

JUDGMENT OF THE COURT (Eighth Chamber)

17 December 2009 (*)

(Directive 2005/36/EC – Recognition of diplomas – ‘Regulated profession’ – Selection of a predefined number of persons on the basis of a comparative assessment conferring a qualification limited in time – National academic qualification for appointment – University lecturer)

In Case C-586/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale del Lazio (Italy), made by decision of 9 July 2008, received at the Court on 29 December 2008, in the proceedings

Angelo Rubino

v

Ministero dell’Università e della Ricerca,

THE COURT (Eighth Chamber),

composed of C. Toader, President of the Chamber, K. Schiemann (Rapporteur) and P. Kūris, Judges,

Advocate General: N. Jääskinen,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Rubino, by F. Brunello, avvocato,
- the Italian Government, by G. Palmieri, acting as Agent, and by F. Quadri, avvocato dello Stato,
- the Greek Government, by E. Skandalou and S. Vodina, acting as Agents,
- the Slovak Government, by B. Ricziová, acting as Agent,
- the European Commission, by H. Støvlbæk and L. Prete, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 3(1)(c) EC and 47(1) EC, and of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).

- 2 The reference has been made in the course of proceedings between Mr Rubino and the Ministero dell'Università e della Ricerca (Ministry for Universities and Research; 'the Ministry') concerning the Ministry's rejection of Mr Rubino's request to be included in the list of holders of the national academic qualification for appointment as a lecturer ('the NAQ') held by the Ministry.

Legal context

Directive 2005/36

- 3 Directive 2005/36 reorganised and rationalised the provisions of earlier directives and, in particular, replaces Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16) and Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48 (OJ 1992 L 209, p. 25). In accordance with recital 14 in the preamble to Directive 2005/36, the recasting by that directive does not affect the mechanism of recognition established by Directives 89/48 and 92/51.

- 4 It is apparent from Article 2(1) of Directive 2005/36 that it is to apply to all nationals of a Member State wishing to pursue a 'regulated profession' in a Member State other than that in which they obtained their professional qualifications.

- 5 Article 3(1)(a) and (b) of Directive 2005/36 contains the following definitions:

'For the purposes of this Directive, the following definitions apply:

- (a) "regulated profession": a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit ...
- (b) "professional qualifications": qualifications attested by evidence of formal qualifications, an attestation of competence referred to in Article 11, point (a)(i) and/or professional experience'.

- 6 Article 11 of Directive 2005/36 is headed 'Levels of qualification'. Article 11(a)(i) provides:

'For the purpose of applying Article 13, the professional qualifications are grouped under the following levels as described below:

- (a) an attestation of competence issued by a competent authority in the home Member State designated pursuant to legislative, regulatory or administrative provisions of that Member State, on the basis of:
- (i) ... a specific examination without prior training ...'

- 7 Article 13 of Directive 2005/36, headed 'Conditions for recognition', provides in paragraph 1 thereof:

'If access to or pursuit of a regulated profession in a host Member State is contingent upon possession of specific professional qualifications, the competent authority of that Member State shall permit access to and pursuit of that profession, under the same conditions as apply to its nationals, to applicants possessing the attestation of competence or evidence of formal qualifications required by another Member State in order to gain access to and pursue that profession on its territory.'

Attestations of competence or evidence of formal qualifications shall satisfy the following conditions:

...

- (b) they shall attest a level of professional qualification at least equivalent to the level immediately prior to that which is required in the host Member State, as described in Article 11.'

National legislation

- 8 On 6 November 2007, Legislative Decree No 206 implementing Directive 2005/36/EC on the recognition of professional qualifications and Directive 2006/100/EC adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania (decreto legislativo n. 206 – Attuazione della direttiva 2005/36/CE relativa al riconoscimento delle qualifiche professionali, nonché della direttiva 2006/100/CE che adegua determinate direttive sulla libera circolazione delle persone a seguito dell'adesione di Bulgaria e Romania) was adopted (ordinary supplement to GURI No 261 of 9 November 2007; 'Legislative Decree No 206/2007').
- 9 However, according to the national court's interpretation of that legislative decree, it is not applicable to the profession of university lecturer.
- 10 In Italy, it is not necessary either to hold a formal qualification or have professional experience to join that profession.
- 11 The selection process for university lecturers is governed in Italy by Law No 230 laying down new provisions concerning university lecturers and researchers and authorising the Government to reorganise recruitment of university lecturers (legge n. 230 – Nuove disposizioni concernenti i professori e i ricercatori universitari e delega al Governo per il riordino del reclutamento dei professori universitari) of 4 November 2005 (GURI No 258 of 5 November 2005; 'Law No 230/2005') and by Legislative Decree No 164 reforming the rules governing the recruitment of university lecturers in accordance with Article 1(5) of Law No 230 of 4 November 2005 (decreto legislativo n. 164 – Riordino della disciplina del reclutamento dei professori universitari, a norma dell'articolo 1, comma 5 della legge 4 novembre 2005, n. 230) of 6 April 2006 (GURI No 101 of 3 May 2006; 'Legislative Decree No 164/2006').
- 12 Article 1(5) to (9) of Law No 230/2005 provides as follows:
 - '5. In order to reform the rules governing the recruitment of university lecturers, while ensuring a selection process suitable for the type of functions to be carried out, the Government shall have authority to adopt, within six months of the date of entry into force of this law and having regard to the autonomy of the universities, one or more legislative decrees, in compliance with the following principles and criteria:
 - (a) before 30 June each year, the Minister for Education, Universities and Research shall institute, by decree and by academic sector and discipline, procedures to award the [NAQ], separately for first-level lecturers and associate professors, by laying down, inter alia:
 - (i) the detailed rules for defining the maximum number of persons who can obtain the [NAQ] for each category and discipline, according to requirements; that number shall be indicated by the universities, increased by a maximum quota of 40%, financial cover being guaranteed, with the proviso that the [NAQ] shall not imply any entitlement to teach; procedures and time-limits in respect of the invitation to take part in, performance of and conclusion of the aptitude tests which are held at the universities, ensuring that the measures and decisions taken by the selection boards are published; in each discipline, at least one post must, however, be offered to the holders of the [NAQ] per 5-year period for each category;

...

6. Candidates considered suitable and not called upon following procedures already organised or whose files have been approved shall retain the [NAQ] for a period of five years from its award. Appointment to first-level lecturer or associate professor posts by the various universities, by calling upon successful candidates found to be suitable ... must in any event be made in accordance with the procedures ...

...

8. The universities shall fill first-level lecturer and associate professor posts following procedures governed by their own regulations, which ensure a comparative assessment of the candidates and publication of decisions, and are reserved to those persons who hold the [NAQ] referred to in paragraph 5(a) ...

9. The universities ... may fill a percentage not exceeding 10% of first-level lecturer and associate professor posts by direct appointment of foreign or Italian specialist researchers employed abroad who have obtained abroad a teaching qualification at the same level ...'

13 Article 3 of Legislative Decree No 164/2006, entitled 'National academic qualification', provides:

'1. The [NAQ] shall be obtained following procedures instituted by Ministerial Decree, for each academic sector and separately for the categories of first-level lecturer and associate professor.

2. The [NAQ] shall be awarded within the limits of the quotas set in the notice sent to candidates who hold the 'piena maturità scientifica' for the category of first-level lecturer and the 'maturità scientifica' for the category of associate professor.

3. Possession of the [NAQ] shall constitute a mandatory condition for participation in the procedures referred to in Article 1(8) of the law and shall not imply any entitlement to hold a post as a university lecturer.

4. For the purposes of participation in the recruitment procedures, the [NAQ] shall be valid for four years from its award.'

14 Article 9 of Legislative Decree No 164/2006, entitled 'Work of the evaluation committees', provides:

'1. The committees which sit at the universities where the aptitude tests are held shall elect their chairperson and define the general criteria and procedures for comparative assessment of the candidates applying, so far as is possible, nationally and internationally recognised parameters.

...

3. In order to assess academic output, other academic qualifications and the general curriculum vitae of the candidate, including teaching activity and any professional and organisational experience, the committee shall take account of the following criteria:

(a) the originality and innovation of the candidate's academic output including publications, patents and innovative projects and methodological rigour;

(b) the individual contribution of the candidate, ascertained analytically, to group work, where [that contribution] can be identified;

(c) leadership and coordination of research groups;

- (d) the suitability of the candidate's activity as regards the disciplines in the sector for which the procedure has been instituted or the interdisciplinary matters which they cover;
- (e) the academic importance of publications and their distribution within the academic community;
- (f) whether academic output has been continuous over time, with regard also to the development of knowledge in the specific sector;
- (g) the importance and nature of teaching posts, certified by the bodies concerned;
- (h) the importance and nature of activities carried out in the clinical and therapeutic domain and in any other professional or occupational domain in which associated experience and competence are expressly required or supplement the candidate's general profile.

4. The committee's decision as to the candidate's academic output, qualifications and overall merit shall be reached by reference specifically to the criteria set out in paragraphs 1 and 3.

5. After assessment of academic output and qualifications, in the context of the aptitude tests for the category of associate professor, the candidates shall take a teaching test and defend their academic output. The call for candidates may provide that the tests are to be taken in the foreign language which is the object of the comparative assessment. In [the context of] the tests for the category of first-level lecturers, the candidates shall defend their academic output and those who do not hold the qualification of associate professor shall also take a teaching test which supplements the general assessment.

...

9. On completion of its work, the committee shall indicate, after a comparative assessment, by decision of the majority of its members, the candidates considered worthy of the qualification of [NAQ] within the limits of the quotas fixed in the call for candidates.'

The dispute in the main proceedings and the question referred for a preliminary ruling

- 15 After working as an academic since 1991, in 2005 Mr Rubino, an Italian national, obtained the 'Habilitation' (Facultas Legendi) in the discipline of oceanography and the 'Lehrbefugnis' (Venia Legendi) in the Faculty of Earth Sciences, University of Hamburg (Germany), which qualify him to teach at a university as a full professor in the German higher education system.
- 16 Mr Rubino currently works as a physical oceanographer at the Cà Foscari University of Venice (Italy) and since 1999 has been on the roll of university researchers.
- 17 Since 14 September 2007, Mr Rubino has, on a number of occasions, applied to have the qualifications he acquired in Germany recognised in Italy, in order to be entered on the register of holders of the NAQ.
- 18 The Ministry has, however, rejected those applications, by decision of 23 January 2008. It disputes the equivalence of the 'Lehrbefugnis' obtained in Germany to the NAQ in the Italian university system, taking the view that Legislative Decree No 206/2007 was not applicable. It is of the view that the profession of lecturer does not constitute a regulated profession in Italy, as it concerns staff recruited by means of a selection procedure in which candidates may participate without being required to hold a specific educational qualification.
- 19 Mr Rubino brought an action before the Tribunale amministrativo regionale del Lazio (Regional Administrative Court of Lazio) against the decision of the Ministry, submitting that it

was contrary to Community law, in particular to Directive 2005/36.

- 20 Taking the view that there was some doubt as to whether the Italian rules were compatible with Community law, the Tribunale amministrativo regionale del Lazio decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is it contrary to the Community principles concerning the abolition of obstacles to the free movement of persons and services between Member States of the [European] Community, and the mutual recognition of diplomas, certificates and other evidence of formal qualifications, set out in Articles 3(1)(c) [EC] and 47(1) [EC], and the provisions contained in Directive 2005/36 ... for national legislation, such as the [national] rules laid down in Legislative Decree No 206/2007, to exclude university lecturers from the scope of the regulated professions for purposes of the recognition of professional qualifications?'

The question referred

- 21 According to the national court, it is not necessary either to hold a formal qualification or have professional experience in order to have access to or pursue the profession of university lecturer in Italy.
- 22 Accordingly, the question referred must be understood as asking, essentially, whether the fact that access to that profession is reserved to candidates who have been successful in a selection procedure such as that leading to the NAQ means that that profession constitutes a regulated profession within the meaning of Article 3(1)(a) of Directive 2005/36.
- 23 It should be borne in mind, in that context, that the definition of 'regulated profession' for the purposes of Directive 2005/36 is a matter of Community law (see, by analogy, with regard to Directive 89/48, Case C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773, paragraph 14, and Case C-285/07 *Burbaud* [2003] ECR I-8219, paragraph 43).
- 24 It follows from Article 3(1)(a) of Directive 2005/36 that where the conditions for taking up or pursuing a professional activity are directly or indirectly governed by laws, regulations or administrative provisions requiring possession of certain professional qualifications, that activity constitutes a regulated profession.
- 25 Under Articles 3(1)(b) and 11(a)(i) of Directive 2005/36, the professional qualifications in question may, inter alia, consist of qualifications attested by evidence of formal qualifications or an attestation of competence issued on the basis of a specific examination without prior training.
- 26 Mr Rubino submits that the NAQ constitutes an attestation of competence issued on the basis of a specific examination without prior training within the meaning of Article 11(a)(i) of Directive 2005/36. He infers that it is a professional qualification within the meaning of Article 3(1)(b) of that directive and that, consequently, the profession of university lecturer is, in Italy, a regulated profession within the meaning of Article 3(1)(a) of that directive. Mr Rubino concludes that, by virtue of Article 13(1) thereof, the qualifications which he obtained in Germany entitle him to be entered in the register of holders of the NAQ.
- 27 It must, however, be noted that it follows from case-law that the general systems for the recognition of diplomas laid down by Directives 89/48 and 92/51 do not concern the choice of selection and recruitment procedures for filling posts and they cannot be relied on as the basis for a right actually to be recruited. Those systems do no more than require the recognition of qualifications obtained in one Member State in order to allow their holder to apply for a job in another Member State, in accordance with the selection and recruitment procedures which govern access to regulated professions in that Member State (see, to that effect, with regard to Directive 89/48, *Burbaud*, paragraph 91). Those principles remain unchanged following the reorganisation and rationalisation resulting from the adoption of Directive 2005/36.

- 28 Accordingly, an applicant cannot rely on Directive 2005/36 to obtain a dispensation from part of a selection and recruitment procedure.
- 29 It is apparent from the documents before the Court and from the Italian rules cited by the national court that obtaining the NAQ constitutes a selection stage in the recruitment procedure for university lecturers.
- 30 That procedure comprises two stages the first of which consists in obtaining the NAQ. The names of the holders of that qualification are entered in a register and can subsequently, in the second stage of the selection procedure, apply for a specific post in a university and, consequently, be recruited on the basis of criteria which vary from university to university.
- 31 With regard, more particularly, to the selection procedure leading to obtaining the NAQ, Article 1(5)(a)(1) of Law No 230/2005 and Articles 3(2) and 9(9) of Legislative Decree No 164/2006 provide that the maximum number of persons who can obtain that qualification is fixed in advance for each discipline according to the needs indicated by the universities. In addition, it follows from Article 1(8) of Law No 230/2005 and Article 9 of Legislative Decree No 164/2006 that selection is on the basis of a comparative assessment of the candidates who sit the tests rather than by application of absolute criteria. Furthermore, by virtue of Articles 1(6) of Law No 230/2005 and 3(4) of Legislative Decree No 164/2006, the NAQ is valid for a limited period of time.
- 32 It must be pointed out that the fact of having been successful in a procedure to select a predefined number of persons on the basis of a comparative assessment of the candidates rather than by application of absolute criteria, which confers a qualification the validity of which is strictly limited in time, cannot be regarded as a professional qualification within the meaning of Article 3(1)(b) of Directive 2005/36.
- 33 In that context, the fact cited by Mr Rubino that Article 1(9) of Law No 230/2005 permits universities, in derogation from the rules normally applicable, to fill 10% of lecturer positions by direct appointment of foreign or Italian specialist researchers employed abroad who have obtained abroad a teaching qualification at the same level is not in itself relevant to the answer to be given to the question referred in respect of Directive 2005/36. Moreover, it is not in dispute that, in the main proceedings, Mr Rubino does not rely on that derogating provision, but seeks to be included in the register of holders of the NAQ without having to undergo the selection procedure laid down by the applicable national rules.
- 34 Having regard to the reference in the question referred to the Court to the provisions of the EC Treaty concerning fundamental freedoms, it must nevertheless be recalled that Articles 39 EC and 43 EC guarantee to the nationals of the Member States access to activities, in a self-employed or employed capacity, without discrimination based on nationality. Consequently, it is for the national authorities to ensure, in particular, that, in the context of a selection procedure such as that leading to registration as a holder of the NAQ, qualifications obtained in other Member States are accorded their proper value and are duly taken into account (see, by analogy, *Burbaud*, paragraphs 99 and 100).
- 35 In the light of all of the foregoing, the answer to the question referred to the Court is that the fact that access to a profession is reserved to candidates who have been successful in a procedure to select a predefined number of persons on the basis of a comparative assessment of the candidates rather than by application of absolute criteria, which confers a qualification the validity of which is strictly limited in time, does not mean that that profession constitutes a regulated profession within the meaning of Article 3(1)(a) of Directive 2005/36.
- 36 Nevertheless, Articles 39 EC and 43 EC require qualifications obtained in other Member States to be accorded their proper value and to be duly taken into account in such a procedure.

Costs

- 37 Since these proceedings are, for the parties to the main proceedings, a step in the action 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 (Eighth Chamber) hereby rules:

The fact that access to a profession is reserved to candidates who have been successful in a procedure to select a predefined number of persons on the basis of a comparative assessment of the candidates rather than by application of absolute criteria, which confers a qualification the validity of which is strictly limited in time, does not mean that that profession constitutes a regulated profession within the meaning of Article 3(1)(a) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

Nevertheless, Articles 39 EC and 43 EC require qualifications obtained in other Member States to be accorded their proper value and to be duly taken into account in such a procedure.

[Signatures]

* Language of the case: Italian.