



Ensuring the effectiveness of EU law

Fact of the case:

Mr Milenkov, a Bulgarian national, was sentenced to 15 years for murder and first-degree robbery by a criminal court in Denmark. After serving part of his sentence in Denmark, Milenkov was delivered to the Bulgarian authorities to serve the remainder of his sentence in Bulgaria. Through the preliminary ruling procedure, the Criminal Court of Sofia submitted several questions to the CJEU, concerning the interpretation of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments in criminal matters.

Immediately after the request for a preliminary ruling, the Prosecutor's Office in Sofia requested the exclusion of the judges who submitted the preliminary question to the CJEU from the case, based on the premise that those judges set out the factual and legal context of the case and this fact raises issues of potential bias in the said case. The Sofia Prosecutor's Office bases its request for exemption on the Bulgarian Supreme Court of Cassation case law, according to which a judge's preliminary judgment on a case before a final and irrevocable decision has been made, constitutes a special case of bias on the part of that judge.

The Sofia Criminal Court, before declaring an exception, again puts forward a request for a preliminary ruling to the CJEU, requesting clarification as to whether Article 267 of the Treaty on the Functioning of the European Union, which provides for the preliminary ruling procedure, interpreted in light of paragraph 2 of Article 47 and Article 48 (1) of the Charter, must be interpreted as precluding the national rule which requires the judges of the referring court to be excluded from the case pending before them on the grounds that they stated the factual and legal context of that case for the purposes of requesting a preliminary ruling.

Arguments to be considered

According to the settled case law of the CJEU the application of national provisions, which may undermine the effectiveness of EU law, is prohibited and national courts must set aside those rules of their own motion when adjudicating cases within the scope of application of EU law.

Legal Framework

Relevant European Law

Council Framework Decision 2008/909/JHA of 27 November 2008 on the mutual recognition of judgments in criminal matters states that it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.



Co-funded by the Justice Programme
of the European Union



Ludwig Boltzmann Institute
Human Rights



CENTRE FOR
EUROPEAN
CONSTITUTIONAL
LAW
Transnational and European Justice Programme



INPRIS



National Research Council of Italy
ISGL
Institute for International Legal Studies



REPUBLIC OF AUSTRIA
FEDERAL MINISTRY OF JUSTICE



REPUBLIKA HRVATSKA
Pučki pravobranitelji

Article 94 of the Rules of Procedure of the CJEU, headed ‘Content of the request for a preliminary ruling’, provides that, in addition to the text of the questions referred, the request for a preliminary ruling shall contain: a) 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 are based; (b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law; (c) 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.

Relevant National Law

Article 29 of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; ‘the NPK’) provides that a judge may not take any part in the hearing of a case where, inter alia, there are reasons to believe that judge to be biased. According to the case-law of the Varhoven kasatsionen sad (Supreme Court of Appeal, Bulgaria), if a judge expresses a provisional opinion on the substance of a case before the final judgment is delivered, that constitutes one particular example of bias.

In the event of bias, the panel of judges allocated the case are obliged to disqualify themselves, which means, first, that those judges are to undertake no further examination of the case, second, that the case is re-allocated to other judges of the court concerned and, third, that the designated new panel of judges recommences examination of the case at issue *ab initio*. If a judge fails to disqualify himself, continues to examine the case and delivers a final judgment, that judgment will be defective, because its adoption will have taken place in ‘breach of essential procedural rules’. The higher court will set aside that judgment and the case at issue will be re-allocated to another judge for examination anew.

Bulgarian case-law adopts a particularly strict interpretation of the criterion of ‘bias’. Review of that criterion is undertaken of the courts’ own motion and even the slightest indication with respect to the facts of the case at issue or their legal classification leads automatically to there being grounds for the disqualification of a judge.

The expression by a judge of a provisional opinion entails not only that the judge is disqualified and his or her final judgment set aside, but also that an action for damages will be brought against the judge for a disciplinary offence. In accordance with points 2.3 and 7.4 of the Kodeks za etichno povedenie (National Code of Conduct), a judge is prohibited from making public statements on the outcome of a case for the examination of which he or she is responsible or from stating a provisional opinion. Further, point 7.3 of the National Code of Conduct provides that a judge may state a view on questions of legal principle, but may not refer to specific facts and their legal classification.

Questions

- 1) Are the cited articles of the Charter of Fundamental Rights applicable in this case?
- 2) Can one deem that the Bulgarian legislation, as interpreted by the Bulgarian Supreme Court of Cassation, by imposing the exclusion of those judges in the said case, guarantees a higher level of protection of fundamental rights?