

Advanced Training in EU Law for Court Coordinators

PRELIMINARY RULING PROCEDURE

Trier, 14 October 2019

Workshop

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I. Topics for discussion

Description of the factual and legal context

Identify EU law and EU case law

How to present the legal arguments in support of the reference

(Re)formulating the questions of the referring judge

II. Case studies (see next pages)

1. Hay, C-267/12, ECLI:EU:C:2013:823

Law

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16)

Article 2:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

[..]

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Background to the dispute and questions referred

At the time of the facts of the case¹, the relevant French legislation restricted marriage to persons of different sexes.

Mr Hay is an employee of Crédit agricole mutuel, whose collective agreement granted certain benefits – days of special leave and a salary bonus – to employees on the occasion of their marriage. Mr Hay, who had entered into a PACS arrangement (civil solidarity pact) with his same-sex partner, was refused those benefits on the ground that, under the collective agreement, they were granted only upon marriage. Mr Hay challenged that refusal before the French courts.

The Cour de cassation (France), before which the case was brought at the highest level of appeal, asked the Court of Justice as follows:

'Must Article 2(2)(b) of [Directive 2000/78] be interpreted as meaning that the choice of the national legislature to allow only persons of different sexes to marry can constitute a legitimate, appropriate and necessary aim such as to justify indirect discrimination resulting from the fact that a collective agreement which restricts an advantage in respect of pay and working conditions to employees who marry, thereby necessarily excluding from the benefit of that advantage same-sex partners who have entered into a [PACS]?'

Discussion

Is the question of the Cour de cassation admissible? If yes/no, why?

Would you want to reformulate the question? If yes, how?

How would you answer the question?

¹ Marriage between persons of the same sex was allowed in France by Law No 2013-404 of 17 May 2013.

2. Radu, C-396/11, ECLI:EU:C:2013:39

Law

TEU

Article 6

'1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. [...]

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

The Charter

Article 6

'Everyone has the right to liberty and security of person.'

Article 47

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.'

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. [...]

Article 48

'1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.'

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.'

Article 52

'1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. [...]

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. [...]

European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention')

Article 5

'1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court; [...]
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; [...]
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. [...]
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

Article 6

- '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

Interrelationship between the Charter and the Convention

Article 52(3) of the Charter makes it plain that there is, and is intended to be, overlap between the provisions of the Charter and those of the Convention. Article 6 of the Charter corresponds to Article 5 of the Convention. The second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the Convention and Article 48 of the Charter corresponds to Article 6(1) and (2) of the Convention. (4)

Background to the dispute and questions referred

On various dates in 2007 and 2008, four European arrest warrants were issued by Public Prosecutor's Offices in Germany for the arrest of Mr Radu. Each of those warrants related to the offence of robbery. That offence is also a crime under Romanian law by virtue of Article 211 of the Romanian Penal Code. Mr Radu did not consent to his surrender.

Before the Curte de Apel Constanța (Court of Appeal, Constanța), Mr Radu put three principal arguments in support of his claim that the warrants in question should not be enforced.

First, he argued that on the date on which the Framework Decision was adopted, neither the Convention nor the Charter had been specifically incorporated into the Founding Treaties of the European Union as rules of law. That is in contrast to the position under the consolidated version of the EU Treaty which entered into force on 1 December 2009 with the Lisbon Treaty. As a result, it is necessary to interpret and apply the Framework Decision in accordance with the Charter and the Convention.

Second, he claimed that the procedures by which the Member States apply the decision are not consistent and draws attention to the requirement of reciprocity in the execution of arrest warrants both as regards the issuing Member State and the executing Member State.

Third, he contended that it is the duty of the executing State to ascertain whether the issuing State has observed the rights and guarantees established by the Charter and the Convention. A failure on that State's part to do so would represent a ground for refusal to execute the European arrest warrants in question.

In those circumstances, the Curte de Apel Constanța decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Are Article 5(1) of [the Convention], and Article 6, read in conjunction with Articles 48 and 52 of [the Charter], with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention], provisions of primary [EU] law, contained in the founding Treaties?

(2) Does the action of the competent judicial authority of the State of execution of a European arrest warrant, entailing deprivation of liberty and forcible surrender, without the consent of the person in respect of whom the European arrest warrant has been issued (the person whose arrest and surrender is requested) constitute interference, on the part of the State executing the warrant, with the right to individual liberty of the person whose arrest and surrender is requested, which is authorised by EU law, pursuant to Article 6 TEU, read in conjunction with Article 5(1) of [the Convention], and pursuant to Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention]?

(3) Must the interference on the part of the State executing a European arrest warrant with the rights and guarantees laid down in Article 5(1) of [the Convention] and in Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention], satisfy the requirements of necessity in a democratic society and of proportionality in relation to the objective actually pursued?

(4) Can the competent judicial authority of the State executing a European arrest warrant refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of [EU] law, by reason of a failure to observe all the cumulative conditions under Article 5(1) of [the Convention] and Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention]?

(5) Can the competent judicial authority of the State executing a European arrest warrant refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of [EU] law, on the ground that the State issuing the European arrest warrant has failed to transpose or fully to transpose or has incorrectly transposed (in the sense that the condition of reciprocity has not been satisfied) [the Framework Decision]?

(6) Is the domestic law of Romania, a Member State of the European Union – in particular Title III of Law No 302/2004 – incompatible with Article 5(1) of [the Convention] and Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention], to which Article 6 TEU refers, and have the above provisions properly transposed into national law [the Framework Decision]?'

Discussion

Assess the admissibility of the questions of the Curte de Apel Constanța.

Would you reformulate (some of) the questions? If yes, how?

How would you answer them?

3. Ognyanov, C-614/14, EU:C:2016:514

Background to the dispute and questions referred

In 2012, Mr Ognyanov, a Bulgarian national, was convicted of murder and aggravated theft by Retten i Glostrup (the court of Glostrup, Denmark) and sentenced to a cumulative fifteen years imprisonment. After having served part of his sentence of imprisonment in Denmark, Mr Ognyanov was handed over to the Bulgarian authorities, on 1 October 2013, so that he could serve the remainder of his sentence in Bulgaria.

In 2014, the Sofiyski gradski sad (Sofia City Court, Bulgaria) referred to the Court various questions on the interpretation of Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (Case C-554/14, Ognyanov)².

After the lodging of those questions for a preliminary ruling in Case C-554/14, Ognyanov, the Sofiyska gradska prokuratura (the Sofia City Prosecutor, Bulgaria), a party to the main proceedings, requested that, inter alia, the panel of judges of the Sofiyski gradski sad (Sofia City Court) that was responsible for the examination of the case at issue should **disqualify** themselves, on the ground that, by setting out, in paragraphs 2 to 4 of the request for a preliminary ruling, the factual and legal context of that case, that court was expressing a provisional opinion on questions of fact and law before deliberations had begun.

The referring court questions the legality, having regard to EU law, of a national rule, such as that at issue in the main proceedings, which obliges a panel of judges in a Bulgarian court to be disqualified because it expressed, in the request for a preliminary ruling addressed to the Court, a provisional opinion, in that it set out the factual and legal context of the case at issue in the main proceedings.

In those circumstances the Sofiyski gradski sad (Sofia City Court, Bulgaria) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) Does it constitute an infringement of EU law (second paragraph of Article 267 TFEU, in conjunction with Article 94 of the Rules of Procedure of the Court of Justice, Articles 47 and 48 of the Charter [... and other applicable provisions) if the court which submitted the request for a preliminary ruling allows the proceedings to continue before it after delivery of the preliminary ruling and delivers a decision on the merits of the case without disqualifying itself? The ground for such disqualification is the expression by that court of a preliminary view on the merits of the case in the request for a preliminary ruling (in that it considered certain facts to have been established and a certain legal provision to be applicable to those facts.

The question is referred on the assumption that all procedural provisions protecting the parties' rights to adduce evidence and to make submissions were complied with in the determination of the facts and applicable law for the purposes of submitting the request for a preliminary ruling.

(2) If the answer to the first question is that it is lawful for the hearing of the case to continue, does it constitute an infringement of EU law if:

(a) The court reproduces in its final decision, without amendment, all the findings set out in its request for a preliminary ruling and declines to take new evidence or to hear the parties in relation to those factual and legal outcomes (with the court, in practice, taking new evidence and hearing the parties only in respect of matters not regarded as having been established in the request for a preliminary ruling)?

² (OJ 2008 L 327, p. 27), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24)

(b) The court takes new evidence and hears the parties on all relevant issues, including those on which it has already stated its view in the request for a preliminary ruling, and sets out its view in its final decision on the basis of all the evidence adduced and after examining all the parties' arguments, irrespective of whether the evidence was adduced before submission of the request for a preliminary ruling or after delivery of the preliminary ruling, and of whether the arguments were put forward beforehand or afterwards?

(3) If the answer to the first question is that it is compatible with EU law for the hearing of the case to continue, is it compatible with EU law if the court decides not to allow the main proceedings to continue before it and to disqualify itself from the case on the ground of bias, it being contrary to national law (which offers a higher level of protection in respect of the interests of the parties and of justice) for the proceedings to be allowed to continue, and where such disqualification is based on the fact that:

(a) before delivering its final decision, the court had expressed a preliminary view on the proceedings in the request for a preliminary ruling, which is permissible under EU law but which is prohibited under national law;

b) the court's final view would be set out in two legal acts instead of one (on the assumption that the request for a preliminary ruling constitutes a final, rather than a preliminary, view), which is permissible under EU law but which is prohibited under national law?'

Discussion

Assess the admissibility of the questions of the Sofiyski gradski sad

How would you answer the question?