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# The Trial: New Adventures of Mr. K in the European Union

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## Introduction

This report summarizes the findings of the proceedings in *Franz K. v. Kingdom of H.*, taking into account the course of the proceedings with regard to the principles of the guaranteed right to a fair trial within the meaning of Article 6 of the European Convention on Human Rights (hereinafter "ECHR") and Article 47 of the European Union Charter of Fundamental Rights (hereinafter "EUCFR").

Judicial proceedings in general are ideally intended to contribute to the common good, justice and legal certainty,<sup>1</sup> and it is no coincidence that the ancient definition of law as an art of good and just.<sup>2</sup> Those objectives can then be achieved only in proceedings which themselves satisfy the criteria of the right to a fair trial under the above provisions. It must not be the case in any proceedings that a party to the proceedings is not aware of the subject-matter of the proceedings and is not given the opportunity to make his views known and to be heard on the decision. Those rules are particularly important in criminal proceedings in which a person's life and guilt of a crime are at stake. It must not be the case that an individual will not know what he is being charged with, will not understand what is happening in the proceedings, will not be able to comment on the evidence gathered against him, will not be heard by an independent and impartial judge or will not be able to participate in the proceedings at all. Such a trial would not be a fair trial that contributes to justice, but would be reminiscent of the fictional character

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<sup>1</sup> Gustav Radbruch, quoted by HANUŠ, Libor. *Glosses on Legal Argumentation*. Brno: Masaryk University, 2013, pp. 14-15. Legal values and legal principles. In HAVEL, Bohumil, PIHERA, Vlastimil (eds.). *Private law on the road. Essays and other texts for the jubilee of Karel Eliáš*. Pilsen: Aleš Čeněk, 2010, pp. 145-149.

<sup>2</sup> "Ius est ars boni et aequi" *Digesta 1, 1, 1, pr.*

Joseph K., who is tried in an absurd trial in which he does not know his charges, does not participate in person and is not informed of the sentence of death.<sup>3</sup>

## **1 The Court of Justice of the European Union further proceedings**

According to the Article 267 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") states that *"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties."* 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." The courts of the Member States have a wide discretion as to whether to request a preliminary ruling and it is at their discretion to decide what question is necessary to decide the case.<sup>4</sup> At the same time, however, it must be a question related to the proceedings, not a hypothetical question,<sup>5</sup> and the court must define the factual and legislative context of the case.<sup>6</sup>

The possibility for a national State to refer a question to the Court of Justice (hereinafter "CJEU") for a preliminary ruling must not be impaired by national or European Union law.<sup>7</sup> Nor can the fact that national procedural rules, according to which courts not of last instance are bound by the higher courts, in any way call into question the possibility for a court to refer a question for a preliminary ruling to the CJEU, provided that the other conditions are met.<sup>8</sup> It is permissible for a court's decision to refer a question referred to the CJEU to be appealed and, if the higher court, in the context of an appeal against a reference for a preliminary ruling, also decides on the merits of the case, the reference for a preliminary ruling loses its relevance.<sup>9</sup> However, if the higher court decides only that the question is not raised (and withdraws it from the CJEU), and if at the same time the proceedings before the original court continue, such rules cannot call into question the right of the court to raise a preliminary question.<sup>10</sup> The Court then

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<sup>3</sup> KAFKA, Franz. *Process*. Prague: Academia, 2008, 259 p.

<sup>4</sup> Case C-173/09 *Elchinov*.

<sup>5</sup> Case 244/80 *Foglia*.

<sup>6</sup> Joined Cases C-320-322/90.

<sup>7</sup> Case 166/73, *Rheinmühlen II*, paras 3-4; Case 127/73, *BRT-Sabam*, para 23.

<sup>8</sup> Case 166/73, *Rheinmühlen II*; Case C-173/09, *Elchinov*, para 27.

<sup>9</sup> Case C-252/06 *De Nationale Loterij*.

<sup>10</sup> C-210/06 *Cartesio*.

takes no account of a decision of a higher court which interferes with the possibility of referring a question to the CJEU for a preliminary ruling.<sup>11</sup>

It can therefore be summarised that, in the present case, it was permissible for there to be an appeal against the referral of a preliminary question to the CJEU, but if the appeal results only in a decision on the possibility of referring a preliminary question and not on the resolution of the entire case, this cannot affect the court's ability to raise a preliminary question. The CJEU should therefore proceed with the preliminary ruling.

## **2 The access to justice and the right to fair trial**

The right of access to a court is guaranteed to everyone by fundamental human rights instruments at international, European and national level. These guarantees are also provided by Article 6 ECHR and Article 47 EUCFR, and the guarantees are elaborated in specific cases by the extensive case law of the European Court of Human Rights and the European Court of Justice.

The basic idea behind the guarantee of the right of access to justice and the right to a fair trial is to protect the individual from state power, against which the individual would otherwise be unable to defend himself effectively due to his unequal position. Thus, in the case of criminal proceedings, the guarantees are intended to prevent an individual from being unfairly tried without the possibility of vindicating his or her rights.

In the present case, there are several breaches of these safeguards. The mere conviction of Franz K. in absentia cannot be regarded as a breach of the right to a fair trial in view of the possibility of a retrial by appeal.<sup>12</sup> However, the conviction on the basis of unlawful evidence clearly constitutes a violation of the right to a fair trial (see further chapters 2.2) and of the principle of the Rule of Law (Recital 5 of the Preamble of the ECHR and Article 2 of the Treaty of the European Union). A fair trial was violated by the failure to respect the defendant's rights in the area of interpretation (see further chapter 2.3) and by interference with the independence of the court (see further chapters 2.4, 2.5 and 2.6). The question of the compatibility of national standards with the standards of European Union law in criminal proceedings was then to be addressed by a tribunal which did not meet the requirements of the concept of a court (see further chapter 2.1).

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<sup>11</sup> Case C-564/19.

<sup>12</sup> Krombach v. France.

## 2.1 Notion of court

On the question of the appointment of a nine-member Chamber to examine the preliminary questions of the lower courts and the objection of Judge Arno V. as to whether the Chamber so appointed is in accordance with Article 47 EUCFR and Article 6 ECHR, the following is stated. The very manner in which judges are elected by Parliament is not a violation of independence. In general, the selection of judges is influenced by certain statutory criteria (the requirement of professional competence and moral integrity to serve as a judge).<sup>13</sup> They must also meet the requirement of independence, particularly from the executive.<sup>14</sup> The statutory method of appointing judges must meet the sole condition that the executive does not determine the method and conditions for their decision-making. That is satisfied in this case.<sup>15</sup> Nor can the fact that the nine-member Chamber is chosen from among the judges so appointed be contrary to those articles. The basic condition for the independence of the judges to be fulfilled is that they must not interfere with the binding and final decision of the court (chamber) by the executive, which will be fulfilled or not violated in the present case.<sup>16</sup> Finally, reference may be made to the similar case of the appointment of judges in San Marino and Denmark, where the ECtHR ruled that the appointment of judges by Parliament cannot be considered to impugn their independence.<sup>17</sup>

However, a possible violation of Article 47 EUCFR can be seen in the fact that the judicial body thus appointed was newly established, i.e. during the ongoing proceedings, and thus does not meet the requirement of a previously established court.

## 2.2 Police incitement

The ECtHR has expressed the position in its constant case law that the use of undercover agents can be tolerated provided that they are subject to "*clear restrictions and safeguards*".<sup>18</sup> The limit of the use of this institution is thus the prohibition of police incitement, since the task of the police is to prevent and investigate crimes, not to incite them.<sup>19</sup> Thus, the public interest cannot justify the use of evidence obtained on the basis of police instigation, since such a procedure would expose the accused to the risk of being definitely deprived of a fair trial from

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<sup>13</sup> Guomundur Andri Ástráosson v. Iceland (GC), paras 219-220 and 232.

<sup>14</sup> Belilos v. Switzerland, para. 64.

<sup>15</sup> Beaumartin v. France, No. 15287/89, 24 November 1994, para 38.

<sup>16</sup> DRAFT - OVA a.s. v. Slovakia, No. 72493/10, 9 June 2015, paras. 80-86.

<sup>17</sup> Filippini v. San Marino, Ninn Hansen v. Denmark.

<sup>18</sup> Teixeira de Castro, §§ 35-36; Ramanauskas v Lithuania, § 54.

<sup>19</sup> Furcht v Germany, § 48.

the outset'.<sup>20</sup> Therefore, evidence obtained in connection with police incitement cannot be used in criminal proceedings.<sup>21</sup>

In the case of the use of a police agent, it is essential that the agent conducts the investigation in an "*essentially passive manner*".<sup>22</sup> A practice whereby an agent pressures a person to commit an offence that he would not otherwise commit in order to obtain evidence for prosecution is unlawful police entrapment.<sup>23</sup>

In assessing whether a particular case involves legitimate infiltration by an undercover agent or incitement, regard must be had, inter alia, to whether the accused was pressured to commit the offence, which may consist, for example, of "*renewing the offer despite his initial refusal*".<sup>24</sup> Police incitement may also be committed by persons who are not members of the armed forces if they act on the instructions of such members.<sup>25</sup>

The ECtHR examines police incitement in two steps, in the first step by the so-called subjective incitement test, in the second step by the so-called procedural incitement test. The subjective test examines "*whether there has been such incitement*", while the procedural test examines whether the identified incitement was adequately reflected in the proceedings.<sup>26</sup> Adequate reflection is then when all evidence obtained by the incitement is excluded from the proceedings or a "*procedure with similar consequences*" is applied. More recent ECtHR case law has even established the conclusion that "*A person shall not be punished for a criminal activity (or a part thereof) which was the result of incitement on the part of the State authorities*".<sup>27</sup>

Applying the above principles to the case of Mr Franz K., it is not possible to come to any other conclusion than that he would not have committed the offence had he not been prompted by Miss G., who acted in accordance with the instructions of the police authority. Franz K. committed the conduct in question only after repeated insistence by Miss G., i.e. he did not himself assume the intention to commit the offence and initially refused Miss G.'s offers. Miss G.'s conduct was active and was therefore not carried out in an "*essentially passive manner*". Thus, in terms of the subjective test, the elements of police instigation were met.

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<sup>20</sup> Teixeira de Castro, §§ 35-36; Edwards and Lewis v. the United Kingdom [GC], §§ 46 and 48; Vanyan v. Russia, § 46, 15 December 2005; Bannikova v. Russia, § 34.

<sup>21</sup> Akbay and Others v Germany, § 111.

<sup>22</sup> Furcht v Germany, § 48.

<sup>23</sup> Furcht v Germany, § 48; Ramanauskas, v Lithuania, § 55; Bannikova, § 37.

<sup>24</sup> Furcht v Germany, § 52

<sup>25</sup> Akbay and Others v Germany, § 113

<sup>26</sup> Akbay and Others v Germany, §§ 111, 122.

<sup>27</sup> Akbay and Others v Germany, § 123.

In these circumstances, it is then necessary to assess whether police instigation was taken into account in the criminal proceedings against Mr Franz K. (the procedural test). As stated above, the consequence of police incitement must be the exclusion from evidence of all evidence obtained in connection with that incitement, and the instigator cannot be punished for such conduct. In view of the fact that Mr Franz K. was found guilty of the offence of "*illicit trafficking*", it cannot be concluded that there has been an interference with his right to a fair trial as guaranteed by Article 6 of the ECHR.

### **2.3 The importance of the quality of interpretation in the court proceedings**

Franz K. did not have a duly appointed interpreter during the interrogation in the pre-trial proceedings. As a general rule, Article 6(3) ECHR gives anyone charged with a criminal offence the right to have the free assistance of an interpreter if they do not understand or speak the language used in court. This is also the case of Franz K. The right guaranteed in this provision overlaps in part with the right of everyone to be informed in a language he understands of the nature and cause of the charges against him (Article 6(a)) and the right of everyone who is arrested to be informed in a language he understands of the grounds for his arrest and of any charges against him (Article 5(2) ECHR).<sup>28</sup> Article 6(3)(e) ECHR thus aims to prevent any inequality between an accused who does not speak the language used in the proceedings before the court and an accused who speaks and understands that language. The assistance provided by the interpreter should be such as to enable the accused to familiarise himself with the matter and to defend himself, in particular by being able to present his version of events to the court. The right to the free assistance of an interpreter also applies to documentary evidence and to the pre-trial proceedings.<sup>29</sup> Finally, as in the case of the right to the assistance of counsel under Article 6(3)(c) ECHR, the ECtHR has also applied the principle to the right to the assistance of an interpreter that, in view of the need to ensure the practical and effective exercise of that right, the obligation arising from that provision is not limited to the provision of an interpreter but may also - if the State authorities are so advised in particular cases - include an obligation to carry out a follow-up check on the adequacy of the interpretation provided. The national courts are thus obliged to guarantee a fair trial, including with regard to the possible absence of translation or interpretation in favour of the accused alien.<sup>30, 31</sup> In the present case, it is not clear whether Franz K. was properly informed of the grounds of his

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<sup>28</sup> Gubruz v. France, 30424/04, 23 October 2007, section 1.

<sup>29</sup> Kamasinski v. Austria, 9783/82, 19 December 1989, paras. 74-75.

<sup>30</sup> Kamasinski v. Austria, 9783/82, 19 December 1989, para. 74.

<sup>31</sup> Katritsch v. France, 22575/08, 4 November 2010, para 44.

indictment and advised of his procedural rights, since it is not clear how the interpreter was chosen and it is not clear whether the defendant understood the instructions. The above facts therefore raise a reasonable doubt as to the proper application of the right to an interpreter. Such a procedure is not in accordance with Directive 2010/64, which<sup>32</sup> develops a minimum standard for the right to the assistance of an interpreter. In the present case, first of all, the specific measures to ensure the quality of the interpretation and translation provided do not comply with the requirements of the directive. Similarly, the Kingdom of H. has failed to comply with the obligation to establish a register of independent interpreters within the meaning of Article 5(2) of the Directive. A factually similar case has also been dealt with by the CJEU, which found<sup>33</sup> a violation of the right to the assistance of an interpreter, since Article 5 of the Directive must be interpreted as requiring Member States to take specific measures to ensure that the provision of interpretation and translation is of sufficient quality to enable the accused to understand the grounds of the charge against him and that such interpretation can be subject to review by the national courts. In the present case, therefore, the Kingdom of H. is in breach of Article 5 of the Directive, since it has no such measures in its domestic law and the right to the assistance of an interpreter has therefore been infringed.

## 2.4 Secondment of judges

First of all, it should be stated that the secondment of judges to higher courts is a procedure which does not in itself constitute an interference with the impartiality and independence of the court, but only provided that clear rules and criteria are laid down under which it is possible to proceed in this way and which provide "*necessary guarantees of independence and impartiality in order to prevent any risk of that secondment being used as a means of exerting political control over the content of judicial decisions*".<sup>34</sup> In the same judgment, the CJEU found that it was necessary that the criteria for the secondment of judges be publicly known in advance and that the decision on the secondment be duly reasoned.<sup>35</sup> The power of the Minister of Justice to decide to terminate a temporary assignment at any time and without proper justification was then found to be contrary to the principle of "*irremovability of judges*".<sup>36</sup> According to the constant jurisprudence of the CJEU and the ECtHR, it is also necessary that the decision on the

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<sup>32</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

<sup>33</sup> EU Court of Justice decision C-564/19, 23 November 2021.

<sup>34</sup> CJEU Joined Cases C-748/19 to C-754/19 (Judgement), paras. 72-73; ECtHR: Richert v. Poland, § 44, Dryzek v. Poland, § 49.

<sup>35</sup> CJEU Joined Cases C-748/19 to C-754/19 (Judgement), para. 79;

<sup>36</sup> Ibid, para. 82.



transfer of judges can be challenged with an effective legal instrument (remedy); therefore, there must be an effective remedy against the decision to transfer a judge to another court or to another judicial department.<sup>37</sup> In general, it was concluded by the CJEU, that European law is *"precluding provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period."*<sup>38</sup> It can therefore be summarised that the secondment of judges to higher courts by decision of the Minister of Justice is possible, but only on the basis of criteria known in advance, the decision must be duly reasoned and there must be an appeal against it, since such guarantees are required to protect the independence and impartiality of judicial decision-making.

The secondment of judge Jana G. from District Court to the Regional Court, even though it was carried out with her consent, did not fulfil the criteria required by the European law for the protection of the independence and impartiality of the judiciary, since the decision to second the judge was not reasoned, the criteria decisive for that secondment were not publicly known, and there was no appeal against that decision. Furthermore, it must be stated that the authorisation of the Minister of Justice to terminate the temporary assignment at any time, without giving reasons and without any possibility of review, can be objectively assessed as a threat to the independence of Judge Jan G., who is disproportionately threatened with possible removal from office, which creates room for the Minister of Justice to influence her activities. In terms of the interference with Mr Franz K.'s right to a fair trial, it must be noted that, although the President of the Court, Mrs Jana G., was not the judge who directly decided his criminal case, her actions taken after her appointment as President of the Court, consisting in the temporary suspension of Judge Arno V. and his replacement by Judge Gregory B, as well as the efforts to terminate the proceedings on the preliminary question put to the CJEU by Judge Arno V., in conjunction with the manner of her appointment as President of the Court, give rise to objective justifiable doubts as to the independence and impartiality of the Court ruling in the Franz K. case, and it must therefore be concluded that there has been a violation of Franz K.'s

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<sup>37</sup> Chamber of Extraordinary Control and Public Affairs of the Supreme Court - Appointment), C 487/19, EU:C:2021:798, paragraphs 115-118; Bilgen v. Turkey, CE:ECHR:2021:0309JUD000157107, §§ 63 and 96.

<sup>38</sup> CJEU Joined Cases C-748/19 to C-754/19 (Judgement), para. 90.

right to a fair trial as guaranteed by Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights.

## **2.5 Position of the Presidents of the Courts**

In general, the appointment and removal of judicial officers by the executive branch is possible (Campbell and Fell v. the United Kingdom and Flux v. Moldova no. 2). In that case, however, an illegitimate aim was clearly pursued, namely interference with the independence of the court in a particular pending proceeding. Although no reasons were given by the Minister of Justice for the decision to dismiss the President of the Court, it is clear from his statement to the press that this was an attempt to influence the ongoing proceedings of Judge Arno V. The newly appointed President of the Court later interfered with the independence of the Court by removing Judge Arno V. and transferring Judge Gregory B. The apparent violation of national standards (duration of office) cannot be overlooked either. It can therefore be summarised that, in the present case, the manner in which the court officials were changed led to a breach of the right to a fair trial, since it ultimately interfered with the independence and impartiality of the court and the right of a lawful judge (see above).

## **2.6 Disciplinary proceedings against a judge for requesting the preliminary ruling**

The CJEU has repeatedly held that the existence of national legislation which allows for disciplinary proceedings against judges for making reference for a preliminary ruling to the CJEU is contrary to European law.<sup>39</sup> Initiation of disciplinary proceedings against a judge for requesting the preliminary ruling constitutes an interference with his independence.<sup>40</sup>

On the basis of the foregoing, it must be concluded that Judge Arno V. was entitled to request a preliminary ruling from the CJEU and the initiation of disciplinary proceedings on the grounds of the refusal to withdraw this request constitutes a clear interference with his judicial independence. Since Arno V. was the judge who, until his suspension, was competent to rule on the Franz K. case, the interference with Arno V.'s independence violated Franz K.'s right to an "independent and impartial tribunal established by law" and thus interfered with his right to a fair trial.

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<sup>39</sup> Case C 564/19, para. 90.

<sup>40</sup> See also Joined Cases C-558/18 and C-563/18, para. 58-59.

## **2.7 The power of the Prosecutor General to submit the extraordinary appeal against a decision requesting the preliminary ruling of CJEU**

The power of the Prosecutor General to lodge an extraordinary complaint against a decision to refer a preliminary question to the CJEU is not, as a general rule, contrary to the case law of the CJEU and the ECtHR. In a similar case, the CJEU recently held<sup>41</sup> that Article 267 TFEU must be interpreted as not precluding a challenge to the referral decision by way of a national law remedy. However, where such an appeal is decided by a superior authority (in this case the Supreme Court), it cannot find that the questions raised are not relevant and necessary to the resolution of the dispute in the original proceedings. Such a decision is incompatible with that article, since the assessment of those facts falls within the exclusive competence of the Court of Justice to rule on the admissibility of preliminary questions, as is clear from the Court's case-law.<sup>42</sup> The principle of the primacy of European Union law requires the lower court to disregard such a decision of the highest national court. Moreover,<sup>43</sup> as also stated by the Advocate General in paragraph 48 of his Opinion, the<sup>44</sup> effect of European Union law would be jeopardised if the outcome of an appeal before the highest national court could prevent a national court hearing a dispute governed by European Union law from exercising its jurisdiction under Article 267 TFEU to refer questions concerning the interpretation or validity of European Union law to the Court of Justice in order to enable it to decide whether or not a national rule is compatible with it.<sup>45</sup>

### **Conclusion**

In conclusion, the criminal proceedings against Mr Franz K. in the Kingdom of H. were tainted by a number of defects which, individually and cumulatively, led to a violation of Mr Franz K.'s right to a fair trial, the most significant of which were the use of evidence obtained on the basis of incitement by a police agent, the failure to provide effective interpretation and the interference with the right to an impartial and independent judge by the actions of the Minister of Justice and the newly appointed president of the regional court.

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<sup>41</sup> C-564/19.

<sup>42</sup> Judgment of 16 December 2008, *Cartesio*, -C210/06, EU:C:2008:723, paragraphs 93 to 96.

<sup>43</sup> C-564/19.

<sup>44</sup> OPINION OF ADVOCATE GENERAL PIKAMÄE, delivered on 15 April 2022, C-564/19.

<sup>45</sup> See judgment of 22 June 2010, *Melki and Abdeli*, C188/10 -and C189/10-, EU:C:2010:363, paragraph 45.