IN THE HIGH COURT OF JUSTICE **Claim No. CO/1456/2011**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

MR. PAUL MCGRATH

Appellant

-and-

THE ARCHITECTS REGISTRATION BOARD

Respondent

OPINION

Introduction

1. I have been asked to advise Mr. Paul McGrath on the merits of his appeal against the decision of the Architects Registration Board refusing to register him as an architect.

Background

2. The title of "Architect" is a protected title. Registration of architects in the UK is governed by the Architects Act 1997 and administered by the Architects Registration Board ("the Board").

3. Mr. McGrath wishes to be registered as an architect. He has obtained qualifications equivalent to the "Part 1" and "Part 2" qualifications required by the Board. He has

not obtained the "Part 3" qualification, which the Board also appears to require (the Board's precise position is considered in more detail below).

4. Mr. McGrath applied to the Board for registration on 29 October 2010. His application was supported by a "statement of case" dated 7 January 2011.

5. The Board rejected Mr. McGrath's application by letter dated 27 January 2011. I have also been given what appears to be an internal note for the Board's consideration, dated 20 January 2011. It is apparent from the letter and the note that the Board has taken the view, in effect, that Mr. McGrath's failure to obtain the Part 3 qualification should prevent his registration.

6. Mr. McGrath seeks to appeal against this decision. He is aggrieved by the Board's decision on a number of grounds, set out in his grounds of appeal. These principally fall into two categories:

   (1) That the Board should not require a UK applicant to obtain the Part 3 qualification in circumstances where applicants from other EEA states are permitted to be registered with lesser qualifications by virtue of Directive 2005/36, as implemented in UK law.

   (2) That the Board did not offer him a proper alternative route to demonstrate competence, without having obtained the Part 3 qualification.

7. I have been asked to advise Mr. McGrath as to whether his grounds of appeal have any merit and, if so, what the likelihood is of the Board's decision being overturned.

The relevant provisions

8. The key statutory provisions, for the purposes of the registration of UK trained architects, are ss.4(1) and (2) of the Architects Act. These read as follows:

   "(1) A person who has applied to the Registrar in the prescribed manner for registration in pursuance of this section is entitled to be registered in Part 1 of the Register if—

      (a) he holds such qualifications and has gained such practical experience as may be prescribed; or

(b) he has a standard of competence which, in the opinion of the Board, is equivalent to that demonstrated by satisfying paragraph (a).

(2) The Board may require a person who applies for registration on the ground that he satisfies subsection (1)(b) to pass a prescribed examination in architecture."

9. The Act gives the Board the power to prescribe the qualifications referred to in s.4(1)(a) and the examinations in s.4(2). Section 25(1) confirms that:

""prescribed" means prescribed by rules made by the Board and "prescribe" means prescribe by rules"

While s.23(1) confers a general power on the Board to make rules:

"The Board may make rules generally for carrying out or facilitating the purposes of this Act."

10. The Board has passed a set of "General Rules", pursuant to s.23(1) of the Act. Rules 13 and 14 are relevant:

"13. Application for Registration-Eligibility

The qualifications and practical experience prescribed by the Board pursuant to Section 4(1)(a) of the Act are that the person:

a. holds such qualification(s) as are listed in Schedule 2 to the Rules; and

b. has completed at least two years' practical training experience working under the direct supervision of an architect registered in the EEA, 12 months of which must be undertaken in the UK under the direct supervision of a Part 1 Registrant. A minimum 12 months of the prerequisite practical training experience must be undertaken after completion of a five-year course of study and award of a qualification of the type described in sub-paragraph (a) of this Rule.

The practical training requirement set out in (b) above can be varied by the Board in relation to the supervising person set out in that paragraph, acting within guidelines published by the Board from time to time."

"14. The examination in architecture prescribed by the Board pursuant to Section 4(2) of the Act (for determining competence pursuant to Section 4 (1)(b) of the Act), shall be one or more of the following:

a. *an examination conducted by the Board or a Committee established by the Board;*

b. *an examination in any subject area(s) nominated by the Board at final level conducted by a school of architecture which awards a prescribed qualification;*

c. *any other examination which the Board may approve for this purpose;*

d. *any oral or written examination carried out under such procedures as the Board may establish."*

11. Schedule 2 of the General Rules contains a list of recognised qualifications, including qualifications under Parts 1, 2 and 3.

12. There also exists a further separate set of rules applicable to architects with qualifications obtained in another EEA state, set out in ss.4(2A) and 4A of the Act. The relevant part of s.4(2A) reads:

"(2A) For the purposes of subsection (1), a Directive-rights national shall be treated as having achieved a standard of competence equivalent to that demonstrated by satisfying subsection (1)(a) if—

(a) he produces evidence of a description specified in section 4A(1) and he is either—

(i) lawfully established as an architect in the relevant European State in which that evidence was issued, or

(ii) eligible to practise as an architect in that State, as confirmed by a competent authority in that State"

13. The relevant part of Section 4A reads:

"(1) The descriptions referred to in section 4(2A)(a) are—

(a) evidence of formal qualifications listed in point 5.7.1 of Annex V to the Directive (qualifications in architecture satisfying the minimum training conditions mentioned in Article 46 of the Directive, including training which is, under Article 22(a), to be treated as meeting those conditions), accompanied, where appropriate, by the certificate listed in relation to that evidence in the column of that point of that Annex entitled "Certificate accompanying the evidence of qualifications";

14. The relevant definitions for the interpretation of these provisions are contained in s.25(1) and read as follows:

"Directive-rights national" means—

(a) a national of a relevant European State other than the United Kingdom, [or]

(b) a national of the United Kingdom who is seeking access to, or is pursuing, the profession of architect by virtue of an enforceable Community right..."

15. Sections 4(2A) and 4A were added to the Architects Act by the Architects (Recognition of European Qualifications etc and Saving and Transitional Provision) Regulations 2008. These Regulations implemented the Architect provisions of EU Directive 2005/36 into UK law.[1]

16. Directive 2005/36, which was of central importance to Mr. McGrath's case before the Board, sets out the conditions under which a person qualified to practice in an EU

[1] There is an ongoing dispute as to whether the Directive was correctly implemented. However, the grounds for this dispute do not affect Mr. McGrath's case.

Member State may be registered as an architect in another state. Broadly speaking, it adopts the principle of "mutual recognition", whereby each Member State is under an obligation to recognise the qualifications of another Member State, rather than the principle of "harmonisation", whereby there is a common standard of qualifications which applies EU-wide. This is subject to minimum standards of architectural education, set out in Article 46 of the Directive.

The merits of the appeal

17. Various grounds of challenge have been raised by Mr. McGrath, at various stages, to the Board's approach to his application. I have considered all of these grounds, but in my view only two offer a potentially viable basis for challenging the Board's decision on appeal:

    (1) The Board's refusal to admit Mr. McGrath on the grounds that he does not possess a Part 3 qualification is irrational, discriminatory and/or violates the principle of equal treatment, in light of the fact that the Board admits applicants from other EU member states that have equivalent qualifications to Mr. McGrath.

    (2) The Board's approach to the consideration of his application under s.4(1)(b) fails to accord with the terms of the Act and is therefore illegal.

18. The merits of each argument are considered in turn.

Irrational to refuse Mr. McGrath in light of the admission of equivalent EU applicants

19. It is clear that Mr. McGrath cannot rely *directly* on the Directive, or the provisions of the Architects Act 1997 that implement it in UK law.

20. The Directive only applies, on its face, to:

    "all nationals of a Member State wishing to pursue a regulated profession in a Member State ...<u>other than that in which they obtained their professional qualifications</u>..." (Article 2(1))

Mr. McGrath obtained his qualifications in the UK. He seeks to be registered in the UK. He is therefore outside the terms of the Directive.

21. The wording of the Architects Act 1997 is slightly different, but to like effect. Section 4(2A) only applies to a "directive rights national". Section 25(1) defines this term as meaning "*a national of a relevant European State other than the United Kingdom"* or *"a national of the United Kingdom who is seeking access to, or is pursuing, the profession of architect by virtue of an enforceable Community right"*. The second part of the definition covers a situation where a British national obtains their qualifications in another Member State, and therefore obtains an enforceable Community right to be admitted in the UK. These provisions are therefore also inapplicable to Mr. McGrath.

22. The non-application of these rules to Mr. McGrath accords with the usual approach of the EU law of establishment to Member States' regulation of their own nationals. Since such regulations do not contain a cross-border element, the relevant EU laws are generally inapplicable to them.

23. The impact of the Directive, if any, must therefore be indirect. In this regard, it is possible to use the outcome generated by the Directive (which allegedly results, as a matter of fact, in non-UK architects being admitted to the UK register despite their only having qualifications akin to those of Mr. McGrath) to attack the Board's decision using standard UK administrative law principles. The argument would run as follows:

    (1) The Board admits (and is required by the Architects Act to admit) applicants with EU Member State qualifications that are equivalent to those held by Mr. McGrath.

    (2) These applicants, once registered, are indistinguishable from UK trained architects that are admitted to the register. Both are entitled to hold themselves out as architects in exactly the same way.

(3) Nonetheless, the Board persists (by virtue of its requirements under the General Rules) in requiring UK trained applicants to have obtained the Part 3 qualification.[2]

(4) The result of this is that UK applicants are, in effect, held to a higher standard than that applied to (some) EU Member State-qualified applicants.

(5) This approach constitutes indefensible discrimination between two classes of similarly placed persons, which violates the principle of equal treatment and is irrational.

24. This argument is therefore an attack on the Board's prescription of certain qualifications under its General Rules. It is based on the inconsistency generated by the Board's obligations under the Directive, but it does not rely on the Directive itself as the basis for Mr. McGrath's claim.

25. One procedural point arises from this argument. It is conceivable that the Board might argue that the challenge should be brought against its decision to continue to prescribe the Part 3 qualifications under its General Rules, rather than the Board's decision not to register Mr. McGrath, on the basis that the latter decision properly followed the requirements of s.4(1)(a) for so long as the General Rules remained in place. Russell Cooke's letter of 10 February foreshadows such an argument at point 6, when it states that "the decision to which your letter relates was not a decision in relation to the prescription of any Part 3 qualification."

26. If pursued by the Board, this would be a rather technical and unmeritorious argument. It is likely that a court persuaded of the arbitrariness of the Board's conduct would look through the requirements of s.4(1)(a) to find that the Board's adherence to the General Rules was unlawful and thus that the Board's decision based on the Rules

[2] This seems to be common ground. However, I note that it is very unclear where, if at all, the General Rules actually prescribe that an applicant for registration under s.4(1)(a) must have the Part 3 qualification. There is an apparent gap between the requirement in Rule 13 that an applicant hold *"such qualification(s) as are listed in Schedule 2 to the Rules"* and the contents of Schedule 2 itself, which simply lists a host of relevant qualifications with no indication of which combinations (Part 1, Part 2, Part 3 or all three) are required. The Board seems to assume that one example of each qualification has been prescribed under s.4(1)(a), but nowhere in the General Rules is this actually stated.

was similarly unlawful. Nonetheless, if the Board does raise this point then it would be prudent to write to the Board requesting it to change its General Rules to remove the requirement to obtain a Part 3 qualification. When the Board (inevitably) decides to refuse this request, this decision could then be judicially reviewed. In light of the likely adverse costs consequences to the Board in forcing such an unnecessary step, it is likely that the Board will accept that the lawfulness of the General Rules should be considered on the appeal.

27. This procedural issue aside, the case for Mr. McGrath set out above is tenable in principle. However, it suffers from several serious shortcomings:

(1) The result argued for by Mr. McGrath is clearly contrary to the scheme of the Directive:

(a) Article 46 requires potential architects to undertake "at least" a minimum period of study, covering certain specified areas.

(b) If a Member State decided that these minimum requirements were sufficient, it could approve for practice as architects all those that undertook them in that state. All other Member States would then be required to recognise and register that Member State's architects, pursuant to the Directive's mutual recognition provisions.[3]

(c) On Mr. McGrath's case, if one Member State took this step then all other Member States would (in effect) be required to match it, since if the other Member Steps sought to maintain higher standards for the admission of their own nationals the resulting mismatch between their domestic admission rules and those applicable to foreign registered architects would render the maintenance of the domestic rules irrational.

(d) The result would be a "race to the bottom", whereby one Member State's adoption of the minimum requirements in Article 46 would, in substance, result in the imposition of that set of requirements on an EU-wide basis.

[3] Subject, if necessary, to an appropriate amendment to Annexe V.7.

(e) It is clear that the Directive does not require this result. Instead, it envisages that a Member State may impose requirements for training that go beyond the minimum requirements set out at Article 46. This possibility would be closed off by the logic of Mr. McGrath's case.

There is therefore a powerful argument for the Board that their approach cannot be unlawful, since the Directive itself (on which Mr. McGrath's argument is based) envisages that it is permitted.

(2) Similarly, it is plain from the twelfth recital of the Directive that the Directive was not intended to be used to permit a person to indirectly circumvent their own Member State's registration requirements. This is noted in the Grounds of Appeal at page 8.

(3) Separately, Mr. McGrath's argument rests on the premise that there is no justification for the Board's practice of admitting foreign applicants to the UK register on the basis of a given set of foreign qualifications, while simultaneously refusing to register UK applicants with "equivalent" qualifications. But this analysis appears to be an inaccurate description of the Board's approach:

(a) The Directive and its rules on the recognition of foreign qualifications are based on mutual respect for each Member State's rules on establishment. These rules are not based, as such, on the equivalence of those qualifications.

(b) Thus an applicant to the Board under s.4(2A) will be registered on the basis that their qualifications have been approved by their home Member States as sufficient for practice as an architect. They are not registered on the basis of an evaluation by the Board that the qualifications they have obtained are suitable. That evaluation has already been undertaken by the applicant's home Member State.

(c) Mr. McGrath's case requires a quite different enquiry, whereby the Board would be required to evaluate the comparative worth of the individual qualifications obtained in different Member States and establish which are of equivalent value. The Board could argue, quite

justifiably, that it is rational for it to avoid engaging in this exercise. The Board has the jurisdiction and the expertise to establish what, in its view, should be the prescribed qualifications for UK-trained architects. It has decided, on the basis of this enquiry, that Part 3 should be required. There is nothing necessarily irrational in the Board trusting other Member States' authorities to conduct a similar enquiry and reach appropriate conclusions, without seeking to go behind these conclusions to establish the actual strength of the foreign applicant's qualifications. This is particularly so given that (as set out above) a degree of difference in the required qualifications is permitted to individual Member States under EU law, provided they meet the minimum prescribed by Article 46 of the Directive.

(d) Only in the most extreme case of a disparity between the requirements imposed by the Board and those imposed by a foreign Member State could it be argued that the Board must reconsider its own requirements on the ground that it had become irrational to insist on them while also admitting (as required) foreign applicants with lesser qualifications. While it is possible to envisage a situation where this would be so, it is not at all clear that Part 3 (which appears to be a one year course) imposes requirements so far in excess of those required from foreign applicants that its continued imposition can be considered unlawful.

(e) To make out this argument, Mr. McGrath would have to show that the disparity between the Board's prescribed qualifications and those of accepted EU applicants was so dramatic as to fall outside the Board's margin of appreciation. This will be very difficult to argue. To date Mr. McGrath has asserted that the requirements for practice in other Member States are equivalent to or inferior to his own qualifications, but he would actually have to prove this were he to take the case forward on appeal. The difficulty (and cost) of establishing this assertion, which will require detailed consideration of a set of foreign qualifications operating in an alien educational system, should not be underestimated. It will also be difficult to establish that the Part 3 qualification imposes such a burden on UK-trained applicants that it

falls outside the proper scope of the Board's discretion to prescribe qualifications under the Act.

28. On the basis of these shortcomings, it is likely that the Board will succeed in defending its decision on appeal. Given the potential exposure of Mr. McGrath to a significant costs liability were this to occur, it would not be advisable to pursue the appeal on this ground.

The Board's approach to s.4(1)(b) is unlawful

29. This argument is much stronger, at least as a matter of principle. In my view, it is very likely that the Board's approach to s.4(1)(b) is contrary to the statutory scheme of the Architects Act, and therefore wrong in law. However, for the reasons given below, it may be that this will make no difference to the particular position of Mr. McGrath.

30. The argument runs as follows:

(1) Section 4(1) offers two routes to registration. Section 4(1)(a) requires the applicant to hold the prescribed list of qualifications and to gain the prescribed practical experience. Section 4(1)(b) requires the applicant to obtain "a standard of competence" which is "equivalent" to these qualifications and experience, in the opinion of the Board. For the purposes of satisfying the Board under s.4(1)(b), an applicant may be required to pass prescribed examinations (s.4(2)).

(2) It is therefore immediately apparent that s.4(1)(b) must envisage that the list of qualifications prescribed under s.4(1)(a) are *not* a necessary precondition for registration. A combination of alternative experience and (if required) the passing of any examinations under s.4(2) are a legitimate alternative basis for registration.

(3) As regards Parts 1 and 2, there does not seem to be any problem with the Board's approach. It has prescribed suitable examinations under s.4(2), and these appear to operate satisfactorily.

(4) The position is different as regards Part 3. No exams have been prescribed under s.4(2) for Part 3. In practical terms, it appears that the Board's position is that the only way to demonstrate the "equivalent...standard of competence" to that acquired from Part 3 is to pass Part 3 itself. This runs directly contrary to the very purpose of s.4(1)(b), which is to provide an alternative to the s.4(1)(a) route. But it is nonetheless apparent that this is the Board's attitude, based on the following facts:

(a) The Board's internal note states at point 5 that "The Board's opinion in broad terms is that equivalence competence [*sic*] is demonstrated by possessing equivalent qualifications principally in architecture". Similarly, the Board's decision letter states that "The Board's opinion as to equivalent competence is that a person with equivalent competence should hold equivalent qualifications to the prescribed qualifications". However, it appears that no such qualifications exist as regards Part 3, meaning it is impossible in practice to satisfy the Board's approach.

(b) This point is made explicit at page 4 of the note, which states that "The Board's opinion has been that a person has standard of competence equivalent to that demonstrated by holding the prescribed qualifications if they hold equivalent qualifications. In the case of Part 3 in practice this has required an applicant to undertake and pass a prescribed Part 3 qualification. Mr. McGrath does not hold any Part 3 qualification and on this basis Mr. McGrath would not generally be entitled to registration under s.4(1)(b)." The circularity of this reasoning, which effectively states that the only way to satisfy s.4(1)(b) is to satisfy the requirements of s.4(1)(a), is obvious.

(c) The Board's internal note asserts that Part 3 courses are "readily available with good flexibility" (page 3). A similar point is made at paragraph 3 of the Board's decision letter. But this is besides the point, since s.4(1))(b) envisages that a Part 3 qualification is not necessarily required.

(d) Similarly, Russell Cooke state in their letter of 10 February 2011 at paragraph 8.2 that "the Board's view is that the flexibility and availability of Part 3 obviates the need for any different or alternative method of assessing competence". If this was correct then s.4(1)(b) would be rendered otiose for applicants without Part 3. The Board will not be permitted to adopt a policy that would have this result.

(e) The internal note sets out the questions on which Mr. McGrath was asked to provide written representations. It is clear from these questions that the Board assumed that Mr. McGrath needed to explain his failure to pass Part 3. For example, Question 2 asks: "Why the assurance provided by the successful completion of a Part 3 qualification should be dispensed with in this case". The obvious answer is that no such requirement is imposed under s.4(1)(b) of the Act. The fact that the Board asked this question demonstrates that it has adopted the wrong approach to s.4(1)(b).

(f) Similarly, the Board's decision letter notes at paragraph 6 that "the Board was not satisfied that you had properly explained or provided sufficient evidence as to why it was not practical for you to attempt to obtain Part 3". This strongly suggests that the Board assumed that registration under s.4(1)(b) should only be granted if the applicant can first explain his inability to apply under s.4(1)(a). But there is no mandate in the Act for imposing a hierarchy on ss.4(1)(a) and (b). The Board therefore appears to have approached its task under s.4(1)(b) from the wrong angle.

(5) The sole exception made by the Board as a matter of policy appears to be in cases where the applicant has been distinguished in architecture (see Board's internal note at page 3). In these cases it appears that the Board will consider actual practical experience as a basis for demonstrating an equivalent standard of competence, provided the applicant has first "evidenced eligibility to be considered". But there is no basis for imposing this precondition, since the Act simply requires an applicant to show an equivalent standard of competence, without more. The availability of the distinguished achievement route appears

to have played a role in the Board's ultimate decision, since it is raised at paragraph 5 of that letter as a basis for rejecting Mr. McGrath's claim to equivalence.

(6) Separately, the Board appears to have considered making an "exception" to its "general approach" for Mr. McGrath based on his personal experience (Board's internal note, page 5; Board's decision letter, page 2). But this is the wrong question to have asked. The Board should not have considered whether Mr. McGrath was an exceptional case, with all the connotations of imposing a higher standard that the word "exception" carries. Instead, the Board should simply have considered whether Mr. McGrath had the "equivalent...standard of competence" to that required under s.4(1)(a), by reference to the totality of his situation, unconstrained by any requirement to show "equivalent qualifications". Nothing more or less was required.

31. On this basis, it is very likely that the Board's approach to s.4(1)(b) could be overturned on appeal. It appears that the Board has not acted in accordance with the requirements of s.4(1)(b) itself, and therefore that its decision was unlawful. It may also have wrongly fettered its discretion, by adopting a policy that requires Mr. McGrath to satisfy additional requirements beyond those of s.4(1)(b) and/or by requiring "equivalent qualifications" to satisfy s.4(1)(b) where no such requirement is imposed by the Act.

32. However, it is important to emphasise that overturning the Board's erroneous approach would be unlikely to make any substantive difference to Mr. McGrath. At best, the Board would then be required to retake its decision, asking itself the right question of whether he had demonstrated a standard of competence equivalent to that required under s.4(1)(a) (i.e. the competence required to pass Part 3 and the other experience requirements set out in Rule 13 of the General Rules). This exercise will be resolved in accordance with the Board's "opinion" (as required by s.4(1)(b)) as to Mr. McGrath's experience to date. In conducting this assessment the Board will have a broad margin of appreciation, within which the court will not interfere.

33. In my view there is no real prospect of the Board reaching a new decision in favour of Mr. McGrath. The likely result is suggested by the Board's analysis at paragraph 4 of

its decision letter.[4] Furthermore, Mr. McGrath has himself said that "for clarity, the Claimant is not contending that equivalence to the Part 3 qualification has been achieved" (Letter Before Claim, paragraph 5.1.1). On this basis, the Court may not even re-refer the question to the Board, since by Mr. McGrath's own admission his case is incapable of satisfying s.4(1)(b).

34. On this basis I must advise against pursuing the appeal. Any victory on the issue of principle will likely be pyrrhic, and entail substantial exposure as to costs.

35. The position may be different if, in due course, Mr. McGrath acquires additional experience that would allow him to meet the requirements of s.4(1)(b). In those circumstances, the arguments outlined above would still be applicable and there might be a reasonable hope of receiving a favourable decision from the Board. However, as matters stand the Appeal should be discontinued.

Conclusion

36. I believe there are two arguable grounds on which to challenge the decision of the Board, namely that it results in indefensible inconsistency as regards UK and EU-trained applicants, and that the Board's approach to s.4(1)(b) is contrary to the requirements of the Architects Act 1997.

37. For the reasons given above, I believe that the first ground is likely to be unsuccessful on appeal. In my view the second ground has much greater force as a matter of principle, but unfortunately it is unlikely to lead to the overturning of the Board's decision as regards Mr. McGrath on the particular facts of this case. On this basis, I would not advise continuing with the appeal.

Craig Morrison

Brick Court Chambers

22 March 2011

[4] This paragraph was included as an alternative basis for the decision, as the Board's primary decision was that it would not treat Mr. McGrath's application "as an exception". For the reasons given above, the Board's contention that this analysis should only be undertaken exceptionally is clearly contrary to s.4(1)(b).