“The Role of the National Judge in the Preliminary Ruling Procedure”

Nourishing the Judicial Dialogue - points for a check-list

Judge Lars Bay Larsen
ERA Copenhagen 23 September 2016
• Goes for the Member States
• Goes for the CJEU?
  • Check opinions of:
    • AG Juliane Kokott in Case C-157/15 Samira Achbita (pending)
    • AG Eleanor Sharpston in Case C-188/15 Asma Bougnani (pending)
• Still, the CJEU has to secure the uniform application of Union Law in the EU and in the Member States
“Preliminary Ruling Procedure”

• National Courts play a key role:
  – By resolving the big bulk of cases on EU Law themselves (perhaps without even reflecting on it)
  – By selecting the cases in which a preliminary reference should be made, a specific judicial dialogue initiated

• But judicial dialogues may be prepared, initiated and handled with more or less care

• The level of care exercised may affect the quality of the dialogue
Preliminary Ruling Procedure 1
- elements to a check-list: Role of the CJEU

• The competence of the CJEU
  – Art. 267 TFEU/Art. 19, 3 (b) TEU
    • Interpretation of Primary and Secondary Union Law
    • Validity of Secondary Union Law (Acts of the EU Institutions)
    • Some exceptions (i.e.: Art. 275 TFEU, CFSP, and Art. 276 TFEU, Police operations to uphold law and order)

• The out-put from the CJEU:
  – Interpretation or validity-check. NOT to apply that interpretation to the underlying facts of the case
Preliminary Ruling Procedure 2
- elements to a check-list: To refer or not?

Interpretation:
• A faculty for lower courts
• An obligation for courts of last instance
  – Exception: “Acte Claire” (no reasonable doubt about the right interpretation of EU-law, see Cilfit-judgment)
  – Exception: “Acte Eclaire” (existing jurisprudence, see Cilfit-judgment)

Validity:
• Only EU Courts may declare an EU act invalid
  – If in doubt of validity, then refer
Preliminary Ruling Procedure 3
- elements to a check-list: To refer or not

- Responsibility of the national judge, not the parties
- Who should refer: First instance/later instance?
- Several elements:
  - Degree of necessity?
  - Other ways to decide the case?
  - Reason to “push case upwards”? 
  - Do NOT refrain from referring for fear you may not like the answer (Danes may think of Ladykid).
Preliminary Ruling Procedure 4
- elements to a check-list: Form

• Appr. 10 pages will often suffice
• Keep it clear, precise and simple
• The ”DDP” (the request (not the annexes) will be translated into all the (23) other EU–languages)
• National judge is setting the scene
  – Concerning national law and case-law
  – Establishing the facts
Preliminary Ruling Procedure 5
- elements to a check-list: Explaining national law

• The aunt at the dinner party test
• You are NOT before your national Supreme Court
• EU-judges are NOT familiar with even key elements of your national legal order (examples from Danish Law):
  – Like basic principles of Family Law: ("Særråden og særhæften")
  – Like rules on when the right of property passes ("aftale/levering/overgivelse")
  – Like rules on vindication/extinction ("DL 6-17-5, 5-7-4 & 5-8-12")
  – Like Danish rules on "skrotpræmie" (pending VAT-case, see AG Bot opinion)
Preliminary Ruling Procedure 6
- elements to a check-list: Consider formulating an answer

• Important to explain why you need an interpretation of EU Law
• Show how you see the interplay/conflict between national law and EU Law
• Consider proposing an answer to your question(s).
• French benefit: Helps you explain national law (a lot) better to bloody foreigners/aunts
Preliminary Ruling Procedure 7
- elements to a check-list: Additional reminders

• Special parties? (UNHCR?) Standing before the CJEU if standing nationally.

• Anonymisation? Timely request needed.

• Request for expedited or urgent procedures?:
  – Priority Treatment
  – Expedited Procedure
  – Urgent Procedure ("PPU" in AFSJ)
Preliminary Ruling Procedure 8
- elements to a check-list: Further reminders

• Costs? ("None")
• Legal Aid?
• Do not forget to send the national file or a copy (as a life-west)
• For a perhaps more complete (and maybe less provocative) list of advice: Consult www.curia.europa.eu (available in all 24 official EU-languages).
Preliminary Ruling Procedure 9
- when things are imperfect

- Judicial dialogues may – in spite of all efforts deployed – and like other dialogues/conversations - be more or less fruitful, lead to new questions or simply go wrong.
  - Possible to seek clarification of a preliminary ruling
  - Possible to ask new questions
Preliminary Ruling Procedure
- elements to a check-list: Final comfort

Finally, remember the advice of Samuel Beckett:

• "Ever tried. Ever Failed. No matter. Try again. Fail again. Fail better."