

JUDGMENT OF THE COURT (Fourth Chamber)

7 July 2011 (*)

(External relations – Association agreements – National legislation excluding, before the accession of the Republic of Bulgaria to the European Union, Bulgarian nationals from inclusion on the list of trainee lawyers – Compatibility of that legislation with the prohibition of all discrimination based on nationality, as regards working conditions, in the EC-Bulgaria Association Agreement)

In Case C-101/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Oberste Berufungs- und Disziplinarkommission (Austria), made by decision of 18 January 2010, received at the Court on 23 February 2010, in the proceedings

Gentcho Pavlov,

Gregor Famira

v

Ausschuss der Rechtsanwaltskammer Wien,

THE COURT (Fourth Chamber),

composed of J. C. Bonichot, President of the Chamber, L. Bay Larsen (Rapporteur), C. Toader, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 13 January 2011,

after considering the observations submitted on behalf of:

- Mr Pavlov and Mr Famira, by R. Keisler and S. Werinos, Rechtsanwälte,
- the Austrian Government, by E. Riedl and G. Holley, acting as Agents,
- the European Commission, by F. Erlbacher and G. Braun, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 March 2011,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of the first indent of Article 38(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, concluded and approved on behalf of the Communities by Decision 94/908/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 358, p. 1; ‘the Association Agreement with the Republic of Bulgaria’).

- 2 The reference has been made in proceedings between Mr Pavlov, a Bulgarian national, and Mr Famira, a lawyer in Vienna (Austria), and the Ausschuss der Rechtsanwaltskammer Wien (Committee of the Vienna Chamber of Lawyers) concerning that committee's rejection of the application for Mr Pavlov to be included on the list of trainee lawyers and to be issued a certificate of entitlement to appear in court.

Legal context

European Union law

The Association Agreement with the Republic of Bulgaria

- 3 Article 7(1) of the Association Agreement with the Republic of Bulgaria provides that '[t]he association includes a transitional period of a maximum duration of 10 years divided into two successive stages, each in principle lasting five years. The first stage shall begin when the Agreement enters into force.' The Association Agreement entered into force on 1 February 1995.

- 4 Article 38(1) of the Association Agreement with the Republic of Bulgaria, which is in Title IV, 'Movement of workers, establishment, supply of services', Chapter I, 'Movement of workers', provides:

'Subject to the conditions and modalities applicable in each Member State:

- the treatment accorded to workers of Bulgarian nationality, legally employed in the territory of a Member State, shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals,

...'

- 5 Article 42(1) of the Association Agreement provides:

'Taking into account the labour market situation in the Member State, subject to its legislation and to the respect of rules in force in that Member State in the area of mobility of workers,

- the existing facilities for access to employment for Bulgarian workers accorded by Member States under bilateral Agreements ought to be preserved and if possible improved,
- the other Member States shall consider favourably the possibility of concluding similar Agreements.'

- 6 Article 45(1) of the Association Agreement, which is in Title IV, Chapter II, 'Establishment', provides:

'Each Member State shall grant, from entry into force of the Agreement, for the establishment of Bulgarian companies and nationals and for the operation of Bulgarian companies and nationals established in its territory, a treatment no less favourable than that accorded to its own companies and nationals, save for matters referred to in Annex XVa.'

- 7 Article 47 of the Association Agreement, also in Title IV, Chapter II, provides:

'In order to make it easier for Community nationals and Bulgarian nationals to take up and pursue regulated professional activities in Bulgaria and the Community respectively, the Association Council shall examine which steps are necessary to be taken to provide for the mutual recognition of qualifications. It may take all necessary measures to that end.'

- 8 Article 59(1) of the Association Agreement, which is in Title IV, Chapter IV, 'General provisions', provides:

'For the purpose of Title IV, nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons and supply of services, provided that, in so doing, they do not apply them in a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of the Agreement. ...'

National legislation

- 9 The provisions on the profession of lawyer and access to that profession are to be found in the Law on the examination for lawyers (Rechtsanwaltsprüfungsgesetz, BGBl. 556/1985, in the version published in BGBl. 71/1999, applicable to the dispute in the main proceedings; ‘the RAPG’) and the Austrian Code of Lawyers (Österreichische Rechtsanwaltsordnung, RGBL. 96/1868, in the version published in BGBl. 128/2004, applicable to that dispute; ‘the RAO’).

The RAPG

- 10 The provisions of the RAPG that are material for the dispute in the main proceedings read as follows:

‘Paragraph 1

The examination for lawyers shall demonstrate the candidate’s capacities and knowledge required for practising as a lawyer, in particular his skill in introducing and dealing with the public and private affairs entrusted to a lawyer and his capability to draft legal documents and legal opinions and to make orderly written and oral submissions on points of law and fact.

Paragraph 2

1. The examination for lawyers may be taken after obtaining a doctorate in law (Doktorat der Rechte) or, for persons who have completed a Diplomstudium in accordance with the Federal Law of 2 March 1978 ... on the study of law (Bundesgesetz über das Studium der Rechtswissenschaften), a master’s degree in law (Magisterium der Rechtswissenschaften) and completing three years’ practical training, including at least nine months with a court and at least two years with a lawyer.

...’

The RAO

- 11 The provisions of the RAO that are material for the dispute in the main proceedings read as follows:

‘Paragraph 1

1. To practise as a lawyer in the [Republic of Austria], no official appointment is required, but merely proof of satisfaction of the following requirements and inclusion on the list of lawyers (Paragraphs 5 and 5a).

2. These requirements are:

(a) [Austrian nationality];

...

(d) practical training of the statutory kind and duration;

(e) passing the examination for lawyers;

...

3. The nationality of a Member State of the European Union or of another State party to the Agreement on the European Economic Area or of the Swiss Confederation shall be equated to Austrian nationality.

Paragraph 2

1. The practical training required for practising as a lawyer shall consist in legal activity with a court and with a lawyer Practical training with a lawyer may be taken into account only if it is exercised as the principal professional activity and is not affected by another professional activity. ...

2. The practical training in accordance with subparagraph 1 shall last for five years. At least nine months of it shall be spent with a court and at least three years with a lawyer, in Austria.

...

Paragraph 15

1. If representation by a lawyer is prescribed by law, the lawyer may also have himself represented, under his responsibility, before all courts and administrative authorities by a trainee lawyer working with him and entitled to substitute for a lawyer; the signing by a trainee lawyer of documents submitted to courts and administrative authorities is not permitted, however.
2. A trainee lawyer who has passed the examination for lawyers is entitled to substitute for a lawyer. ...
3. If representation by a lawyer is not prescribed by law, the lawyer may also have himself represented, under his responsibility, before all courts and administrative authorities by another trainee lawyer working with him; the signing by a trainee lawyer of documents submitted to courts and administrative authorities is not permitted, however.
4. The Committee of the Chamber of Lawyers must provide trainee lawyers working with a lawyer with certificates attesting to the substitution entitlement in accordance with subparagraph 2 ('große Legitimationsurkunde') or the representation entitlement in accordance with subparagraph 3 ('kleine Legitimationsurkunde').

Paragraph 30

1. To obtain inclusion on the list of trainee lawyers, on starting training with a lawyer, notice must be given to the Committee [of the Chamber of Lawyers], providing proof of [Austrian nationality] and of satisfaction of the requirements prescribed for starting court training, and the training period is reckoned only from the date of receipt of that notice.

...

4. The persons concerned have the right to appeal against a refusal of inclusion on the list of trainee lawyers, against deletion from that list and against a refusal to certify training with a lawyer to the Oberste Berufungs- und Disziplinarkommission (Higher Appeal and Disciplinary Board) ...
5. The nationality of a Member State of the European Union or of another State party to the Agreement on the European Economic Area or of the Swiss Confederation shall be equated to Austrian nationality.'

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

- 12 Mr Pavlov completed his legal studies in Vienna in 2002. Since 2004 he has worked as an employee in the office of Mr Famira, a lawyer practising in Vienna. Mr Pavlov holds an Austrian residence permit and an establishment permit under Austrian law authorising him to take up and perform work throughout Austrian territory. Mr Famira holds an authorisation, issued by the employment authorities, to employ Mr Pavlov as a trainee lawyer for the period from 1 January to 31 December 2004.
- 13 On 2 January 2004 Mr Famira and Mr Pavlov applied for Mr Pavlov to be included on the list of trainee lawyers. They also asked for him to be issued with a certificate of entitlement to appear in court ('kleine Legitimationsurkunde') on the basis of Paragraph 15(3) of the RAO.
- 14 By order of 6 April 2004, the Second Section of the Ausschuss der Rechtsanwaltskammer Wien refused the application on the ground that Mr Pavlov did not satisfy the nationality condition in Paragraph 30(1) and (5) of the RAO. The complaint brought against that decision was dismissed on 15 June 2004 by that body sitting in plenary formation.
- 15 By order of 1 August 2006, the Oberste Berufungs- und Disziplinarkommission dismissed the appeal of Mr Pavlov and Mr Famira against the order of 15 June 2004, taking the view that the profession of lawyer is a regulated profession, and that regulation also affects trainee lawyers. It held that, under the Association

Agreement with the Republic of Bulgaria, discrimination is prohibited only as regards working conditions, and that, as regards access to regulated professions, the States parties to the Agreement retain the possibility of introducing restrictions.

- 16 On 8 October 2007 the Verfassungsgerichtshof (Constitutional Court) quashed the order of 1 August 2006 and sent the case back to the Oberste Berufungs- und Disziplinarcommission, on the ground that that tribunal had failed to refer a question to the Court of Justice of the European Union on the interpretation of the relevant provisions of the Association Agreement, thereby infringing the complainants' right to proceedings before the proper court, guaranteed by the national constitution.
- 17 By order of 17 April 2008, the Oberste Berufungs- und Disziplinarcommission set aside the orders of the Ausschuss der Rechtsanwaltskammer Wien of 6 and 15 June 2004, having regard to the changed legal situation following the accession of the Republic of Bulgaria to the European Union with effect from 1 January 2007. Since it considered that from that date the conditions laid down in Paragraph 30(1) and (5) of the RAO were satisfied, it referred the case back to the Ausschuss der Rechtsanwaltskammer Wien for it to reopen the procedure and take a fresh decision.
- 18 On 2 July 2009 the Verfassungsgerichtshof quashed the order of 17 April 2008 on the ground that the accession of the Republic of Bulgaria to the European Union had not changed the fact that the years 2004 to 2006 were important for Mr Pavlov because, first, he could sit the examination for lawyers only after completing practical training of at least two years with a lawyer and, secondly, to be included on the list of lawyers, practical training of at least three years with a lawyer had to be demonstrated. In order to decide the issue relating to the years 2004 to 2006, it was therefore necessary, in accordance with the decision of the Verfassungsgerichtshof of 8 October 2007, to refer a question to the Court on the interpretation of Article 38 of the Association Agreement with the Republic of Bulgaria.
- 19 In those circumstances, the Oberste Berufungs- und Disziplinarcommission decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Was Article 38(1) of the [Association Agreement with the Republic of Bulgaria] directly applicable in the period from 2 January 2004 to 31 December 2006 in a procedure for including a Bulgarian national on the list of trainee lawyers?

If Question 1 is answered in the affirmative:

(2) Did Article 38(1) of the [Association Agreement with the Republic of Bulgaria] preclude the application of Paragraph 30(1) and (5) of the [RAO], under which, inter alia, proof of Austrian citizenship or a nationality regarded as equivalent is a condition of inclusion, to an application by a Bulgarian national employed by an Austrian lawyer, made on 2 January 2004, for inclusion on the list of Austrian trainee lawyers and for the issue of a certificate of entitlement in accordance with Paragraph 15(3) of the [RAO] and the rejection of the application solely on the ground of nationality, despite the other conditions being satisfied and the applicant having an establishment and employment permit for Austria?'

Consideration of the questions referred

- 20 By its two questions, which should be considered together, the referring tribunal essentially asks whether the principle of non-discrimination in the first indent of Article 38(1) of the Association Agreement with the Republic of Bulgaria precluded, before the accession of the Republic of Bulgaria to the European Union, legislation of a Member State such as Paragraph 30(1) and (5) of the RAO, under which a Bulgarian national, because of a nationality condition laid down by that legislation, was unable to obtain inclusion on the list of trainee lawyers and, consequently, to obtain a certificate of entitlement to appear in court.
- 21 According to the wording of the first indent of Article 38(1) of the Association Agreement with the Republic of Bulgaria, the prohibition set out in that provision applies to all discrimination based on nationality which a person who is already lawfully employed might be subject to as regards his working conditions, remuneration or dismissal.
- 22 Mr Pavlov submits that inclusion on the list of trainee lawyers concerns the working conditions of that

profession, and that the refusal, based on nationality, to include him on the list, pursuant to Paragraph 30(1) and (5) of the RAO, therefore constitutes discrimination prohibited by the first indent of Article 38(1) of the Association Agreement with the Republic of Bulgaria.

- 23 According to the information supplied to the Court by the referring tribunal, under the national legislation at issue in the main proceedings, access to practical training is necessarily linked to inclusion on the list of trainee lawyers, and that inclusion is thus a condition of access to training as a lawyer. Until a person is included on that list, he can lawfully work only as a legal assistant, not as a trainee lawyer.
- 24 It should be added that, while the exercise of the activities of a trainee lawyer can take place in an employment relationship as in the case of the dispute in the main proceedings, it also constitutes the practical part of the training necessary for access to the regulated profession of lawyer (see, to that effect, Case C 313/01 *Morgenbesser* [2003] ECR I 13467, paragraph 51).
- 25 It must therefore be concluded that inclusion on the list of trainee lawyers constitutes a condition of access to the regulated profession of lawyer at issue in the main proceedings.
- 26 The question therefore arises whether the prohibition of discrimination based on nationality in the first indent of Article 38(1) of the Association Agreement with the Republic of Bulgaria extends to rules of access to the regulated profession of lawyer such as those at issue in the main proceedings.
- 27 Nothing in the Association Agreement with the Republic of Bulgaria allows it to be deduced from the first indent of Article 38(1), or other provisions of the Agreement, that the contracting parties intended to eliminate all discrimination based on nationality as regards access to regulated professions by Bulgarian nationals. It must also be borne in mind that that provision appears in Title IV, Chapter I of the Agreement, ‘Movement of workers’, while regulated professions are mentioned in Article 47 of the Agreement, which appears in Title IV, Chapter II, ‘Establishment’, and deals with access to regulated professions without imposing an obligation in that connection not to discriminate on grounds of nationality.
- 28 It follows that the principle of non-discrimination in the first indent of Article 38(1) of the Association Agreement with the Republic of Bulgaria must be interpreted as not extending to national rules on access to the regulated profession of lawyer such as those at issue in the main proceedings. Inclusion on the list of trainee lawyers, which, as stated in paragraph 25 above, is a condition of access to the regulated profession of lawyer, thus cannot be regarded as a working condition within the meaning of the first indent of Article 38(1).
- 29 As to the establishment and employment permits relied on by Mr Pavlov as giving him access to training as a lawyer, it suffices to state that it is for the referring tribunal to ascertain whether those permits, issued by the authorities of the host Member State, constitute under national law decisions that have that scope and in themselves allow access to the profession of lawyer.
- 30 Accordingly, the answer to the referring tribunal’s questions is that the principle of non-discrimination set out in the first indent of Article 38(1) of the Association Agreement with the Republic of Bulgaria must be interpreted as not having precluded, before the accession of the Republic of Bulgaria to the European Union, legislation of a Member State such as Paragraph 30(1) and (5) of the RAO, in the version applicable in the main proceedings, under which a Bulgarian national, because of a nationality condition laid down by that legislation, was unable to obtain inclusion on the list of trainee lawyers and, consequently, to obtain a certificate of entitlement to appear in court.

Costs

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

On those grounds, the Court (Fourth Chamber) hereby rules:

The principle of non-discrimination set out in the first indent of Article 38(1) of the Europe Agreement

establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, concluded and approved on behalf of the Communities by Decision 94/908/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994, must be interpreted as not having precluded, before the accession of the Republic of Bulgaria to the European Union, legislation of a Member State such as Paragraph 30(1) and (5) of the Austrian Code of Lawyers (Österreichische Rechtsanwaltsordnung), in the version applicable in the main proceedings, under which a Bulgarian national, because of a nationality condition laid down by that legislation, was unable to obtain inclusion on the list of trainee lawyers and, consequently, to obtain a certificate of entitlement to appear in court.

[Signatures]

* Language of the case: German.