

MEDICAL SCHOOLS COUNCIL
RECRUITMENT TO THE UK FOUNDATION PROGRAMME

OPINION

1. I have been asked to advise the Medical Schools Council on some aspects of a proposed new system for allocating places to doctors on the UK's Foundation Programme, which is the programme under which doctors undertake their first full time placements in clinical practice as part of completing their medical training. I have been asked to consider whether some aspects of the proposed system would be compliant with EU law. I should mention also that the system would have to comply with UK public law standards of reasonableness and fairness.
2. I set out below the questions which have been put to me, with my views on each question.
3. Before doing so, I indicate the legal framework as to the recognition of medical qualifications across Europe.
4. Article 39 of the EC Treaty secures freedom of movement for workers within the Community. It prohibits any discrimination based on nationality as regards employment, remuneration and other conditions of work and employment.
5. Article 43 prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Article 49 prohibits restrictions on the freedom to provide services

within the Community in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

6. The principal EU Directive in this context is 2005/36/EC, a consolidating Directive covering a range of professions. It is intended to facilitate (amongst other things) the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications. The 2005 Directive replaces Directive 93/16/1/EEC.
7. Under the Directive each Member State should recognise the diplomas, certificates and other evidence of formal qualifications awarded to nationals of Member States by the other Member States by giving such qualification the same effect in its territory as those which the Member State itself awards. Article 12 requires equal treatment of qualifications.
8. Article 24 deals with the requirements which medical training must meet for the diploma, certificate or other evidence of formal qualifications awarded following that training to be recognised in other Member States.
9. Article 24 provides as follows:-

Article 24

Basic medical training

1. Admission to basic medical training shall be contingent upon possession of a diploma or certificate providing access, for the studies in question, to universities.
2. Basic medical training shall comprise a total of at least six years of study or 5 500 hours of theoretical and practical training provided by, or under the supervision of, a university.
For persons who began their studies before 1 January 1972, the course of training referred to in the first subparagraph may comprise six months of full-time practical training at university level under the supervision of the competent authorities.
3. Basic medical training shall provide an assurance that the person in question has acquired the following knowledge and skills:

- (a) adequate knowledge of the sciences on which medicine is based and a good understanding of the scientific methods including the principles of measuring biological functions, the evaluation of scientifically established facts and the analysis of data;
- (b) sufficient understanding of the structure, functions and behaviour of healthy and sick persons, as well as relations between the state of health and physical and social surroundings of the human being;
- (c) adequate knowledge of clinical disciplines and practices, providing him with a coherent picture of mental and physical diseases, of medicine from the points of view of prophylaxis, diagnosis and therapy and of human reproduction;
- (d) suitable clinical experience in hospitals under appropriate supervision.

10. The Directive has been implemented in the UK through amendments to the Medical Act 1983 and through the European Communities (Recognition of Professional Qualifications) Regulations 2007 (SI 2007/2781). The detail of those Regulations does not appear to be relevant to the present discussion. (For completeness, I add that, earlier this year, the UK was found by the European Court in case C-556 08/*Commission v UK* to have been late in implementing the Directive, but nothing turns on that here.)

11. Section 3 of the Act, in its present form, provides as follows:-

3.— Registration by virtue of primary United Kingdom or primary European qualifications.

(1) Subject to the provisions of this Act any person whose fitness to practise is not impaired and who-

- (a) holds one or more primary United Kingdom qualifications and has satisfactorily completed an acceptable programme for provisionally registered doctors; or
- (b) being a national of any relevant European State, holds one or more primary European qualifications,

is entitled to be registered under this section as a fully registered medical practitioner.

(2) Any person who-

(a) is not a national of a relevant European State; but

(b) is, by virtue of an enforceable Community right, entitled to be treated, for the purposes of access to and pursuit of the medical profession, no less favourably than a national of a relevant European State,

shall be treated for the purposes of subsection (1)(b) above as if he were such a national.

12. Section 17 explains the meaning of “primary European qualification”. In broad summary, for presently relevant purposes, the term refers to qualifications listed in the Directive and which comply with its requirements. Section 55 indicates that “relevant European State” means a European Economic Area State or Switzerland (the EEA comprises the EU States plus a few others)¹.
13. Section 15A provides for provisional registration for nationals of relevant European states who have completed basic medical training under Article 24 in order to enable them to obtain employment for the purposes of obtaining clinical experience and so to obtain a primary European qualification.
14. Thus, a European doctor may either complete his or her training (including the clinical element thereof) in a relevant European State and then seek full registration in the UK, or may take a route similar to that taken by UK doctors, undertaking a medical degree and then entering the Foundation Programme (with provisional registration) so as to complete the training. The entitlement to full registration is achieved when the clinical element of training has been completed (in UK terms, after completion of the Foundation year).
15. I do not think that section 15A is to be read as guaranteeing a job to every European applicant. The section is expressed to have effect “for enabling a national of a relevant European State to be employed

¹ The “primary United Kingdom qualification” is defined by section 4(3) of the 1983 Act. In most cases, this is a medical degree (see the full list of qualifications below). A UK trained doctor qualifies for full registration by obtaining a primary UK qualification and then undertaking the Foundation year.

4(3) In this Act “primary United Kingdom qualification” means any of the following qualifications, namely—

- (a) the degree of bachelor of medicine or bachelor of surgery granted by [a body or combination of bodies included in the list maintained under subsection (1)]²;
- (b) licentiate of the Royal College of Physicians of London [or the Royal College of Surgeons of England]³ or the Royal College of Physicians of Edinburgh or the Royal College of Surgeons of Edinburgh or the Royal College (formerly Royal Faculty) of Physicians and Surgeons of Glasgow;
- (c) membership of the Royal College of Surgeons of England [granted before the coming into force of section 1 of the [Medical Qualifications \(Amendment\) Act 1991](#)];
- (d) licentiate in medicine and surgery of the Society of Apothecaries of London.

for the purpose of enabling him to acquire the clinical experience under appropriate supervision which he needs in order to obtain a primary European qualification". The entitlement conferred by the section is to be provisionally registered, not to be employed.

16. Those undertaking the Foundation year become employees of NHS bodies. This is important because, quite apart from any question of recognition of qualifications, employees are entitled to be treated on a non discriminatory basis under EU and domestic law. In addition, however, the fact that those seeking to enter the Foundation Programme are applying for jobs may be significant in establishing that the proposed new system complies with the Directive if, as appears to be the case, the system is not about recognising qualifications but about allocating jobs.

17. The European Court explained the purpose and effect of the predecessor to the present Directive in the case of *Hocsman* [2000] ECR I 6123:-

33 The function of directives which lay down common rules and criteria for mutual recognition of diplomas is thus to introduce a system in which Member States are obliged to accept the equivalence of certain diplomas and cannot require the persons concerned to comply with requirements other than those laid down by the relevant directives.

18. See also *Colegio de Ingenieros* [2006] ECR I-801 (a case concerning engineering qualifications) at para 18:-

differences in the organisation or content of education and training acquired in the Member State of origin by comparison with that provided in the host Member State are not sufficient to justify a refusal to recognise the professional qualification concerned. At most, where those differences are substantial, they may justify the host Member State's requiring that the applicant satisfy compensatory measures, either a period of adaptation or an aptitude test.

19. Accordingly, to comply with the Directive and the Act, the system for allocating places on the Foundation Programme must not involve the imposition of any requirement as to the form and content of training or the nature of a qualification which is not permitted by the Directive. In addition, to comply with the Directive and with general principles of European law, the system must operate in such a way that it does not discriminate against candidates for any reason relating to the candidate not being trained in the UK.
20. The outline proposals which I have been asked to consider do not appear to me to offend against the Directive or against the principle of non discrimination, but I stress that it will be necessary to test the detail of the proposals against the relevant legal principles once the details are worked out. I expand on this general expression of my view below, by reference to the specific questions raised in my instructions.

Question 1: Can an administration fee be charged for the proposed Situational Judgment Test?

21. In my opinion, charging a fee to all applicants would be lawful. The fact that some applicants might receive assistance from medical schools in paying the fee would not be significant provided that the fee is fairly and equally applied across the board. If there were something like a waiver of the fee to all UK applicants, that would be discriminatory and unlawful, but I do not understand any such waiver to be proposed.

Question 2:

(1) How reasonable is it to ask non-UK Medical Schools to provide information that meets the same standard framework, set by the UK stakeholders, as UK Medical Schools?

(2) How reasonable is it to require the formal collection of the above described information, given the potential extra work involved for medical schools?

(3) How acceptable is it to require the medical schools to give the position of the applicant in the class list in relation to his/her peers?

(4) How acceptable is it to require independent verification of that position in the class list, of any applicant (UK and non-UK), for the purposes of audit and quality assurance?

(5) Would it be acceptable to exclude the applicant if the position in class had been falsified, i.e. the agreed standard framework for Educational Performance ranking had not been adhered to?

(6) What, if anything, would the Steering Group need to change to ensure the Educational Performance component of the selection process was reasonable, acceptable and met the requirements of EU Employment Law?

22. When this question was first put to me in a different form, I was concerned that it was proposed to ask non-UK medical schools to confirm that they had adhered to a training framework as applied in the UK. If that had been the proposal, it would probably have contravened the Directive by imposing a requirement not specified or permitted by the Directive for recognition of training or qualifications.

23. After discussing the matter in conference, however, I understand that what is proposed is that all medical schools, UK and non-UK, should be asked to provide information showing the relative position within a class of an applicant to the Foundation Programme. This information will be used in matching applicants to jobs.

24. As to sub question (1), I do not see the general concept of the proposal as offending against EU law. Gathering information for the purposes of allocating jobs does not entail failing to recognise qualifications or imposing requirements as to qualifications over and above those provided for by the Directive. Please note, however, the potential concern which I mention in paragraph 30 below. This is an area where the detail of the proposal will have to be carefully analysed in due course.

25. As to (2), the collection of the information may impose some administrative burden on medical schools, but this does not impact on the free movement rights of candidates, and does not appear, in domestic public law terms, to impose an irrational burden.
26. As to (3), see paragraph 24 above. I cannot see why it should not be possible for medical schools to provide the information requested, and do not think that seeking such information would contravene EU law. There would be no element of discrimination as all schools would be asked for the information.
27. As to (4), I am not sure what form verification or auditing might take in this context, but in principle any decision making body concerned with allocation of public resources could reasonably seek to satisfy itself of the genuineness of information provided to it. Care would have to be taken not to apply any verification or auditing requirements in a discriminatory fashion by, for example, seeking verification in respect of a much higher number of candidates from one country as compared to the UK or other countries.
28. As to (5), I would regard it as always acceptable to exclude candidates who commit any form of fraud in relation to an application. No principle of EU or public law would preclude excluding a candidate who gives false information in support of a job application.
29. It is difficult for me to comment further in relation to (6) without seeing more precise details of the proposed information requirement. In principle, however, requiring information as to candidate ranking in group does not appear to me to be objectionable.

30. With further reference to (6), and touching again on (1), I understand that it may be proposed to assess professional behaviour, communication skills etc as well as knowledge, and for all Schools to agree a common (yet to be agreed) framework. I have to express a concern that, if the proposed system tends towards requiring a common approach to training or assessment which could go beyond the minima specified in the Directive, there could be difficulty, by reference to the legal principles set out above. As mentioned above, we will have to look carefully at the detail.

Question 3: Can a situational Judgment test be used as a discriminator between applicants?

31. I can see no reason why such a test could not be employed, provided that the test is applied to all candidates and is not discriminatory in content.
32. There is a difference between applying a requirement for the recognition of a qualification which is not laid down by the Directive and applying to all candidates for appointments a non discriminatory requirement to take a test as part of the process of applying for a position.

Question 4: Could candidates be required to take the test at one location in the UK?

33. I can see no objection to requiring candidates to take the test at a particular location in the UK. Overseas candidates would, after all, be seeking to work in the UK and would, if successful, have to relocate in any event. The requirement to travel to participate in a job selection enterprise is a facet of free movement, not a bar to it. A candidate living in the far north of Scotland might find it at least as time consuming and expensive to travel to London as would a candidate living somewhere in continental

Europe (indeed, a candidate coming from Paris could travel to London in less time and at less cost than a candidate from, say, Orkney).

Question 5: Could an application be rejected if the applicant does not meet the person specification for a Foundation post?

34. So long as the person specification does not call for training or qualification in excess of the requirements of the Directive, and does not impose any requirement which would discriminate against non UK applicants (note here that the Directive permits a language requirement: see), it ought not to raise any difficulties under EU law. Note here that the Directive permits a language requirement. Article 53 provides as follows:-

Persons benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State.

The knowledge shall be such as is necessary for practising the profession, so in the case of doctors it would be lawful to require a standard of language proficiency commensurate with clinical practice. On this basis, requiring more than just basic English language ability would be consistent with the Directive.

Question 6: Does the allocation of places at the beginning of the final year of the degree course raise any issues?

35. This does not appear to raise any EU law issue, and would not be susceptible to challenge on domestic public law grounds unless irrational or plainly unfair. I can not see any obvious grounds for saying that a system operated in this way would be irrational or unfair.

An additional point on Post Graduate Deans

36. I have been asked whether the provision of clinical training by Post Graduate Deans who may not be attached to universities would be consistent with the Directive. I think that it would be, so long as the training is “under the supervision of a university”. The university can delegate training. See Article 24.2. Under article 24.3(d), clinical training must be under “appropriate supervision”.
37. A question has been raised as to how a person who is excluded from the Foundation Programme because of unsatisfactory performance but who has no connection with a UK university could appeal against such exclusion. I do not have any information about the proposed exclusion or appeal system (I infer that persons attached to UK universities may have rights of appeal to those universities, but I do not have details on this), but observe that all persons on the Programme ought to be afforded equivalent rights to challenge decisions made in relation to their training. The Directive does not guarantee a right to complete training regardless of performance, but there should be no discrimination on grounds of nationality or other prohibited ground in relation to the availability of appeal rights.

Conclusion

38. I hope that my views on the matters raised are sufficiently clear from what I have said above. I should add that, as the proposals are currently at a formative stage, it would be prudent for further advice to be taken when the proposals reach what a more developed and detailed form.
39. Please do not hesitate to contact me should you wish to discuss this matter further.

Gerard Clarke

Blackstone Chambers

3rd September 2009