FEDERAL CONSTITUTIONAL COURT

- 1 BvR 1662/97 -

IN THE NAME OF THE PEOPLE

In the proceedings

on

the constitutional complaint

of Dr. K...

- authorised representative: Rechtsanwalt Dr. Hugo Lanz,
Schwanthalerstrasse 102, Munich -

against a) the order by the Higher Administrative Court *(Verwaltungsgerichtshof)* of Baden-Württemberg dated 28 July 1997 - 9 S 1141/97 -,

b) the judgment of the Administrative Court *(Verwaltungsgericht)* of Freiburg
dated 11 April 1997 - 7 K 1760/96 -

the Second Chamber of the First Senate of the Federal Constitutional Court

with the participation of Justices

Kühling,

Jaeger,

Hömig

unanimously held on 9 March 2000:

1. The order by the Higher Administrative Court of Baden-Württemberg dated 28 July 1997 – 9 S 1141/97 – and the judgment of the Administrative Court of Freiburg dated 11 April 1997 - 7 K 1760/96 – violate the complainant's fundamental right under Article 12.1 of the Basic Law. They are overturned.

The proceedings are referred back to the Administrative Court of Baden-Württemberg.

2. The *Land* (state) of Baden-Württemberg shall reimburse the complainant for his necessary expenses.

R e a s o n s:

I.

The constitutional complaint concerns the entitlement of a physician to call himself a specialist for a branch of medicine if the specialisation is not recognised in Baden-Württemberg where he practises medicine, although it was previously recognised in the German Democratic Republic. […]. 1

[…]. 2-3

The complainant, who was born in 1942, received his licence to practise medicine in 1968 in the Federal Democratic Republic; in 1973 he received recognition as a specialist in sport medicine. Since 1990 he has had a private practice in Baden-Württemberg and has called himself a “specialist in sport medicine” and “naturopathic treatment”. In the spring of 1996, the Regional Medical Association *(Bezirksärztekammer)* requested the complainant to cease describing himself as a “specialist in sport medicine” in Baden-Württemberg. The Regional Medical Association stated that entitlement to continue to use a specialisation to describe oneself, which was acquired in the German Democratic Republic, is governed by state law. Pursuant to § 41 sentence 1 of the Law Concerning Professional Bodies *(Kammergesetz, KaG)* the only terms to describe additional qualifications, which may be used in Baden-Württemberg, are [those] for which there are equivalent terms to describe a medical specialisation contained in the Further Training Regulation *(Weiterbildungsordnung)* of the Baden-Württemberg State Medical Association. The Regional Medical Association stated further that the term “specialist in sport medicine” does not exist in Baden-Württemberg. 4

The Administrative Court dismissed the […] action […]. The court explained that although the additional description “sport medicine” existed in Baden-Württemberg, since there was no further training available leading to the right to call oneself “specialist in sport medicine”, the complainant was not entitled to use such description […]. If the opposite view were adopted, the purpose of describing physicians by their qualifications i.e. to provide comprehensibility, clarity and comparability would only be partially possible; in addition, there would be scope for market distortion. The Higher Administrative Court rejected the application for an appeal […]. The Higher Administrative Court expounded that the complainant – like any other physician – was subject to the law of the *Land* where he set up medical practice […]. 5

[…]. 6

3. By lodging a constitutional complaint against the decisions of the Administrative Court and the Higher Administrative Court, the complainant is [essentially] alleging a violation of his fundamental rights under Article 12.1… of the Basic Law…. The com- 7

plainant alleges that being a specialist in sport medicine is a separate profession…. It took him five years to acquire the additional qualifications necessary for becoming a specialist…. In his view there was no evidence that the challenged provision served to guard any of the community's objects of legal protection. Nor was there any likelihood of confusion about the physician's professional qualifications […].

[…]. 8

4. The governments of the *Länder*, medical associations and professional organisations have stated their opinions. 9

[…]. 10

[They unanimously find it logically consistent] […] that where the responsible professional representative body has formally introduced additional fields of training, parts of fields or areas, recognition may be possible in individual cases and the (further) qualification may be stated […]. 11

[…]. As a rule, only the Free States of Saxony and Thuringia recognise descriptions of medical specialisations in their States which are only available from other medical associations in the Federal Republic of Germany […]. 12

[…]. 13-14

II.

The Chamber admits the constitutional complaint for decision because this is necessary for the assertion of the rights set out in § 90.1 of the Law on the Federal Constitutional Court *(Bundesverfassungsgerichtsgesetz, BVerfGG)* (§ 93a.2.b of the Law on the Federal Constitutional Court). The remaining prerequisites contained in § 93c.1 of the Law on the Federal Constitutional Court are also fulfilled. The challenged decisions violate the complainant's freedom to practise an occupation (Article 12.1 of the Basic *Law (Grundgesetz, GG)*. 15

1. The Federal Constitutional Court *(Bundesverfassungsgericht, BVerfG)* has already decided the relevant constitutional questions (cf. BVerfGE 33, p. 125 – Medical Specialist Decision). The decision to practise as a specialist is something approaching the choice of a profession. The resolution to train to become a specialist and to restrict one's future practise of medicine to one's chosen field is, as a rule, a long-term plan and a decision for life. After uniform medical training, specialist training presents a physician with special tasks, exposes him or her to a certain circle of patients and carries with it particular economic opportunities related to practising as a specialist (BVerfG, *loc. cit.,* p. 161). Furthermore, the Federal Constitutional Court has held that an honest reference to a formally acquired professional qualification does not amount to illegal advertising (BVerfG, *loc. cit.*, p. 170). The members of free professions must be allowed scope in legal or business dealings to provide information of interest and relevance to their professions, which does not give rise to misunderstandings (cf. BVerfGE 82, p. 18, at pp. 28 – 29). 16

2. Apart from examining the Law Concerning Professional Bodies to see whether the interpretation and application of its provisions violate the prohibition of arbitrary decision-making, the Federal Constitutional Court can only examine the interpretation and application of the Law's provisions to see whether errors in interpretation have occurred which derive from a fundamentally erroneous view of the significance of the fundamental right affected – in particular with regard to the scope of the protection it offers. This will be the case where the interpretation of its legal provisions, as undertaken by the originally competent courts, does not sufficiently take into account the scope of the fundamental right or results in a disproportional restriction of freedom under the Basic Law (cf. BVerfGE 18, p. 85, at pp. 92 - 93, 96; 85, p. 248, at pp. 257 - 258; 87, p. 287, at p. 323). 17

This is the case here. The challenged decisions do not meet the standards set by Article 12.1 of the Basic Law. 18

a) According to these decisions, the complainant is not entitled to use the description "specialist in sport medicine", which he acquired in the German Democratic Republic, in Baden-Württemberg [because according to] […] § 41 sentence 1 in conjunction with § 32 of the Law Concerning Professional Bodies […] the authorization to use a description for a field or a part of a field or some additional description, allowed in other *Länder* where the Federal Medical Practitioners Regulation applies, may only apply in Baden-Württemberg if the *Land* of Baden-Württemberg's Further Training Regulation contains an equivalent provision. 19

b) This interpretation of the statutory provisions does not sufficiently take into account the scope of Article 12.1 of the Basic Law. There are no reasonable public interest considerations for a general prohibition of all descriptions of medical specialisations, which are not contained in the *Land* of Baden-Württemberg's Further Training Regulation irrespective of the descriptions' informational value for patients. 20

In the course of his or her additional training to become a specialist, a physician improves his or her competency in a certain specialist field in a particular way. If the physician has formally acquired a specialist qualification of such kind, then only weighty public interest considerations can justify prohibiting a reference to the qualification provided that the reference is not misleading. The federal structure of the Federal Republic of Germany and the sole jurisdiction of the *Länder* to regulate medical law are not public interest considerations of sufficient significance to justify such decision […]. 21

[…]. 22

The uniform application of descriptions for medical specialisations within a *Land* in accordance with its health care needs and the need to protect physicians from competition cannot […] legitimise restrictions of the kind here on professional freedom. If there is no health care need for a certain medical specialisation, it is the prerogative of the medical associations not to make provision for further training in this field. The 23

sole jurisdiction of the *Länder* to regulate their own law on further training also guarantees that, as a rule, uniform conditions apply in each *Land*. The mutual recognition rule does not, however, guarantee that the training standards usual in one *Land* are maintained in another *Land*; insofar the *Länder* mutually accept the safeguarding of quality standards by other *Länder*. To the extent that references to specialisations common in other *Länder*, but not usual in the *Land* concerned are excluded, this is simply intended - as was also admitted in the Opinions given – to avoid distortions of competition. To this extent health policy considerations and other public interest considerations are not apparent. The federal structure of the Federal Republic of Germany in itself is not a public interest consideration, which can legitimise *vis-à-vis* the party affected the refusal to recognise an administrative decision made in a *Land* that now belongs to the Federal Republic of Germany.

Insofar as the restricted recognition of specialists is intended to serve to protect physicians from competition, the medical associations would not be authorised to use their Further Training Regulations to interfere with competition solely for the purposes of protecting physicians whose further training occurred in their own *Land*. Physicians do not enjoy protection against competing physicians who have acquired other qualifications. Protection from competition is also not a pubic interest consideration. There is no likelihood that the description of the type of specialisation (“specialist in sport medicine”), acquired in the German Democratic Republic, would confuse patients. This is all the more so the case since the common, additional description “sport medicine” is recognised in Baden-Württemberg. The fact that a physician’s having a specialisation suggests that he or she has also had longer training is a correct impression. 24

The complainant cannot be advised to instead use the additional description “sport medicine”. Permission to use an additional description is not the equivalent of permission to call oneself a specialist. This follows already from § 95.2 and § 95a of the Fifth Book of the Social Security Code *(Fünftes Buch Sozialgesetzbuch)* whereby it is no longer possible for a physician to be recognised as a physician eligible to provide services under the statutory health insurance scheme unless his or her specialist qualifications are recognised. 25

c) Since there are no public interest considerations, which could possibly speak against correctly informing the public with regards to the actual qualification acquired in a branch of medicine, it is necessary to interpret § 41 sentence 1 of the Law Concerning Professional Bodies as being in conformity with the constitution. A specialist qualification must also be recognised even if it is not included in the *Land* of Baden-Württemberg’s Further Training Regulation. 26

§ 41 sentence 1 of the Law Concerning Professional Bodies allows this interpretation. A description within the meaning of § 32 of the Law Concerning Professional Bodies can be understood as covering every description of a field or part of a field or additional description which has been formally acquired in another *Land*. That is even 27

the case normally since the Model Further Training Regulation *(Muster-Weiterbildungsordnung)* unified the descriptions for fields and parts of fields as well as additional descriptions in largest part […].

Insofar as the Federal Medical Association has stated for understandable reasons that specialists in sport medicine are not necessary nationwide, such statement is not constitutionally objectionable. It does not follow from this, however, that a specialist qualification which has already been acquired should be kept secret. No reasons for this are evident […]. 28

[…]. 29-30

The challenged decisions are based on the alleged violation of Article 12.1 of the Basic Law since the possibility that the courts in the original proceedings would have decided otherwise, if they had interpreted § 32 and § 41 of the Law Concerning Professional Bodies in conformity with the Basic Law, cannot be excluded. The challenged decisions must, therefore, be overturned so that this can now be done […]. 31

[…]. 32-34

Kühling Jaeger Hömig

Bundesverfassungsgericht, Beschluss der 2. Kammer des Ersten Senats vom 9. März 2000 - 1 BvR 1662/97

Zitiervorschlag BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 9. März 2000 - 1 BvR 1662/97 - Rn. (1 - 32-34), http://www.bverfg.de/e/rk20000309_1bvr166297en.html

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