

20 The vehicle by which the Directive has been implemented into domestic law is the ESMQO. Article 8 of the Directive is implemented by Article 3(4)(c) of the ESMQO which provides:

(c) the STA shall as respects the United Kingdom perform the functions of a Member State referred to in the following articles of the Directive--
(i) Article 8(1) (requirement to fulfil domestic requirements for specialist training in certain specialties), and
(ii) Article 8(2) (requirement to take into account training already undertaken abroad.)
The previous paragraph (b) makes the STA the competent authority under Article 8(2) and (3) to issue certificates, verify the duration and content of foreign specialist training and communicate what additional training is required. Accordingly the whole of Article 8 is referred to in the implementing legislation.
21 Ms Jemima Stratford, for the Secretary of State, points out that Article 3(4) of the ESMQO makes clear that it confers functions in addition to the functions conferred elsewhere in the order. The functions of the STA in awarding CCSTs are set out in detail in Articles 6 and 7 of the ESMQO.
22 Part IV of the ESMQO deals with the specialist register. By Article 8(1) the GMC is required to keep and publish a register of specialists. This is to contain by Article 8(2):

(a) persons who hold a CCST awarded by the STA; and
(b) other eligible specialists as specified in Article 9.
23 The diploma, certificate or other evidence of formal qualifications referred to in Article 6 of the Directive, which the Claimant may acquire under Article 8(1) of the Directive, is in the United Kingdom the CCST. Possession of a CCST creates an entitlement to entry on the specialist register, which is simply a list of names with each person's specialty indicated in parentheses.
24 It is in my judgment fundamental to the understanding of the issues in this case to appreciate that the ESMQO goes further than required by Community law. Article 9 introduces the concept of an "eligible specialist". This is not required under the Directive or under EC free movement principles. It is an additional route for entry onto the specialist register in the United Kingdom. As Lesley Hawksworth, the chief executive of the STA, points out in her evidence, outside the system of mutual recognition there are three routes towards entry in the specialist register. A Doctor may (i) obtain a CCST awarded by the STA, (ii) satisfy the STA that he or she has a foreign qualification that is equivalent to a CCST in the specialty in question; or (iii) satisfy the STA that he has a foreign specialist qualification or knowledge of or experience in any medical specialty derived from academic or research work that gives him a level of knowledge or skill consistent with practice as a consultant in that specialty in the National Health *470 Service. For example, a person is to be regarded as an eligible specialist for the purposes of Article 8(2)(b) if he has specialist medical qualifications awarded outside the United Kingdom in a specialty listed in schedule 2 and he satisfies the STA that those qualifications are equivalent to a CCST in the specialty in question (Article 9(2)(b)). Dermatology is in schedule 2; dermato-venereology is not.
25 The Claimant does not advance his case to the STA by route one, but by what I have called route two, in particular by Article 9(3)(a) of the ESMQO which provides:
A person is also an eligible specialist for the purposes of Article 8(2)(b) if--

(a) he has specialist qualifications awarded outside the United Kingdom in a medical specialty not listed in Schedule 2; ...
and he satisfies the STA that these give him a level of knowledge and skill consistent with practice as a consultant in that specialty in the National Health Service.

26 This in my judgment is an entirely different route from that provided for in Article 8 of the Directive. In short the Directive is of no relevance to an application under Article 9(3)(a) of the ESMQO. Whilst under Article 8 the host Member State is obliged to take into account training completed in another Member State the ESMQO enables the STA to take into account (among other things) medical experience or knowledge acquired in an EEA State when deciding whether the second or third routes are open (see Article 9(4)(b)). The second and third routes enable a doctor to bypass the training requirements leading to a CCST.

27 A closer look at Article 9 of the ESMQO confirms that of its different provisions, Article 9(1) implements Articles 4 and 6 of the Directive by providing for automatic entry to the specialist register for nationals of EEA States (or those with enforceable Community rights) who hold EEA specialist qualifications. This only applies, as required by Articles 4 and 6 of the Directive, to those specialisms in which the United Kingdom awards a CCST: all such specialisms are listed in schedule 2 of the ESMQO.

28 Article 9(2) is concerned with mutual recognition and generally applies to persons who holds non-EEA specialist qualifications in a schedule 2 specialty, or who are non-EEA nationals with a specialist qualification in a schedule 2 specialty. For example an Indian doctor holding a specialist qualification in dermatology could seek to rely on Article 9(2) to obtain entry onto the specialist register. Such a person may be recognised as an eligible specialist if he satisfies the STA that his qualifications are equivalent to a CCST in the specialty in question.

29 At one point the Claimant asserted that his Greek qualification in dermato-venereology was identical or equivalent to the United Kingdom CCST curriculum in dermatology and that he should be entered onto the specialist register for dermatology and the STA *471 should have assessed his application under Article 9(2)(b). However, it is now accepted that his qualification in dermato-venereology is not in a schedule 2 specialty so that Article 9(2)(b) cannot apply. It is therefore to Article 9(3)(a) that Mr Tom de la Mare, for the Claimant, has essentially directed his argument.

30 Article 9(3)(a) of the ESMQO applies to persons who hold a non-schedule 2 specialist qualification awarded outside the United Kingdom. It therefore applies to EEA and third country nationals alike. It applies to the Claimant as he holds a qualification in a non-schedule 2 specialty (dermato-venereology) which is awarded in Greece. He sought recognition as an eligible specialist under this Article rather than to obtain a CCST in dermatology under route one. The STA will recognise a person as eligible as a specialist under this Article if:
... he satisfies the STA that (his specialist qualification awarded outside the United Kingdom in a medical specialty not listed in Schedule 2) give(s) him a level of knowledge and skill consistent with practice as a consultant in that specialty in the National Health Service.

31 The most natural meaning of the words *in that specialty* is that they are referring to a specialty not listed in schedule 2. As was pointed out in argument there is paradox because there may well be no such specialty in the National Health Service. There is

indeed no specialty in dermato-venereology in the National Health Service but this did not prevent the STA from considering the Claimant's application and nor, in my judgment, should it have done so. As Mr Lasok points out, Article 9(3) is not concerned with the award of CCSTs but with the classification of someone as an eligible specialist by virtue of the fact that he has the level of knowledge and skill consistent with practice as a National Health Service consultant. A consultant in the National Health Service is a post and not a medical qualification (see Article 2(3)(a) and schedule 5 of the ESMQO). Thus the emphasis is on the knowledge and skill expected of someone with consultancy status in the specialty under consideration, that specialty being, by definition, one not listed in schedule 2.

32 Mr Tom de la Mare's argument is that both Article 9(3) and indeed Article 9(2) should be construed purposively in order to overcome what he contends to be defective implementation of the Directive. The purpose of Article 8 of the Directive, he submits, is to permit a doctor with a non-mutually recognised qualification in one State to obtain recognition in the host Member State in the analogous specialty practised in that State. If he is right, Article 9(3)(a) entitled the Claimant to be registered as an eligible specialist in dermatology. He submits that the operative test is whether a doctor in the position of the Claimant has a level of knowledge and skill consistent with practice as a consultant in the related specialty practised in the United Kingdom in the National Health Service. This is how the closing words of Article 9(3)(a) *472 are to be read. Because of his considerable experience and background his contention is that Dr Lambiris amply meets that test.

33 In my judgment however there is no need to interpret Article 9 of the ESMQO purposively in this way. Mr Tom de la Mare submits it is necessary in order to give proper effect to Article 8 of the Directive. But in my judgment it is not because, as I have illustrated, Article 8 has been fully and separately introduced into domestic law by the CCST route. Article 9 of the ESMQO is not the route by which Article 8 is implemented into domestic law. The Claimant's sophisticated and detailed argument is not built on a secure foundation. Take away the foundation and the whole edifice collapses. In my judgment Article 9(3)(a) has nothing to do with Article 8 of the Directive.

34 There is another basis for concluding that Mr Tom de la Mare's argument about Article 9(3)(a) is wrong. By Article 19 of the Directive, a doctor who has a mutually recognised Greek qualification can come to the United Kingdom and use the professional title applicable in this country. Article 8, however, does not fall under this umbrella because what the recipient receives is the United Kingdom qualification (the CCST) but what the Claimant wants is to use Article 8 to obtain entry on the specialist register (via Article 9(3) of the ESMQO) as a dermatologist without obtaining a CCST.

35 He would therefore in effect be permitted to call himself a dermatologist, on the basis of his Greek specialist qualification, something that would not be permitted under Article 19 of the Directive. This seems to me to be a clear indicator that Mr de la Mare's argument is fallacious. Article 19 was considered by the European Court in Case C-16/99, Ministre de la Santé v. Erpelding. [FN7] The Court said the first question the national court asked was in essence whether a doctor who has obtained in another Member State a diploma in specialised medicine which does not appear on the list of specialist training courses in Article 7 of the Directive may rely on Article 19 to use the corresponding professional title of specialist in the host State. The answer was "no". The Court said at paragraph 25:

The right to use the title of doctor or specialist doctor in the host Member State, in the language of that State and in accordance with its nomenclature, is thus a necessary corollary of the mutual recognition of diplomas, certificates and other evidence of formal qualifications established by Directive 93/16.

FN7 [2000] E.C.R. I-6821.

26. However, that applies only if the title of doctor or specialist doctor satisfies the minimum conditions required for this automatic and compulsory mutual recognition. It is thus fully consistent with that system of mutual recognition that Article 19 of Directive 93/16 entitles Community nationals to use the professional title of doctor or specialist doctor only if they fulfil the conditions laid down in the first and second paragraphs of that provision.

36 The Claimant's case is that entry on the specialist register as a dermato-venereologist is pointless because it bears no significance in *473 the United Kingdom. This in my judgment is not so. Article 11 and schedule 5 of the ESMQO provide that a person may not take up appointment to a post as a consultant in the National Health Service in the medical specialty unless his name is on the specialist register. Thus it is an entry on the specialist register that controls entry to consultant posts. An entry on the register as a dermato-venereologist would not of itself prevent a doctor being employed as a consultant dermatologist. It is perfectly possible to have consultant posts in specialties in which a CCST is not awarded, *e.g.* dermato-venereology. Examples given in the evidence are paediatric neurology and paediatric oncology. Neither is listed in schedule two for the award of CCSTs but there are several consultant posts in the National Health Service in these specialties. Once a doctor has an entry on the specialist register, it is for any prospective employer to decide whether the individual doctor has the particular skills and expertise required for the post in question. If the Claimant satisfied conditions for entry onto the specialist register, he would be eligible for employment in any substantive consultant post, regardless of whether his entry recorded his specialty as dermatology or dermato-venereology. A prospective employer would look at his training and experience and decide whether or not he was qualified for the specific consultant post. Indeed Miss Stratford for the Secretary of State makes the point that if a dermato-venereologist fulfils the specification for a particular consultant post just as well as a dermatologist but is rejected solely on the basis that his entry on the specialist register is dermato-venereology, then this could well be unlawful as offending EC principles of free movement.

37 The fact that the United Kingdom allows suitably qualified dermato-venereologists to be entered on the specialist register provided they have the requisite level of knowledge and skill certainly does not render the Article 9(3)(a) exercise one of automatic mutual recognition. Dermato-venereology and dermatology are not mutually recognisable. Neither is a specialism, common to all Member States (per Article 5.3 of the Directive), nor is dermato-venereology a specialism in which the United Kingdom provides a specialist training course (per Article 7.2 of the Directive). The degree of co-ordination of standards in dermato-venereology is not yet sufficient for that specialism to generate an obligation of mutual recognition (see paragraph 35 of the opinion of Advocate General Jacobs in Hocsman).

38 Finally, if Mr Tom de la Mare's argument about Article 9(3)(a) is right it seems to me to make something of a nonsense for those consulting the register. Instead of the Claimant being entered as a dermato-venereologist, he would be entered as a dermatologist, notwithstanding that he did not qualify for a CCST in dermatology. There would therefore be two classes of dermatologist on the register, both falling within the description of dermatologist. There would be fully qualified dermatologists and a sub-class of dermatologist with qualifications of a lesser nature.
39 *474 For these reasons I conclude that Article 8 of the Directive is irrelevant to an application under Article 9(3)(a) of the ESMQO. When faced with an application under Article 9(3)(a) the STA has to ask itself the following questions. First, has the applicant specialist medical qualifications awarded outside the United Kingdom in a medical specialty that is not listed in Schedule 2. Secondly, do his specialist qualifications give him a level of knowledge and skill in the specialty in which he has his qualifications that are consistent with consultancy status in the National Health Service, notwithstanding that there may be no such National Health Service consultants. In answering this second question the STA has to take into account medical experience or knowledge acquired in an EEA State. If the answer to both questions is "yes" then the applicant is an "eligible specialist" for the purposes of Article 8(2)(b) and is entitled to have his name included on the specialist register. Thus if the Claimant is able to establish affirmative answers to both questions his name would go onto the specialist register as a dermato-venereologist.

Going behind the Greek qualification

40 There was some debate during the hearing about the extent, if at all, to which it was possible to go behind the Greek certificate of qualification. Article 22 of the Directive provides:
In the event of justified doubts, the host Member State may require of the competent authorities of another Member State confirmation of the authenticity of the diplomas, certificates and other evidence of formal qualification issued in that other Member State and referred to in Chapters I to IV of Title II and also confirmation of the fact that the person concerned has fulfilled all the training requirements laid down in Title III.
41 The Claimant's position is that once the Greek authorities have confirmed the certificate is valid that is the end of the matter, with the consequence that training evidenced by a qualification cannot be re-evaluated. The STA was not therefore entitled to "re-open" the Claimant's Greek qualification. [FN8]

FN8 See, for example, Case C-5/94, R. v. Ministry of Agriculture Fisheries and Food, Ex parte Hedley Lomas (Ireland) Ltd: [1996] E.C.R. I-2553; [1996] 2 C.M.L.R. 391.

42 There is in my judgment a short answer to this question in the present case. Article 22 applies within the context of Articles 6 and 8 of the Directive. It is of no relevance to Article 9(3) of the ESMQO. Furthermore, Article 22 is concerned with confirmation of the authenticity of a foreign qualification and confirmation that training carried out in another Member State fulfils the requirements of Title III of Directive 93/16. Because the Claimant's Greek qualification is not the subject of mutual recognition and the Claimant's relevant experience was acquired in the United Kingdom his case does not *475 engage

with either matter. Even if it did, the STA was entitled to question the Greek qualification because it had "justified doubts".
43 Because this is not a mutual recognition case the STA is not bound by the Claimant's Greek qualification and his complaints about "re-opening" the Greek qualification are misplaced. The responsibility of the STA under Article 9 of the ESMQO is to carry out an assessment of whether his qualifications and experience are equivalent to those required of a British applicant. I accept the GMC's submission that were this an Article 8 case, which it is not, it would be up to the host Member State to assess how far the periods of training for the non-recognisable qualification "correspond" to those required in the host State.
44 The GMC during the course of the hearing put down markers on two issues that it regards of considerable importance. Because these issues do not, on my analysis, arise in the present case. I propose to say little about them. The issues are (i) the ability of the STA to make enquiries of the competent authorities of other Member States and (ii) the ability of the competent authorities of one Member State to assess whether a qualification issued by another Member State meets the pre-conditions for mutual recognition set out in Article 24 to 27 of the Directive. Suffice it to say that nothing I heard in argument persuaded me that the position of the GMC was other than correct. First, the STA has the power to make enquiries of other Member States' competent authorities and those powers include powers to inquire whether the training in fact undertaken in a particular case complies with the Directive's requirements. It seems to me nonsense to suggest that the power to make such enquiries is vested solely in the GMC. Secondly, and I emphasise the point does not arise for decision in the present case, I think there are good practical reasons for saying that if the competent authorities of one Member State have genuine doubts about the content or duration of training leading to the award of a specialist qualification in the awarding Member State they should be entitled to raise those doubts with the competent authorities in the awarding Member State and if necessary enter into a dialogue about them. They are not limited simply to a request followed by a bare "confirmation". Substantive and detailed enquiries are also permitted.

Did the Appeal Panel make an error of law in its approach?

45 The fundamental question is whether the appeal panel was right to uphold the STA's conclusion that the Claimant's Greek qualification, medical experience and knowledge did not give him a level of knowledge and skill consistent with practice in that specialty in the National Health Service. The appeal was by way of rehearing and the Claimant should by that stage have been under no illusions about the need to remedy any deficiency in the material he had put before the authorities.
46 *476 Given that what the Appeal Panel was doing was deciding whether the Claimant was an eligible specialist under Article 9(3)(a) of the ESMQO did it undertake and conclude that task lawfully when it upheld the STA's decision? Article 9(4)(b) requires the STA to take into account specialist medical experience or knowledge acquired in an EEA State, *i.e.* in this case the United Kingdom and Greece.
47 There are certain basic points that need to be kept in mind at the outset when considering this question. In the first place, the decision that is challenged is that of the Appeal Panel and not the STA's original decision. As the appeal decision is by way of

rehearing it is that decision upon which it is necessary to concentrate rather than on anything that has gone before.
48 The Claimant put in a written appeal. The STA responded and the Claimant put in a reply. Furthermore, in the decision appealed from the STA had made it clear that, based on the information available, it was not satisfied that the Claimant had demonstrated the necessary qualifications to meet the requirements of Article 9 of the ESMQO. It attached a checklist and table based on the information the Claimant had provided and went on to point out in the penultimate paragraph that if he wished to reapply it was up to him to provide further evidence about his training qualifications and expertise (see letter of 30 March 2001, bundle 2 p. l46).
49 Mr Tom de la Mare identifies one of the issues as whether the role of the STA is inquisitorial or adversarial. That in my judgment is nothing to the point. The decision with which the court is concerned is that of the Appeal Panel. Questions can and sometimes do arise about whether the role of a domestic tribunal is inquisitorial or adversarial. There is no absolute demarcation. Tribunals often display features of both characteristics. In the present case what, in my judgment, is clear is that it was up to the Claimant to put before the Appeal Panel whatever material he wished in order to substantiate his appeal.
50 The Claimant also complains that no member of the Appeal Panel was a specialist in dermatology and that somehow this affects the rationality of its decision. The absence of such a specialist breaches no legislative or other requirement and, as far as I am aware, no complaint was made at the time. There is no substance in the point.
51 The next point is that the Appeal Panel was concerned solely with applying English law, the ESMQO, and insofar as the allegation is of a failure to comply with EC law, Community law adds nothing when one is considering the lawfulness of the Appeal Panel's approach. Also, this was not a "matching specialties" case where there should have been mutual recognition. What the Appeal Panel was concerned with here was whether the Claimant had acquired sufficient knowledge and experience to justify entry on the register as an eligible specialist.
52 Both the appeal panel and the STA before it were required to undertake what Mr Lasok, in my view accurately, described as a technical judgmental exercise. They had to decide whether the *477 Claimant's specialist qualification gave him the requisite level of knowledge and skill, having regard to the medical experience and knowledge that he had acquired.
53 The main thrust of the Claimant's argument is that when assessing his training the Appeal Panel did not have to be satisfied that it corresponded exactly with what would be required in the United Kingdom. It was enough if it was substantially equivalent to training in the United Kingdom. Both the STA and the Appeal Panel took the wrong approach. The Greek qualification was ignored or reopened and all the training underlying it measured against a strict benchmark of whether or not it was JCHMT-approved training. The Claimant submits that the fact that the training took place in the United Kingdom is irrelevant and that he is entitled to be treated as if the substantive training he received was in Greece or Germany. I cannot accept this submission.
54 Since the yardstick or standard is knowledge and skill consistent with practice as a consultant in the health service, it is very difficult to see why experience in the United Kingdom should not be measured against the criteria expected in the United Kingdom.

No one is better equipped to evaluate the worth of training in the host State than the authorities of the host State; no one better able to see how closely it matches the skill expected of a consultant in the relevant field. It seems to me that the fundamental flaw in Mr Tom de la Mare's argument is that such an approach is required by Article 8 of the Directive. But in my view Article 8 has no relevance in what is a straightforward application of a provision of domestic legislation. As Mr Lasok points out there is no question here of treating someone with a foreign qualification unfairly. Any unfairness that would arise would arise, were I to accept Mr Tom de la Mare's argument, to someone who had done exactly as the Claimant but had not obtained a foreign qualification on the strength of his training in the United Kingdom.

55 Mr Tom de la Mare seeks to rely on the principle of what he calls substantial equivalence, namely that minor differences in training, qualifications, *etc.*, between the training followed in the host State and the training followed elsewhere do not prevent someone from obtaining a qualification in the host State. But that principle has no relevance where, as here, the training was actually carried out in the host State and the person undertaking it had the opportunity to comply with the host State's requirements. The principle of substantial equivalence is concerned with minor differences between actual training in a Member State, *e.g.* Greece and that required in the host State, *e.g.* the United Kingdom, but that is not this case.

56 The STA was, in the end, required to carry out a relatively straightforward task, namely to assess whether his qualifications and experience were equivalent to those required of a British applicant. Since the training that was claimed to be relevant was all carried out in British hospitals the STA was well placed to assess its value. What it *478 had to do was, in effect, a wholly domestic exercise. The Claimant's overriding difficulty is that as the training posts in question are not approved as training by the United Kingdom authorities (the STA) he was unable to meet the test in Article 9(3)(a). The Appeal Panel said:

We had regard to the JCHMT criteria for assessment under (Article 9(3)(a)). The criteria require the duration of the training programme followed to be not less than that set out for the specialty in Directive 93/16 EEC, which in the case of dermatology/venereology is three years. The JCHMT criteria required that the content of training must relate to the training in terms of clinical and theoretical content, required for recognition as a specialist in the UK. The STA's approach to the UK posts relied upon for training purposes by Dr Lambiris, as the STA commented in its submission, apply equally to this Article and we have already concluded that the STA was correct to disregard such posts for the required specialist training purposes. Accordingly the only educational credit Dr Lambiris can rely upon is the 3 months he spent in Greece which means that he is 2 years and 9 months short of the required minimum training of 3 years. Dr Lambiris has failed to satisfy the requirements of Article 9(3)(a).

I am unable to fault this approach.

57 The Claimant complains that he has done a lot of work as a locum consultant and that this should have been taken into account. It is true that he held posts at Plymouth (June 1999 to September 2000), Luton and Dunstable (September 2000 to January 2001) and both Newham and the Whittington Hospital (since January 2001). These were service posts and the Appeal Panel said they were left with insufficient knowledge of the content of these jobs, and what training experience they gave the Claimant. The Claimant can

have been under no illusions that it was up to him to provide this information (see, *e.g.* STA's letter of 9 May 2001). Such information might help via Article 9(4)(b) on the road to obtaining entry onto the specialist register under Article 9(3)(a).

58 The Claimant's case to the Appeal Panel advanced both the Article 9(2)(b) and 9(3)(a) routes albeit the present judicial review application has been primarily directed at the latter route. The panel concluded that:

Dr Lambiris did not enter into a formal training programme and we are unable on the evidence to reach a different conclusion from that of the STA, namely that Dr Lambiris has not shown that any of his UK posts met the specialist training requirements of the Directive and/or that his specialist qualifications gave him a level of knowledge and skill consistent with practice as a National Health Service consultant.

That seems to me to be a conclusion that the Appeal Panel was fully entitled to reach. Indeed it is difficult to see how it could have come to any other.

Conclusion

59 The attempts of Dr Lambiris to obtain entry onto the specialist register in his field of specialty have had a lengthy and somewhat *479 unfortunate history. He is clearly, as the Appeal Panel pointed out, an accomplished physician who is respected by his colleagues. He is, however, unable to satisfy the requirements of either of two routes onto the specialist register. This, regrettably for him, will bar entry to the more lucrative and satisfying areas of specialist practice in the United Kingdom. I agree with the Appeal Panel that it is unfortunate that he did not enter into any formal specialist training programme in this country. That said, the philosophy of the legislation, both European and domestic, is to achieve even treatment between those who specialise in the same areas and to maintain common standards of qualification. This is essential for the confidence and health of the public. The legislation in this field is far from easy and it would obviously be helpful to others, who may be in a similar position to the Claimant, for the authorities to explain from an early stage in simple terms what is required of them and the necessary material to achieve it. In this case a letter along the lines of that written by STA's solicitors on 25 April 2002 could reasonably have been written long before. There are, in my judgment, no grounds for concluding that the Appeal Panel has acted unlawfully in this case and the claim for judicial review therefore fails.

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[2002] 3 C.M.L.R. 18