

## Decision of the European Ombudsman closing the inquiry into complaint 503/2012/DK against the European Commission

Decision

**Case** 503/2012/DK - **Opened on** 28/03/2012 - **Recommendation on** 07/05/2013 - **Decision on** 09/06/2015 - **Institution concerned** European Commission ( Critical remark ) |

The case concerned the European Commission's handling of a complaint concerning an Irish law governing the right to work as an architect. The law required that persons who had not obtained formal qualifications as architects, but who wanted to use the title 'architect' in Ireland, should have worked for at least 10 years as architects in Ireland. The complainant considered that this requirement discriminated against persons who had obtained equivalent experience outside of Ireland. When the Commission closed the infringement complaint by concluding that the Irish law was not discriminatory, the complainant contacted the Ombudsman.

The Ombudsman called upon the Commission to recognise that the Irish law was discriminatory and that the only reason it had not taken the matter further was that it felt it would be disproportionate to do so.

The Commission did not accept the Ombudsman's draft recommendation. The Ombudsman therefore closed the case with a critical remark.

## The background

1. The complainant is a native of France who moved to work as an architect in Ireland following a period practicing as an architect in the United Kingdom. He does not hold any formal qualifications as an architect. In 2010, the complainant lodged an infringement complaint with the European Commission concerning the Irish Building Control Act 2007 (hereinafter 'the Act'). One of the options provided for under the Act is that persons without formal architectural qualifications could nevertheless be recognised as architects in Ireland on the basis of 10 years' professional experience gained in the Irish State. The complainant considered that this was discriminatory since the experience he had acquired in the UK was not taken into account in addition to his 7 years of professional experience in Ireland.

2. When, in November 2011, the Commission closed [1] the infringement complaint, he



complained to the Ombudsman.

3. The Ombudsman opened an inquiry into the complaint. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint, and the complainant's observations on it.

4. Ireland's Building Control Act 2007 provides for a system of registration of those entitled to practice under the title of "architect" in Ireland. The Act provides for the recognition of **qualifications** obtained both in Ireland as well as in other Member States. In addition, it provides for arrangements whereby individuals with no formal qualifications, but who had been practising as "architects" prior to the Act, could have their experience recognised for the purposes of registration as an architect. In fact, the Act provides for two separate sets of arrangements for enabling the registration of individuals with experience, but without formal qualifications. The standard arrangement, in brief, requires that the individual has had at least seven years' experience (not necessarily within the Irish State) and passes an exam. An alternative arrangement, under requirements specified in Section 21-22 of the Act, is available to individuals who (at the time of the passing of the Irish Act) had at least ten years relevant experience in the Irish State. [2] The latter arrangement, which applies to a finite number of individuals, is less expensive in terms of fees and time commitment than is the former arrangement.

## **The Commission's alleged error in closing the infringement complaint**

### **The Ombudsman's draft recommendation**

5. In the course of this inquiry, the Ombudsman made a draft recommendation to the Commission [3] . In doing so, the Ombudsman took into account the arguments and opinions put forward by the parties.

6. The Ombudsman took the view that the requirement that the relevant experience be acquired "*in the State*" of Ireland could adversely affect a greater number of non-Irish nationals than Irish nationals.

7. EU law allows for the possibility of objectively justifying such requirements, provided the requirements have a legitimate objective and provided the means used to achieve that objective are both proportionate and necessary. The Ombudsman found that the Commission had not properly investigated whether this was indeed the case as regards the Irish law. The Ombudsman noted that the Commission had produced no evidence that it had asked the Irish authorities: (a) whether the requirement for the experience in question to be acquired in the State could be objectively justified by a legitimate aim unrelated to any discrimination on grounds of nationality and (b) whether the means of achieving that aim were proportionate and necessary. The Ombudsman concluded that the Commission had wrongly taken the view that



there was no infringement of EU law in the present case, and that the complainant's allegation was well-founded. The Ombudsman therefore made the following draft recommendation to the Commission:

*Taking into account the Ombudsman's findings, the Commission should recognise that Sections 21-22 of the Irish Building Control Act 2007 are discriminatory and should recognise that the sole justification for closing the infringement complaint was that it would be disproportionate to pursue the matter.*

*Arguments of Commission in response to the Draft Recommendation*

**8.** In its reply, the Commission stated that its legal assessment took into account the objectives pursued by the Act and its overall construction, as well as the arguments put forward by both the complainant and the Irish authorities. On the basis of that assessment, the Commission could not conclude that the intention of the Irish authorities was to discriminate on the basis of nationality or that any discriminatory effects, unintentionally produced, in isolated cases, arose due to the nationality of the persons concerned.

**9.** The Commission further noted that the Irish authorities argued, as regards the compliance of the disputed sections of the Act with EU law, that the limitation ensured that only a pre-defined number of persons with acquired rights, regardless of nationality, were granted the possibility of continuing their practice without the qualifications otherwise required of architects by the Act. Since Ireland was "virtually" unique in not regulating the activities of architects or protecting the professional title of "architect", the provision was always going to target primarily Irish nationals, without it necessarily constituting a breach of EU law.

**10.** Moreover, the Commission added, the difference in treatment was justified by the fact that experience acquired in other Member States would necessitate a more in-depth assessment. This is because each country has unique characteristics, both in terms of the regulatory framework for the practice of the profession, and other factors, such as those relating to differences in the physical environment and national traditions, which impact on the activities of architects. This in-depth assessment is guaranteed under Section 14 of the Act. It is therefore reasonable to accept that the in-depth assessment necessary to establish the credentials of a person who seeks access to a regulated profession on the basis of experience acquired in Member States, other than the host Member State, may necessarily be more onerous for the applicant than an assessment provided for under a transitional "grand-fathering clause" targeting, on a one-off basis, persons established in the Member State concerned for a long time. Therefore, there exist objective reasons for a difference in treatment between applications for registration as 'architect' under Sections 21-22 and Section 14 respectively and for the difference in the related costs.

**11.** The Commission insisted that Sections 21-22 cannot be read in isolation to determine whether the Act is fair to all professionals seeking to practice as "architects" in Ireland, regardless of their nationality or the Member State of qualification. The system must be analysed holistically, and not by treating self-taught architects as a separate category, as suggested by the complainant.



**12.** Section 14 covers the recognition of self-taught architects wherever they have acquired their expertise and/or qualifications. In that context, the practical experience of those professionals may have been gained from performing duties in Ireland or abroad. If the experience was obtained abroad, the duties must be commensurate with those of an architect in Ireland. This section is explicitly targeted towards persons who chose to gain access to the professional title of “architect” primarily through practical experience, rather than academic training.

**13.** On the other hand, according to the Commission, Sections 21-22 cover a finite number of self-taught architects, irrespective of nationality, who have been providing architectural services in Ireland for a period of ten years at the time the Act became binding. Again, those services had to be commensurate with those of an architect in Ireland. The important element in this context is that the architectural services to be assessed were those understood to be provided by architects in Ireland. The nationality of the persons concerned was not an issue in this respect.

**14.** In other words, Sections 14 and 21-22 cover different factual situations, and introduce different assessment methods. The Commission assessed these sections holistically and reached the conclusion that the system as a whole is not discriminatory. For this reason the Commission said that it cannot accept the Ombudsman's finding that it had erred in its examination of the case.

**15.** The Commission added that a disagreement between it and the Ombudsman as to the legal assessment of a case should not be considered by the Ombudsman as an instance of maladministration. It is for the Court of Justice to judge whether or not a Member State has failed to meet its obligations under the Treaty. The Commission must limit itself to determining whether or not there is sufficiently compelling evidence that a Member State has created conditions impeding free movement in the Single Market to warrant action before the Court and whether the scale of the problem justifies pursuing legal action. Taking into account its analysis of the relevant provisions of the Irish law, as well as the information provided by both the complainant and the Irish authorities, the Commission concluded that it could not make the case that the system created by the Irish government for registration of architects by means of the Act was discriminatory on the grounds of nationality.

**16.** The Commission concluded its reply by stating that it did not believe that any change in its position would be of benefit to the complainant if it were not accompanied by concrete remedial action by the Irish authorities. At the time of the investigation, the Irish authorities signalled that, should Sections 21-22 of the Irish Building Control Act be found to be incompatible with the Treaty, they would opt for the deletion of Sections 21-22 rather than extending them to persons who were established as architects in other Member States without holding formal qualifications. This means the complainant would have exactly the same route to registration available to him. The Commission added that a report of an Irish parliamentary committee recommends reviewing the grandfathering regime. Should the Irish Government undertake action aimed at changing the regulation in this area, the Commission would seek to ensure that the amendments do not discriminate against any self-taught architects on the grounds of nationality. To ensure smooth cooperation, the Commission said it had already contacted the Irish



authorities.

#### *Arguments of complainant*

**17.** The complainant argued that the Commission's reply again missed the central point of his complaint, namely that the professional experience he gained in the UK as an architect, before relocating to Ireland, was not taken into account by the Act in so far as its Sections 21-22 were concerned. The complainant also observed that the Commission's argument, that an in-depth assessment of the professional experience acquired outside of Ireland would be more onerous, because of factors such as those relating to differences in the physical environment and national traditions, is contrary to the principle of freedom of movement within the European Union. The complainant also pointed out that the Commission's argument, that Ireland was virtually unique in not regulating the activities of architects, was false, pointing to the example of the United Kingdom. The complainant also pointed out that it was not he who had created the idea of self-taught architects being a separate category; in fact it is Sections 21-22 of the Act that created it. For these reasons, the complainant maintained his view that the Commission wrongly closed his infringement complaint.

## **The Ombudsman's assessment after the draft recommendation**

**18.** The Ombudsman notes that the draft recommendation was based on the finding that the Commission had erred by closing the complainant's infringement complaint without fully examining whether Sections 21-22 of the Irish Building Control Act 2007 discriminated on the basis of nationality and are thus not in compliance with EU law.

**19.** The Ombudsman finds, after examining the response of the Commission to her draft recommendation, that the Commission has still not provided sufficient information to show that it conducted a proper investigation before arriving at the conclusion that these sections of the Irish Building Control Act 2007 are not discriminatory.

**20.** The Ombudsman points out that had the Commission carried out a full examination of the situation, it could have verified, as the Ombudsman has done [4] by contacting the UK authorities, that the UK also allowed self-taught architects to work as architects in the past and used a grandfathering clause for self-taught architects similar to the one in Ireland (the complainant obtained part of his experience in the UK) [5]. The Ombudsman considers that had the Commission carried out a proper examination of the situation, it could have taken an informed decision as to whether experience obtained in the UK could, objectively, be differentiated from experience obtained in Ireland, taking into account the great similarities of legal, administrative and architectural regimes in these two Member States. Furthermore, it appears that the UK was the only other Member State in which self-taught architects were allowed to practice.

**21.** The Commission should have taken the necessary steps to investigate these points. It did



not. Had it done so, it would have established that, by excluding professional experience gained in another Member State, the Act, in effect, was excluding only professional experience gained in the UK - despite the fact that, as stated above, Ireland and the UK are very similar in terms of legal, administrative and architectural regimes.

**22.** As regards the wording of the draft recommendation, the Ombudsman wishes to clarify that, while it reflects the then Ombudsman's view that the provisions of the Irish Act are discriminatory, taking a definitive position on this issue is a matter for the Commission and, ultimately, the Court. The more substantive and relevant conclusion of the Ombudsman is that the Commission failed to fully examine the situation complained about. This conclusion is reinforced further following the Commission's reply to the draft recommendation. The Ombudsman therefore maintains the position of the former Ombudsman.

**23.** At this stage, it seems clear that the complainant is very unlikely to benefit from any change of position on the part of the Commission. Had the Commission taken the view that the Irish law discriminated on the grounds of nationality, but that pursuing the matter would be disproportionate, this might have been helpful to the complainant if he wished to take legal action in relation to his own case in the Irish Courts. Given the passage of time, such action seems unlikely - though this clearly is a matter for the complainant.

**24.** In light of the above, and in view of the fact that the Commission refused to accept the Ombudsman's draft recommendation, she will close the case with a critical remark.

## Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following critical remark:

**The Commission erred by closing the complainant's infringement complaint without fully examining whether Sections 21-22 of the Irish Building Control Act 2007 are discriminatory. This was an instance of maladministration.**

The complainant and the Commission will be informed of this decision.

Emily O'Reilly,

Strasbourg 09/06/2015

[1] The Commission said there was no compelling proof of an infringement of EU law by Ireland.

[2] Such individuals may have to submit a work-related portfolio and may also be required to



undergo a professional assessment interview.

[3] The Draft Recommendation of the Ombudsman is found here:

<http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/50053/html.bookmark>  
[Link]

[4] The Ombudsman made these inquiries following the rejection of her draft recommendation.

[5] In contrast to the situation in Ireland, the UK authorities did not require that the experience obtained as an architect be acquired only in the UK.