

Yraton, Applicant
v.
Ministry of Justice of the Kingdom of Detimil, Respondent

Facts

1. Yraton is a national of the Republic of Larebil, an EU Member State. She is also a keen linguist; as well as her native language of German, she speaks fluent Dutch and has a working knowledge of both English and French. Having always dreamed of becoming a notary to follow in the steps of her grandfather and great grandfather, Yraton chose to study law at the Maxeon law school in Larebil, where she specialised in civil law subjects, also attending an optional course on the law of succession in her third year.

2. Yraton was also accepted on the Erasmus programme, which enabled her to spend a year at the Etaluger University in Detimil (a neighbouring EU Member State which shares a common border with Larebil and which has Dutch as its official language). Detimil is also the home of Yraton's maternal grandmother and so she was able to stay with her during her study trip. Her studies in Detimil included a two-semester course on the Foundations of the Law of the Kingdom of Detimil which was assessed by exam, which she passed with merit. Yraton was also able to participate in a one-month course on her special interest subject of the law of succession, in which she also sat and passed an exam. On her return to Larebil, she decided to write her final masters' thesis on succession, entitling this "A comparative assessment of the laws of succession in the Republic of Larebil and the Kingdom of Detimil". She graduated from Maxeon law school (with honours) in 2009 and was given a special academic award for the best law thesis that year.

3. Immediately following her graduation, Yraton obtained a position as a trainee notary at the office of a notary in Maxeon, the capital of Larebil, which she took up on the 1 September 2009, simultaneously registering as a candidate with the Larebil Chamber of Notaries (The Chamber).

4. In Larebil the notary profession is regulated and administered by the Chamber. The detailed regulations of the notary profession are set out in the Notaries Code of 1996 (The Code) which includes the following provisions: -

- *The Chamber shall be responsible for the regulation of the notaries profession (Article III)*
- *A maximum number of notaries may hold office at any one time (numerus clausus) (Article IV)*
- *To be eligible to be appointed to the office of notary applicants must:*
 - I. Be holders of a qualifying law degree,*
 - II. Have completed a minimum of 3 years work experience as a registered trainee notary and,*
 - III. Have passed the notaries exam set by the Chamber.*
- *Appointments to vacancies for a notary are awarded in chronological order, so that the first person named on the waiting list for appointments would automatically be appointed to any new vacancy (Article V)*
- *All trainee notaries are required to be in the employ of a notary and to act under his/ her supervision to assist in executing the duties of a notary. All trainee notaries are required to follow a course of training designed by his/ her supervisor which complies with the requirements of the training programme published by the Chamber to ensure that each trainee acquires the requisite knowledge and experience to be eligible for appointment as a notary and to undertake the primary duties of a notary which include*

- *Preparing and authenticating powers of attorney for use overseas*
- *Dealing with purchase or sale of land and property abroad*
- *Authenticating foreign wills and providing documents to deal with the administration of the estates of people who are abroad, or owning property abroad*
- *Authenticating personal documents and information for immigration or emigration purposes, or to apply to marry or to work abroad, such as education or professional qualifications or declarations of freedom to marry*
- *Authenticating company and business documents and transactions or providing certificates as to the status of a company or the identity of its directors (Article VI)*
- *The Chamber is required to maintain a list of trainee notaries who are eligible to be appointed to the office of notary. Whilst registered as a trainee notary, all trainees are required to follow a compulsory course of studies, to include attendance at special seminars organised by the Chamber (Article VII)*

5. In November 2012 Yraton had completed her three years of practical training and had also passed the professional exam organised by the Chamber. In December 2012, the Chamber duly confirmed that Yraton had fulfilled all the necessary conditions to be added to the waiting list for a full appointment as a notary. Although this now guaranteed her eligibility for a position in the future, it meant that she would only be appointed when a vacancy became available and she had reached the top of the list. As notaries in Larebil had a median age of 40, Yraton realised that she might have to wait for 20 years or more before achieving her dream to become a fully qualified notary.

6. Yraton however was still determined to become a notary and so she agreed to stay on with her current employer. However, this was only possible under the terms of a standard employment contract as a legal assistant, as she was no longer a notary public candidate. In fact, Yraton soon discovered that this was not the only disadvantage of her 'interim status' as she was also no longer entitled to attend seminars organised by the Chamber for notaries and notary public candidates and as her employer was now supervising another notary public candidate, she was forced to spend more of her working hours on administrative tasks rather than assisting her employer in exercising the tasks conferred on notaries. In her spare time however, at her own expense, she attended several law seminars, including an intensive week's seminar in Brussels which considered the provisions and impact of the new European Certificate of Succession.

7. In December 2016 she saw an announcement of a competition for a notary public vacancy in Detimil, which would be based in the region close to the borders of the Republic of Larebil. Thinking that this was at last her opportunity, Yraton carefully read through the Detimil advert and the terms of the competition and decided that she should be eligible, so she duly applied for the position on the 31st January submitting the following documents:

- A copy of her law degree from Maxeon law school;
- Copy certificates testifying to the courses and exams undertaken in the framework of the Erasmus programme in the Kingdom of Detimil
- A copy of her thesis from Maxeon law school;
- A certificate attesting to the completion of seven years of practice in a notary's office;
- Copy language qualifications, including a C2 certificate in Dutch, and B1 certificates in both English and in French.

(All the copies had been certified in accordance with Larebilian national law, which required production of the original to a designated local authority department for certification by a duly authorised official; under Larebilian national law, this certification is considered fully equivalent to certification by a notary.)

Yraton also submitted a letter of motivation in support of her application which inter alia, detailed her family history, her dream of being a notary as well as her interest and qualifications in the law of succession. It also mentioned her personal connection with

Detimil through her grandmother and added that winning the competition would enable her to play a more active role in the care of her 75-year-old widowed grandmother who was not in the best of health.

8. Unfortunately, on 1st April 2017 all Yraton's hopes were dashed, when she received a letter from the Ministry of Justice of the Kingdom of Detimil formally advising that her application had not been successful and that the position had now been offered to another candidate.

9. In the letter, the Ministry advised her that she had failed to fulfil the eligibility requirements detailed in Article 5 of the 1899 Act in that she: -

- Did not provide evidence of a law degree from a university in an EU Member State, certified by a notary public;
- Had not completed the required studies of Detimil law;
- Had not completed the required minimum six years of practice as a notary public candidate;
- Did not hold the required knowledge of English at level C1.

10. Yraton immediately wrote protesting the decision and received a reply stating that, even had the requirements been satisfied and her professional experience been equivalent in qualification and profession to that demonstrated by the successful candidate (quod non), then, as a female candidate, preference would still have been given to the successful candidate (of male gender), in accordance with Article 5a of the 1960 Act. At the time of the competition, the Register of Notary Publics contained 39 females and 20 male names. The reply concluded that the Ministry's decision was final but was open to judicial review.

11. In the meantime, Yraton had found out from her friend that the successful applicant was a Detimil citizen who had graduated from the Detimil State University in 2010. Although his legal interests appeared to more directed to international criminal law (his masters' thesis was entitled "International Criminal Tribunal for the Former Yugoslavia: chasing the bad spirits"), he did possess a C2 English qualification and all his documents had been duly certified by a notary public.

Relevant national law

12. In the Kingdom of Detimil, a Member State of the European Union whose official language is Dutch, the notary public profession is regulated by Notary Public Act n° 5/1960, as later amended.

13. Under Article 2 of the Notary Public Act, the profession is administered by the Ministry of Justice. Notaries public are appointed by the Minister of Justice and the ministry keeps records of the appointed notaries.

14. The maximum number of notaries public in the Kingdom of Detimil (numerus clausus) is to be determined by the Ministry of Justice under the conditions laid down in Article 3 of the Notary Public Act, the current maximum number is set at 60 notaries public.

15. Under Article 4 of the Notary Public Act, any vacant notary public position shall be filled by means of open competition. The competition shall be organised by the Ministry of Justice.

16. The eligibility criteria, set out in Article 5 paragraph 1 of the Notary Public Act, are as follows:

- citizenship of the Kingdom of Detimil or of another EU Member State,
- law degree from a university in an EU Member State,
- six years of work experience as a notary public candidate,
- a knowledge of Dutch to level C2 and English to level C1.

17. Under Article 5, paragraph 2, a copy of the law degree certified by a notary shall be attached to the application.

18. Under Article 5, paragraph 3, candidates with a law degree from another Member State are required to demonstrate having completed a six-month full-time course in constitutional law, civil law, commercial law and civil procedure at a university in the

Kingdom of Detimil; proof of an exam having been successfully passed at the end of the course, certified by a notary public, shall also be attached to the application.

19. The Notary Public Act had been amended in 2012 to remove the citizenship condition and to open vacancies to all eligible candidates from EU Member States following a series of judgments of the EU Court of Justice which ruled that the requirement was incompatible with Union law (judgment of 24 May 2011 in C-54/09, Commission/Germany, and other similar judgments).

20. Regarding the requirement of knowledge of English, the explanatory memorandum to the 2012 amendment referred to the Recommendation of the European Commission of 27 July 2011 on notaries public in the internal market framework. The recommendation suggested, among other things, that, in order to facilitate free movement of persons throughout the EU, having regard to the increasingly "European" character of the public notary profession and taking into account the multiple tasks conferred increasingly to public notaries on the basis of EU legislation, knowledge of English, French or German, the most commonly spoken languages within the EU, should be required for the exercise of the notary public profession. The authors of the 2012 amendment chose English as the most commonly spoken and understood foreign language throughout the EU. Statistics also show that 75 % of the population of Detimil speaks English to B2 level and amongst younger persons (aged 21 or less) the percentage is even greater at 95%.

21. Under Article 5a of the Notary Public Act, if, when a vacant public notary position is being filled, it turns out that a gender represents less than 40 % of public notaries at the relevant time, preference should be given to the candidate whose gender is underrepresented at the time, unless another candidate (of the overrepresented gender) has superior qualifications. In either case the selection committee is required to take account of all the circumstances including the specific personal situations of the respective candidates. The explanatory memorandum to the 2012 amendment to the Notary Public Act explained that the same rule was being established throughout the entire public service in the Kingdom of Detimil. Although notaries public are generally not subject to the Public Service Act, the scope of their competences means that some provisions of the Public Service Act also apply to them. The rule at issue should therefore also apply to all notaries public.

22. Pursuant to Article 6 of the Notary Public Act, the competences of a notary public include:

- to authenticate instruments and agreements; the intervention of the notary may be mandatory or optional, depending on the document to be authenticated; the notary's intervention confirms that all conditions required by law for the drawing-up of the document are satisfied, and that the parties have legal personality and capacity to enter into legal transactions; a notarial act has probative force;
- to draw up private documents and to represent parties in certain proceedings exhaustively listed in Article 7;
- acting as a commissioner of the court, to carry out in certain non-contentious matters the activities listed in Article 8; those activities include various tasks concerning the law of succession such as, in particular, recording the death, drawing-up the inventory of the estate, identifying the heirs and receiving their declarations of acceptance of the inheritance, conserving the estate, and taking the necessary measures for that purpose; in the event of contradictory declarations of acceptance of an inheritance, if no agreement can be reached, the notary decides who is entitled to the inheritance; the notary public's decision is considered as an equivalent to a judgement of a first-instance court and is amenable to review by an appeal court;
- to act as the issuing authority of European Certificates of Succession within the meaning of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession,
- other tasks include the valuation and sale of movable and immovable property, the drawing-up of inventories, and the conducting of agreed divisions of property.

Procedure and preliminary questions

23. On 21 April 2017, Yraton took the decision to obtain legal advice and instructed her lawyers to institute proceedings on her behalf in the Detimil Administrative Court seeking judicial review and annulment of the decision taken by the Ministry of Justice on the 1st April 2017 which rejected her application for an appointment as notary public, on the following grounds: -

- a) That the decision of the Ministry of Justice is in breach of European Union law, in that it directly discriminates against the applicant on the grounds of her sex contrary to Article 19 TFEU
- b) That by failing to recognise qualifications gained in another EU Member State it breaches the principle of mutual recognition and the right of establishment contrary to the provisions of Directive 2005/36/EC and Article 49 TFEU respectively.
- c) That it further breaches the principle of mutual recognition in refusing to accept documents certified in accordance with the national law of Larebil as equivalent to certification by a notary public
- d) That in failing to take account of the cumulative periods of practical experience gained both as a notary public candidate and by working in the office of a notary public, it has not complied with its obligation to assess whether the applicant has completed the requisite minimum period of practical experience required by Article 5 (2) b) of the 1960 Act

24. Yraton's lawyer adds

- that Yraton had satisfied the requirement to have the requisite knowledge of Detimil national law through her Erasmus studies in Detimil
- That the requirement of knowledge of English at level C1 is neither necessary nor proportionate, considering that Dutch is the official language of the Kingdom of Detimil, a language in which the applicant has C2 level proficiency, moreover the applicant also satisfies the terms of the 2011 Commission Recommendation by speaking two other languages, namely French and German, the latter being the most commonly used in the region of jurisdiction of the notary public vacancy.
- That in failing to give due regard to her specialist knowledge of the law of succession, which are included in the competence of the notary public appointment, the gender equality rule was applied in a disproportionate and unfair manner contrary to the provisions of Article 23 of the Charter of the Fundamental Rights of the EU and that, setting aside the formalities at issue, the applicant is better qualified than the successful candidate.
- In addition, the Ministry of Justice failed to take account of her specific personal situation as explained in her letter of motivation

25. In reply the Ministry of Justice states that, in its opinion, the decision at issue is fully compliant with EU law for the following reasons:

- a) it is clear from the caselaw of the Court of Justice, (C-342/15 Piringner) that a Member State may reserve authentication of certain documents to notaries public;
- b) Article 2.4 of Directive 2005/36 expressly states that '*notaries who are appointed by an official act of government*' are excluded from the scope of its provisions
- c) in its case-law on the requirement of nationality for the exercise of notary public profession, the EU Court of Justice recognised that notary publics act in the public interest, therefore the requirement of completion of a six-month full-time course in constitutional law, civil law, commercial law and civil procedure at a university in the Kingdom of Detimil is clearly justified and was not satisfied by the applicant.
- d) the applicant did not fulfil the requirement of six years of practice as a notary public candidate; in this regard, the Ministry of Justice points out that the practical experience of the applicant that followed her three years of practice as a notary public candidate was of a completely different nature and could not be considered equivalent to practice as a notary public candidate;

e) the requirement of English at level C1 is justified and proportionate taking account of the aim to ensure the progressive “Europeanisation” of the public notary profession and particularly necessary in the light of increased foreign trade and tourism and the country’s growing popularity as a tourist destination and retirement base for nationals of other EU Member States.

f) That there were no special grounds in the applicant’s motivation letter which would justify not applying the gender equality rule, even if the applicant’s qualification and professional experience should be considered equivalent to those of the successful candidate (quod non)

In these circumstances, the Detimil Administrative Court decides to stay the proceedings and to refer the following questions to the Court of Justice to the EU, in accordance with the preliminary ruling procedure under Article 267 TFEU

1. Do the terms of Directive 2005/36/EC and/or Article 49 TFEU preclude legislation of a Member State that sets out a requirement of authentication of certain documents by a notary public, as in the current case, and consequently excludes other forms of recognition carried out in accordance with the national law of another Member State (such as certification by a duly authorised national official)?

2. Shall Article 2 paragraph 4 of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications be understood as excluding notaries public appointed by a Minister of Justice from its scope?

3. Shall Directive 2005/36/EC and/or Article 49 TFEU be interpreted as requiring the authorities of a host Member State to accept – in the case of nationals of another Member State who apply for the position of a notary public in the host Member State – qualifications, such as that demonstrated by the applicant in the current proceedings, as equivalent to the qualification required by the national legislation (completion of a six-month course and exam in constitutional law, civil law, commercial law and civil procedure at a university in the host Member State)?

4. Shall Directive 2005/36/EC and/or Article 49 TFEU be interpreted as requiring the authorities of a host Member State to accept – in the case of nationals of another Member State who apply for the position of a notary public in the host Member State – professional experience as demonstrated by the applicant, as equivalent to the professional experience required by the national legislation, namely six years of practice as notary public candidate?

5. Shall Directive 2005/36/EC and/or Article 49 TFEU be interpreted as prohibiting, in the circumstances of the present case, the requirement for a candidate for a vacancy of notary public to demonstrate a knowledge of English language at level C1?

6. Having regard to the qualification, professional experience and personal situation demonstrated by the applicant in the main proceedings, does the decision at issue in the main proceedings breach Article 49 TFEU and/or the principle of non-discrimination set out in Article 19 TFEU in that it allows preference to be given to a candidate whose gender is underrepresented in the notary profession in the Member State in question?