



This publication has been produced with the financial support of the European Union's Justice Programme 2014-2020. The contents of this publication are the sole responsibility of the author and can in no way be taken to reflect the views of the European Commission.

ERA SEMINAR (DUBLIN)

Tuesday 14th March 2017

“How to Litigate the Right to Family Life before the European Courts”

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The contents of this presentation do not constitute the provision of legal advice.
This material has been prepared for informational purposes only.

ERA Seminar

- Taking a Case to the Court of Justice of the European Union (CJEU) with particular reference to Article 267 TFEU
- Jurisdiction of the General Court

Most Common Types of Cases before the CJEU

1. Enforcing the Law (Infringement Proceedings):
Arts. 258-260 TFEU
2. Annuling EU Legal acts (Actions for Annulment): Article 263 TFEU
3. Interpreting the Law (Preliminary Rulings):
Article 267 TFEU

Jurisdiction of General Court

- Jurisdiction to hear and determine at first instance actions of proceedings referred to in Articles 263, 265, 268, 270 and 272 with the exception of those assigned to a specialised court and those reserved in the Statute for CJEU
- Jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 in specific areas laid down by the Statute
- Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the CJEU for a ruling
- Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the CJEU under the conditions and within the limits laid down by the Statute if there is a serious risk of the unity or consistency of Union law being affected.

Articles 258-260 TFEU

- **Article 258 TFEU:**
 - Commission fulfills its watchdog role as guardian of the Treaties
 - Types of Breach by Member States of Community law e.g. failure to implement a Directive or inadequate implementation of EU law
 - Procedure
 - State Defences
- **Article 259 TFEU:**
 - Mechanism for one Member State to initiate action against another Member State
- **Article 260 TFEU:**
 - Lump sum or penalty payment

Article 263 TFEU

- Central article for challenging acts of Community institutions
- Institutions/Bodies that may have their acts or legislation reviewed
- Acts/legislation that may be challenged - see Case *C-540/03 European Parliament v. Council* [2006] ECR I-5769 on challenge brought to the Family Reunification Directive
- Grounds that form the basis for a challenge - see in particular in the context of family life, the general principles of EU law to include proportionality, legal certainty, legitimate expectations and non-discrimination
- Time limits
- Categories of applicant that may challenge acts
- Related actions: Art. 279 TFEU (Interim measures), Art. 265 TFEU (Failure to act) and Art. 277 TFEU (Plea of Illegality)

- Article 267 TFEU reads:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretations of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

The Provisions which can be Referred under Article 267 TFEU

- (i) References can be made concerning the interpretation of the Treaties.

- (ii) References can be made concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Community.

The Courts or Tribunals to Which Article 267 TFEU Applies

- Question one of Community and not national law
- What is more significant than the label attached is whether the body performs judicial functions
- Case by case determination
- The ECJ in *Dorsch Consult*, Case C-54/96 [1997] ECR I-4961 provided a list of what constitutes a 'judicial function' for the purposes of Article 267 TFEU to include:
 - (i) Whether the body is established by law;
 - (ii) Whether it is permanent;
 - (iii) Whether its jurisdiction is compulsory;
 - (iv) Whether its procedure is *inter partes*;
 - (v) Whether it applies rules of law;
 - (vi) Whether it is independent.

Obligation or Discretion to Make a Preliminary Reference

- Article 267 TFEU draws a distinction between the courts against whose decision there is no judicial remedy in national law and are therefore obliged to refer where this is necessary for the interpretation or validity of EU law (Article 267(3)) and the courts which enjoy a discretion as to whether to make a preliminary reference (Article 267(2)).
- The ECJ established in *Köbler v. Austria*, Case C-224/01, [2003] CMLR 1003, that Member States can be held liable for breaches of EU law committed by their Supreme Courts, with one of the circumstances being non-compliance by the court in question with its obligation to make a preliminary reference under Article 267(3) TFEU.
- ‘Concrete theory’ and ‘Abstract theory’ - see *Costa*, Case 6/64, [1964] ECR 585 and *Lyckeskog*, Case C-99/00, [2002] ECR I-4839.

The Circumstances in Which a Preliminary Reference May be Made by National Courts

Broadly speaking, there are three situations which may result in a preliminary reference:

- Where a piece of secondary Community law may be invalid;
- Where national law might be in conflict with EU law;
- Where there is doubt as to how Community law is to be applied.

Exceptions to the Obligation to Refer

1. Facts virtually identical to earlier case law – see *Da Costa*, Cases 28-30/62 [1963] ECR 31.
2. There exists previous case law – see *CILFIT* Case 238/81, [1982] ECR 3415.
3. The answer is obvious – see *CILFIT* Case 238/81, [1982] ECR 3415.

The Circumstances under Which the ECJ may Declare a Reference Inadmissible

1. If it concerns a purely hypothetical question – see *Borker v. Paris Bar* Case 138/80 [1980] ECR 1975.
2. If the ECJ considers that the parties to the dispute had contrived together in the absence of a genuine dispute – see *Foglia v. Novello (No .2)* Case 244/80 [1981] ECR 3045.
3. If the questions raised are not relevant to the resolution of the substantive action in the national court – see *Meilicke* Case C-83/91 [1992] ECR I-4871.
4. If the questions are not articulated clearly enough for the ECJ to be able to give any meaningful legal response.
5. If the facts are insufficiently clear to enable it to apply the relevant legal rules.

Statute of the CJEU

- Title III – Procedure before the CJEU
- Article 20 – the procedure before the CJEU shall consist of two parts: written and oral
- Article 23 – Cases governed by Article 267 TFEU
- Article 23a – Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice an urgent procedure.

Rules of Procedure of the CJEU

- Consolidated version of the Rules of Procedure of the Court of Justice of 25th September 2012 (as amended on 18 June 2013 and 19 July 2016)
- Title III – References for a Preliminary Ruling
- Article 94 – Content of the request (i) summary of the subject matter and accounts of facts on which the questions are based (ii) tenor of any national provisions and where, appropriate, the relevant national case-law (iii) statement of reasons which prompted the reference
- Article 96 – Participation in preliminary ruling proceedings
- Article 99 – Reply by reasoned order

Rules of Procedure of the CJEU

- **Chapter 2 – Expedited Preliminary Ruling Procedure**
 - Article 105 – Expedited Procedure derogating from the provisions of the Rules
 - Ordinary or Standard Procedure - delays of up to 16.8 months and this necessitated introduction of speedier reference mechanisms for limited categories of cases.
 - Article 105(1) – statements or written observations may be lodged within a time-limit prescribed by the President which shall not be less than 15 days
 - Article 106 – transmission of procedural documents

Rules of Procedure of the CJEU

- **Chapter 3 – Urgent Preliminary Ruling Procedure**
 - Scope: areas covered by Title V of Part Three of TFEU
 - Decision as to urgency: this is taken by the designated Chamber, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General
 - Article 109 – the decision to deal with the reference under the urgent procedure shall prescribe the time-limit within which those parties or entities may lodge statement of case or written observations
 - The designated Chamber may, in cases of extreme urgency, decide to omit the written part of the procedure referred to in Article 109(2).

Recommendations to National Courts and Tribunals in relation to the Initiation of Preliminary Ruling Proceedings

- The Recommendations (2016/C439/01) replace the Information Note on references from national courts for a preliminary ruling (OJ C 160, 28.5.2011).
- The following are some of the Recommendations:
 - a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of EU law, or where the existing case-law does not appear to be applicable to a new set of facts
 - the referring court or tribunal must set out the reasons which prompted it to inquire about the interpretation or validity of provisions of EU law and the relationship between those provisions and the national legislation applicable to the main proceedings
 - the request for a preliminary ruling should be drafted simply, clearly and precisely, avoiding superfluous detail.
 - Since the CJEU has no jurisdiction to give a preliminary ruling where a legal situation does not come within the scope of EU law, any provisions of the Charter that may be relied upon by the referring court or tribunal cannot, of themselves, form the basis for such jurisdiction.

Recommendations (Ctd).

- About 10 pages is often sufficient to set out in a proper manner the context of a request for a preliminary ruling.

- The request must contain, in addition to the text of the questions:

- (i) A summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions referred are based;
- (ii) The tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;
- (iii) A statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law and the relationship between those provisions and the national legislation applicable to the main proceedings.

The Recommendations also contain an Annex which address the essential elements of a request for a preliminary ruling and include: the referring court or tribunal, the parties and their representatives, the subject matter of the dispute, the grounds for reference, and the questions referred .

Recommendations (Ctd).

- **Conditions for the application of the expedited and urgent procedures**
 - Application for expedited procedure must only be sought in particular circumstances that warrant the Court giving its ruling quickly
 - Application for urgent procedure must be requested only where it is absolute necessary e.g. proceedings concerning parental authority or custody of young children.
 - Request must set out precisely the matters of fact and law which establish the urgency and, in particular, the risks involved in following the ordinary procedure.

Recommendations (Ctd).

- In so far as is possible, the referring court or tribunal must also briefly state its view on the answer to be given to the questions referred
- The request for the application of the expedited or urgent procedure must be submitted in an unambiguous form that enables the Registry to establish immediately that the file has to be dealt with in a particular way
- The order for reference must be concise where the matter is urgent, to help ensure the rapidity of the procedure.

Practice Directions to Parties Concerning Cases brought before the Court (31.1.2014)

- By means of a “working tool” for legal practitioners, the ECJ had published *Notes for the Guidance of Counsel (2009)* which addressed the steps in preliminary reference proceedings before the ECJ. These have now been included in Practice Directions to Parties concerning cases brought before the Court.
- The procedure before the CJEU is to consist as a general rule, of a written and an oral part.
- The purpose of the written part in preliminary reference proceedings is to put before the Court the observations which the interested persons referred to in Article 23 of the Statute intend to submit concerning the questions.
- The oral part is intended to allow the Court to complete its knowledge of the case by the possible hearing of submissions from those parties or interested persons at a hearing, and if appropriate, by hearing the Opinion of the Advocate General.
- In preliminary rulings, it is for the referring court or tribunal to rule on the costs of the proceedings.

Practice Directions to Parties Concerning Cases brought before the Court (31.1.2014)

- Where a party considers it necessary that its identity or certain information concerning it should not be disclosed in a case brought before the Court, it may request that the Court “anonymise” the relevant case, in whole or in part.
- The written part of the procedure in preliminary references is characterised by the absence of adversarial proceedings, the interested persons referred to in Article 23 of the Statute being merely requested to submit any observations they may make on the questions referred by a national court or tribunal, without as a general rule knowing the position adopted by the other interested persons on those questions.
- The written observations must be lodged within a time limit of two months from service of the request for a preliminary ruling (extended on account of distance by a single period of 10 days), that cannot otherwise be extended.
- The written pleadings or observations lodged are presented in a form in which they can be processed electronically by the court and that, in particular, documents can be scanned and character recognition used.

Practice Directions to Parties Concerning Cases brought before the Court (31.1.2014)

- The written pleadings or observations must be drafted in clear, concise language.
- Only the documents expressly provided for by the procedural rules may be lodged at the Registry and must be lodged within the prescribed time-limits and observing the requirements set out in Article 57 of the Rules of Procedure.
- An oral hearing is arranged by the Court whenever it is likely to contribute to a better understanding of the case and the issues raised by it, whether or not a request to that effect has been made by the parties or the interested persons referred to in Article 23 of the Statute.
- Where those parties or interested persons consider that a hearing must be arranged in a case, the onus is on them as soon as they have received notification of the end of the written part of the procedure to inform the Court by letter why they wish to be heard.
- Before the hearing begins, the members of the formation of the Court usually hold a short meeting with the representatives of the parties of interested persons about the organisation of the hearing.

Practice Directions to Parties Concerning Cases brought before the Court (31.1.2014)

- The normal procedure at the hearing:

(i) The oral submissions

- Only the decisive points for the purposes of the Court's decision must be brought to its attention

- As a general rule, the speaking time is fixed at 15 minutes. However, that duration may be made longer or shorter depending on the nature or the specific complexity of the case, the number and procedural status of the participants in the hearing and any measures of organisation of procedure.

- If the parties have a text available, however short, of notes for the oral submissions or an outline of their argument, it should be sent in advance to the interpretation directorate.

(ii) Questions from the members of the Court

- The persons presenting oral argument may be requested, at the end of the oral submissions, to answer additional questions from the members of the court.

(iii) Replies

- After that exchange, the representatives of the parties or the interested persons finally have the opportunity, if they consider it necessary, of replying briefly. Those replies, of a maximum duration of five minutes each, do not constitute a second round of oral submissions.

Selection of Irish Preliminary References in Family and Child Law

- Case C-428/15, *Child and Family Agency v J.D.*, 27th October 2016 – Scope and conditions applicable to Article 15 of *BrusselsIIbis*
- Case C-173/16 *M.H. V. M.H.* - Order of the CJEU of 22nd June 2016 – Determination of the time when a court is seised under *BrusselsIIbis*

Selection of Irish Preliminary References in Family and Child Law

- Case C-92/12 PPU, *HSE v S.C. And A.C.*, 26th April 2012 – Material scope of Article 56 of *Brussels IIbis*
- Case C-400/10 PPU, *McB v E*, 5th October 2010
Rights of Custody in context of child abduction.