Court Of Appeal

Judges

THE HON. CHIEF JUSTICE JOSEPH AZZOPARDI
THE HON. MR. JUSTICE MARK CHETCUTI
THE HON. MR JUSTICE ROBERT G. MANGION

Sitting of Friday 31st May 2019

Number: 1

Application Number: 740/11 GM

Isabella Zananian Desira

v.

Kunsill Mediku

The Court:

Having seen the application for a retrial filed by the Medical Council following the judgement of the Court of Appeal of the 2nd March 2018 which upheld the first Court judgment in that it upheld the first two requests of plaintiff Zananian Desira;

Having seen the reply filed by plaintiff Zananian Desira who submitted that there was no valid reason for a retrial as requested by the Medical Council;

Having seen the records of the case and heard submissions by counsel to the parties;

Having seen the judgement of the Court of Appeal which is being reproduced herein for reference and clarity as to the objections being made by the Medical Council:

> Now considers:
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> That as the First Court noted, this is a case of judicial review. Plaintiff, who at the time held Georgian Nationality (she has since, in 2013, acquired also Maltese nationality) is a qualified medical doctor, whose foreign qualifications were accepted by the Malta Centre for Recognition of Qualifications and Information as equivalent to a Master of Arts and Ph.D. She applied with the Maltese Medical Council to be registered in Malta in the Register of the Council so that she will be able to practice locally her profession. By decision of the 3rd of February 2011, the Council held that for plaintiff's request to be acceded to "she is being requested to sit for

and successfully pass the Medical Council examination for medical practitioners", this being the standard procedure for non-European Union citizens who do not have a European Union degree.

Plaintiff does not agree with this decision of the Medical Council and claims that it goes against the law and is discriminatory in her regard.

The Court considers that the whole issue turns on the interpretation of the proviso to section 11(1)(a) of the Health Care Profession Act (Chapter 464 of the Laws of Malta). This article and proviso read as follows:

> "11. (1) The Medical Council shall keep a register, in this Act referred to as "the Medical Register", in which, following an application to that effect by the person concerned, shall be entered the name of any citizen of Malta, or of a Member State or of a person who benefits from the provisions of article 1 of Appeal Number: 740/11 Regulation 1612/68 EEC or of a person who has been established in a Member State who holds –
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> "(c) a qualification recognized for the purpose by a Member State, obtained from a University College, or Medical School:
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> "Provided that in respect of applicants coming from third countries, whose qualifications have not been recognized in a Member State, the Medical Council may, in respect of such qualifications, require the applicant to sit for and pass a professional and linguistic proficiency test, and may also require that he serves as house physician and, or surgeon in a hospital recognized for the purpose by the Medical Council, for such period, being not longer than two years, as the Minister may prescribe, and the provisions of article 7(3) and (4) shall apply to a person requited in virtue of this proviso to serve as a house physician or surgeon as if such person were the person referred to in those subarticles".

The relevant part is the proviso which requires the applicant to sit for and pass a professional and linguistic proficiency test if she is coming from a non-EU country “whose qualifications have not been recognized in a Member State”.

In its appeal application, the Medical Council is interpreting this part of the proviso in this sense; “a degree which has previously been recognized by another Member State”. As can be seen, the words “previously” and “another” are not found in the law, and have been added by appellant to support its decision. This Court, however, does not agree with this submission. Had the law wanted to provide a rule as stated by appellant, it could easily have said so. As it is, the law is quite clear that the test is to be imposed on applicants only where the applicant’s qualifications “have not been recognized in a Member State”. Member State is defined in article 2 of the Act as “a state member of the European Union, ….” Malta is such a state and therefore “ a Member State” in the proviso includes Malta. Appeal Number: 740/11.

In this case the qualifications of plaintiff have been recognized by Malta, which is an EU Member State, and there is no requirement that her qualifications be recognized by a second Member State. As Mr Vanbrocdorff, representative of the Qualifications authority, said,

the diploma obtained by plaintiff was so obtained by one of the best scientific institutions in Georgia, and is “considered of Ph.D. standard”, and there is, therefore, no justifiable reason to have her excluded from the Medical Register in terms of article 11 of the said Chapter 464 of the Laws of Malta, and this so long as she satisfies other provisions of the law which may be applicable to her case. No other “standard policy” as practice can substitute the express terms of the law.

In view of the above, this Court rejects the appeal application filed by defendant Kunsill Mediku, and confirms the judgment delivered on the 14th February, 2017 by the First Hall of the Civil Court.

Costs are to be borne by defendant Kunsill Mediku, appellant.

The records of the case are to be sent back to the First Hall of the Civil Court for continuation.

Now considers:

Defendant Medical Council is claiming that there is a right for a retrial based under article 811(e) of Chapter 12 of the Laws of Malta. This article states as follows:

> Where the judgment contains a wrong application of the law;
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> For the purposes of this paragraph there shall be deemed to be a wrong application of the law only where the decision, assuming the fact to be as established in the judgment which it is sought to set aside, is not in accordance with the law, provided the issue was not in reference to an interpretation of the law expressly dealt with in the judgment;

Defendants Medical Council submits that the Court of Appeal in its judgement applied incorrectly article 11(1) of Chapter 464 (Health Care Professions Act) since such article was applied in respect of a person who does not hold 'a qualification recognized for the purpose by a member state'. They state that recognition of the academic qualifications of plaintiff by the MQRIC cannot bypass the recognition procedure entrusted to the Medical Council as the sole authority which regulates the medical profession in Malta as established by Chapter 451 of the Law of Malta (Mutual Recognition of Qualifications Act). They state that the principle of automatic recognition catered for in article 11(1)(c) is only applicable in cases where the candidate has passed through the entire process of recognition by the competent authority in another EU member state. The recognition by the MQRIC for academic purposes cannot be

equated to a permission to practice a regulated profession. Article 2 of Chapter 451 (Mutual Recognition of Qualifications Act) specifies that it is the designated authority in Malta which is empowered to mutually recognize qualifications to a regulated profession and the schedule to the Chapter specifically mentions the Medical Council as the designated authority in relation to medical practitioners. The Medical Council further contends that EC Directive 2005136 on the Recognition of Professional Qualifications (art. 1) (as amended by virtue of EC Regulation 2013/55EC) stipulates: 'This Directive establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (referred to hereinafter as the host Member State) shall recognize professional qualifications obtained in one or more other Member States (referred to hereinafter as the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession'.

The Council reiterates that the erroneous application the provisions of article 11(1)(c) in the present case as premised above implies a clear disregard of the distinction established in the cited provision of European Law between the home Member State (i.e. the State where the qualification was obtained/has been recognized) and the host Member

State (i.e. the State which is bound to grant recognition in terms of the provisions of the Directive).

The application in the present case of article 11(1)(c) casts Malta in the role of both home and host Member State, thereby giving rise to a situation where the authority competent to regulate the medical profession in Malta shall be bound to recognize a qualification recognized in Malta by another (distinct) authority - and this purportedly on the basis of the legislation above-cited which caters for a completely different situation.

In addition EC Directive 2005/36 on the Recognition of Professional Qualifications (art. 2.2) stipulates: 'Each Member State may permit Member State nationals in possession of evidence of professional qualifications not obtained in a Member State to pursue a regulated profession within the meaning of article 3(1)(a) on its territory in accordance with its rules' (emphasis added). In the 'User Guide' published by the European Commission specifically in relation to Directive 2005/36/EC it is clearly explained that if the individual in question has obtained his/her professional qualification in a third country (A country which is not one of the 27 Member States of the European Union or Iceland, Norway and Liechtenstein): 'Directive 2005/36/EC does not apply to a Member State receiving an application for recognition of

your professional qualification for the first time within the European Union ('the first application for recognition').

Further considers:

It is established case law that a retrial is an extraordinary remedy granted only in specific cases mentioned in article 811 of Chapter 12. This is not a third appeal and therefore the law must be interpreted restrictively and limitedly within the strict parameters of the law.

Before entering into the merits of the legal cause alleged for the revocation of the judgment of the Court of Appeal of the 2nd March 2018 a preliminary issue raised during the appeal proceedings has first to be considered and decided since the outcome would have a direct bearing on whether the Court can at this stage decide upon the legal cause alleged for the revocation of the judgement.

The legal issue which this Court has to consider is whether there is in fact the right to a retrial from a partial judgement delivered by the Frist Court between the parties on the 14th February 2017. It is undeniable that the First Court gave judgement in the first three claims brought forward by claimant and adjourned the case to hear evidence and give judgement on the remaining two claims regarding responsibility and payment of damages. The judgement on the first three claims was subject to appeal

and the appellate Court by judgement of the 2nd March 2018 rejected the appeal. The present retrial is a consequence of the Appeal Court judgement of the 2nd March 2018.

The Court makes reference to the Appeal Court judgement **Dr Patrick Spiteri vs Sylvana Spiteri** (31/05/2013) wherein the Court stated as follows:

> "L-Artikolu 811 tal-Kodici ta' Organizzazzjoni u Procedura Civili jiddisponi b'mod car li hi l-"kawza" li tista' tigi ritrattata u mhux sentenza, u biex kawza tinghad li giet definita, jehtieg sentenza finali fuq il-meritu kollu tal-istess kawza. Kif qalet din il-Qorti fil-kawza Mifsud Bonnici v. Scicluna, deciza fis-26 ta' April, 1993,
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> "Ir-ritrattazzjoni hija tal-kawza u meta l-kawza ghadha qed tigi trattata ma tistax tigi ritrattata."
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> "Hu veru li, f'dik il-kawza, ir-ritrattazzjoni kienet qed tintalab ta' sentenza fuq eccezzjoni preliminari, pero`, il-principju hu l-istess meta si tratta minn sentenza preliminari li tolqot biss parti mill-meritu tat-talbiet attrici. Kif osservat din ilQorti fis-sentenza msemmija, ma tistax tintalab ritrattazzjoni ta' decizjoni meta "l-atti taghha qeghdin quddiem qorti ohra". Is-sentenza li tat din il-Qorti fil-25 ta' Novembru, 2011, ma ddisponietx mill-kawza, u allura ma hemm lok ghal ebda ritrattazzjoni (ara wkoll Mamo noe v. Axisa et, deciza minn din il-Qorti fis-16 ta' Dicembru, 2003 u Rodo et v. Grech et, deciza mill-Prim' Awla talQorti Civili fit-28 ta' Mejju, 2009, fejn intqal illi "erronea hija s-sottomissjoni tar-ritrattandi li ritrattazzjoni tista' tintalab kemm ta' sentenza finali izda, anke ta' sentenza parzjali", u cahdet talba ghar-ritrattazzjoni "ta' sentenza li ddecidiet il-kawza in parte").
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> "Is-sentenza issa impunjata ma wasslitx ghat-tmiem tal-kontroversja bejn iz-zewg partijiet, u l-kawza ghadha pendenti quddiem qorti tal-ewwel istanza. Ir-ritrattazzjoni tista' tintalab biss fil-kaz ta' kawza deciza fil-meritu b'sentenza ta' din il-Qorti li tkun ghaddiet in gudikat – quando terminat negotium de quo agitur."

This judgement makes the issue quite clear. There is no right of retrial from a partial judgement when the preliminary judgement has not

terminated the whole suit between the parties, but only decides on particular claims and further claims have yet to be dealt with and decided.

The issue before this Court is identical to the teaching of the appellate Court in the Spiteri case. The First Court and Court of Appeal only decided on the first three claims put forward by claimant but is still at the stage of considering and deciding the remaining two claims. For this reason the Court decides that a retrial at this stage is inadmissible.

Decide

In view of these considerations the Court of Appeal decides that the request for a retrial of the judgement of the Court of Appeal dated 2 March 2018 is inadmissible in law and is being dismissed at this stage of the proceedings saving defendants' right at law at a future stage. With costs against defendant Medical Council.

Joseph Azzopardi Chief Justice	Mark Chetcuti Judge	Robert G. Mangion Judge

Deputy Registrar
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