

Case C-807/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

29 December 2023

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

16 October 2023

Appellant:

DF

Respondent:

Rechtsanwaltskammer Wien

Subject matter of the main proceedings

Inclusion in the list of trainee lawyers – Lawyer training – Substitute periods and core periods – Activity abroad

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Must Article 45 TFEU on freedom of movement for workers be interpreted as precluding national legislation under which, as a condition for inclusion in the list of Austrian trainee lawyers, part of the practical training (training period) of a trainee lawyer must be completed as a trainee lawyer with a lawyer established in Austria, that is to say, within the national territory ('core period'), whereas, for that part of the practical training (training period), activity for a lawyer established in another Member State is not sufficient, even if that activity is carried out there

under the supervision of a lawyer admitted in Austria practising in the field of Austrian law?

Provisions of European Union law relied on

Article 45 TFEU

Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained

Council Directive 89/48/EEC of the Council 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

Provisions of national law relied on

Bundesgesetz über den freien Dienstleistungsverkehr und die Niederlassung von europäischen Rechtsanwältinnen und Rechtsanwälten sowie die Erbringung von Rechtsdienstleistungen durch international tätige Rechtsanwältinnen und Rechtsanwälte in Österreich (Federal Law on the freedom to provide services and the establishment of European lawyers and the provision of legal services by internationally active lawyers in Austria, 'the EIRAG')

Rechtsanwaltsordnung (Lawyers Code, 'the RAO')

Paragraph 30 (1) In order to obtain registration in the list of trainee lawyers, a notice shall be sent to the board when commencing practical training with a lawyer, accompanied by proof of Austrian nationality, nationality of a Member State of the European Union or of another State party to the European Economic Area Agreement or of the Swiss Confederation, as well as proof of having completed studies of Austrian law (Paragraph 3). The period of practical training with a lawyer (Paragraph 2(2)) will only be calculated as of the date on which this notice is received.

Paragraph 2 (2) The practical training as defined in Paragraph 1 shall cover a period of five years. A minimum of seven months of this period shall be spent working at a court or a public prosecution office in Austria and a minimum of three years with a lawyer in Austria.

(3) The following activities shall also be recognised for the purposes of the duration of the practical training that need not necessarily be spent at a court or a public prosecution office or with a lawyer in Austria:

1. a maximum of six months of university education after completing studies of Austrian law (Paragraph 3) if this led to an additional academic qualification in law being obtained;

2. a practical training period abroad equivalent to the training as defined in Paragraph (1), provided this activity has been useful for practising the profession of lawyer.

3. any other legal practice in Austria or abroad, provided that such activity has been useful for practising the profession of lawyer and has been carried out under the responsibility of a duly qualified person or body.

Succinct presentation of the facts and procedure in the main proceedings

- 1 By e-mail of 14 January 2022, DF, the first appellant, applied to the Rechtsanwaltskammer Wien (Vienna Bar Association, Austria) for inclusion in the list of trainee lawyers and for a partial entitlement card to practice under Paragraph 15(3) of the RAO. To that end, she also sent the application form signed by KI, the second appellant, as her training lawyer.
- 2 By letter of 7 March 2022, following a request for information, DF informed the Bar Association that she was working at Jones Day in Frankfurt am Main (Germany), where she was also domiciled and habitually resident. She had a secondary residence in Vienna. Her training lawyer was an Austrian lawyer and partner with Jones Day at the Frankfurt office. He advised Austrian and other clients in Austrian law and represented them before Austrian authorities and courts. She also accompanied him to such meetings. She had several weekly contacts with Austrian authorities and courts to represent her training lawyer's clients.
- 3 DF also sent her contract of employment with Jones Day. It was governed by German law and DF's place of work was Frankfurt am Main.
- 4 By letter of 20 April 2022, KI sent, inter alia, a summary list of the work carried out by the first appellant in the field of Austrian law during the period from 1 January to 14 April 2022.
- 5 By decision of 14 June 2022, the competent section of the Vienna Bar Association rejected the first appellant's applications for inclusion in the list of trainee lawyers and for the partial entitlement card to practise. While it is true that Paragraph 30(1) of the RAO does not contain local requirements as conditions for registration as a trainee lawyer, that provision refers to Paragraph 2(2) of the RAO, which assumes activity as a trainee lawyer with a lawyer established within the national territory.
- 6 The first appellant appealed against that decision. However, the board of the Vienna Bar Association (plenary assembly) confirmed it by decision of 6 September 2022 and rejected the first appellant's application. In that regard, the following was stated:

- The second appellant is a partner in Jones Day, an unlimited partnership under the law of the U.S. State of Ohio, established in Cleveland. His office is in Vienna, but he has been declared absent since 15 November 2016 due to permanent residence abroad.
 - The first appellant in the main proceedings satisfies the personal conditions for registration as a trainee lawyer; there are no grounds for refusal.
 - Her employment relationship does not exist with the second appellant but with Jones Day in Frankfurt am Main.
 - Inclusion in the list of trainee lawyers was refused on the ground that it was conditional on working for a lawyer within the national territory.
- 7 Previously, on 1 September 2022, the second appellant, acting on behalf of Jones Day, notified the Vienna Bar Association of the end of the first appellant’s employment relationship with effect from 31 August 2022.
- 8 The appellants appealed against the decision of 6 September 2022 to the Oberster Gerichtshof (Supreme Court, Austria).

Brief presentation of the reasoning in the request for a preliminary ruling

- 9 The appeal now relates only to the ‘retroactive inclusion of the first appellant in the list of trainee lawyers for the period from 14 January 2022 to 31 August 2022’, with the result that the referring court must examine the contested decision only in that regard. DF’s employment relationship with Jones Day ended on 31 August 2022, with the result that any entitlement card issued to her would have become invalid on that date. From that date, the issue of an entitlement card was therefore no longer of any legal interest. A lawyer has no independent interest in the inclusion of a trainee lawyer in the list of trainee lawyers. In the absence of any legal interest on the part of the second appellant, his appeal was dismissed by the referring court.
- 10 A trainee lawyer may represent a party before the courts and authorities only after inclusion in the list of trainee lawyers (B. Fink in Murko/Nunner-Krautgasser (editors), *Anwaltliches und notarielles Berufsrecht*, § 30 RAO, Rz 5). The ‘retroactive effect’ as of the day of receipt of the notice, referred to in the last sentence of Paragraph 30(1) of the RAO, relates only to the taking into account of time in practice, but not to the creation of the power of representation (B. Fink, op cit., Rz 4; OGH 2.10.2014, 24 Os 6/14h).
- 11 If, on the date of the decision, the registration applicant had already left the law firm, there is no scope for retroactive registration. In that situation, it is necessary to recognise the applicant’s legal interest in finding that the conditions for registration were met, this being a condition for taking into account the time in

practice (as already argued in OBDK 25.10.1993, Bkv 7/92 AnwBl 1994, 531 and 30.10.1998, Bkv 5/98 AnwBl 1999, 175). In the present case, it is therefore not necessary to recognise retroactive registration, but to determine whether and, if so, during what period the conditions for inclusion in the list of trainee lawyers were met.

- 12 In accordance with Paragraph 30(1) of the RAO, read in conjunction with Paragraph 2(2) of the RAO, for the purposes of inclusion in the list of trainee lawyers when taking up practical work for a lawyer established in Austria, a notice must be submitted to the competent Bar Association board, accompanied by proof of Austrian nationality and a proof of qualification awarded on completion of studies of Austrian law; the duration of the practical training (training period) is five years.
- 13 The practical training to be spent within the national territory is also referred to as the 'core period'. There are also 'substitute periods' which do not necessarily have to be spent in a court, at a public prosecutor's office or with a lawyer within the national territory, for example any equivalent activity abroad.
- 14 The possibility to spend substitute periods abroad was created in 1973, but inclusion in the list of trainee lawyers continued to be possible only when taking up work for a law office established within the national territory, no legislation to the contrary having been put in place. Furthermore, the term 'office' is also to be understood as a workplace, which expresses a geographical link with the national territory.
- 15 In the present case, the first appellant was employed by a law firm under the law of the U.S. State of Ohio, which has a branch in Frankfurt am Main, DF's place of employment. DF therefore joined an office in Germany. This cannot constitute practical training within the national territory, even for activities under the direction of an Austrian lawyer in the field of Austrian law. Even taking modern communication possibilities into account, an activity in Frankfurt am Main cannot substitute the intensity of the judicial and administrative contacts guaranteed by training in Austria. It also seems unlikely that the first appellant would travel from Frankfurt am Main to participate in proceedings before the Austrian courts and authorities, particularly in view of the fact that the 'partial' entitlement card which she seeks to obtain confers only a very limited right of representation. Although in the field of Austrian arbitration law, in which, by his own account, the second appellant mainly carries out his activities, there is no obligation to be represented by a lawyer, so that representation with a partial entitlement card would be possible (Rohregger in Engelhart Hoffmann Lehner Rohregger Vitek, RAO¹⁰ § 15 Rz 23), this small field cannot provide the comprehensive training appropriate to the lawyer's professional profile.
- 16 The website of the Vienna Bar Association contains a list of criteria for the recognition of professional traineeships from which it is apparent that a professional traineeship which is not completed in Austria with an Austrian

lawyer may be taken into account only for substitute periods. The appellants must therefore have been aware of that practice. That legislation also seems reasonable, as otherwise insoluble questions would be raised as to the foreign states in which the trainer lawyer may have his or her office and where the trainee lawyer's place of employment may be located – only in German-speaking foreign countries, neighbouring countries, the European Union, etc.

- 17 In addition, professional supervision also militates in favour of the requirement to join a law office located within the national territory. The scope of the Bar Association extends only to each federal Land, in which it has supervisory and monitoring obligations vis-à-vis its members. It also includes checks to verify whether the specialist training required, in particular professional training, is carried out (Vitek in Engelhart Hoffmann Lehner Rohrgger Vitek, RAO¹⁰ § 30 Rz 3).
- 18 The lawyer must ensure full training of the trainee lawyer corresponding to the lawyer's professional profile. The supervision and monitoring obligation of the Bar Association also includes reviewing activities directly with the lawyer, who is required to grant the board's review bodies access to the law office (Gartner in Murko/Nunner-Krautgasser (editors), *Anwaltliches und notarielles Berufsrecht*, § 1 DSt Rz 186). That would not be possible in the case of a place of employment of the trainee lawyer abroad.
- 19 To date, the Verfassungsgerichtshof (Constitutional Court, Austria) has not raised any objection to the refusal to recognise activities carried out in law offices abroad for the core period. The referring court also considers that the distinction between core periods and substitute periods is not unobjective and has no doubt as to the legality of the Vienna Bar Association's catalogue of criteria for the recognition of professional traineeships.
- 20 DF considers that her freedom of movement is restricted because her mere physical presence in Germany prevents her from practising as a trainee lawyer for an Austrian lawyer, despite being exclusively occupied with Austrian law, and she claims there is no justification for that. The answer to this question depends decisively on whether the fact that core periods must necessarily be spent within the national territory infringes the free movement of workers even when part of the period of practical training may be spent abroad as a substitute period.
- 21 DF relies on the judgment of 17 December 2020, *Onofrei* (C-218/19, EU:C:2020:1034), which, however, did not concern inclusion in the list of trainee lawyers but access to the profession of lawyer. In that judgment, the Court held that since the conditions for access to the profession of lawyer of a person who has not been authorised in any Member State to exercise that profession have not, up to the present time, been harmonised at EU level, the Member States retain the power to define those conditions. It follows that EU law does not preclude legislation of a Member State from making access to the profession of lawyer contingent on the possession of the knowledge and qualifications deemed to be

necessary. However, the Member States must exercise their powers in this area in a manner which respects the basic freedoms guaranteed by the FEU Treaty.

- 22 The Court has already held, in its judgment of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411), that national rules that restrict access to the profession are in principle lawful but must be applied in a non-discriminatory manner. The national measures must fulfil four conditions:
- they must be applied in a non-discriminatory manner;
 - they must be justified by imperative requirements in the general interest;
 - they must be suitable for securing the attainment of the objective which they pursue;
 - they must not go beyond what is necessary in order to attain it.
- 23 In the judgment in Case C-218/19, the Court also recalled that the protection of consumers and the proper administration of justice are objectives which feature among those which may be regarded as overriding reasons in the public interest capable of justifying restrictions both on the freedom to provide services, as well as on the free movement of workers and the freedom of establishment.
- 24 In the present case, the decisive question is whether a national provision under which part of the practical training period of a professional trainee must be spent within the national territory ('core period') infringes the free movement of workers when another part of the period of practical training ('substitute period') may be spent abroad in any case.
- 25 The referring court considers this differentiation to be appropriate and consistent with EU law. In accordance with Paragraph 18(1) of the EIRAG, which implements EU law, anyone who has effectively and regularly practised in Austria as a European lawyer established in Austria for at least three years in the field of Austrian law, including EU law, is to be entered in the list of lawyers. EU law therefore requires not only knowledge of local law but also local activity. An activity solely from abroad does not satisfy this requirement. It is clear that this is the only way that the practical experience necessary for practising the profession of lawyer within the national territory can be acquired. If that is the case for lawyers, the same must also apply to professional trainees.