The case of K. v Kingdom of H.

Legal Report by the German Team at Themis 2021 Grand Final

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A. Jurisdiction and Admissibility

The request for preliminary ruling is admissible.

I. Preliminary Reference by Judge Arno

1. The right to make a preliminary reference

The preliminary questions concern the interpretation of EU law according to Article 267 (1b) TFEU such as i.a. Art. 47, 48 (2) of the Charter, and Directives 2010/64/EU, 2012/13/EU and 2013/48/EU.

Insofar as the judgments of first instance against Joseph K. and Marc W. have not been appealed, this does not alter the power of the Court to give ruling on the matter of Franz K. The CJEU is only bound by the preliminary questions and matters raised in the proceedings before the referring court which only concern Franz K. and must thus be held distinct from other criminal proceedings.

2. The obligation to make a preliminary reference

The court acknowledges that the referring court in the present case assumes an obligation to make a reference under Article 267(3) TFEU. According to Article 267(3) TFEU, a court of last instance is obliged to refer questions of interpretation to the ECJ. In principle, the Regional Court of the Kingdom of H. does not constitute a court of last instance under national law, as the Regional court has the option to refer a question of interpretation to the Extraordinary Chamber of the High Court. Within this legal process, the High Court interprets national law in accordance with the constitution of the Kingdom of H. This represents an additional legal instance, which conflicts with the qualification as a court of last resort.

However, this is to be judged differently if one questions the independence of the Extraordinary Chamber of the High Court, as indicated here by the referring court. In such a case, the Extraordinary Chamber of the High Court would not meet the requirements of a “Court” under Article 47 of the Charter of Fundamental Rights, which would lead to a de facto elimination of the last instance.

It is ultimately for the referring court to rule on that matter having made the relevant findings in that regard. It must be borne in mind that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions. Irrespective of this fact, the question of the independence of the Extraordinary Chamber of the High court is also irrelevant in the present case, since the Regional Court could in any case profit from his right under Article 267(2) TFEU. Under this article any court of a Member State can refer a preliminary question to the European Court of Justice, if it considers that a decision on the question is necessary to enable it to give judgement.

II. No withdrawal of the reference

According to Art. 100 (1) of the rules of procedure of the CJEU, the Court remains occupied with a matter as long as the matter had not been properly revoked. The question whether the reference for preliminary ruling had been revoked thus relates to an interpretation of the rules of procedure of the CJEU and thus to an interpretation of European law.

It is first and foremost for the referring court to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to withdraw it.[1]

Whereas a decision by a national court to refer a question to the CJEU can in principle be questioned and annulled according to national law,[2] that application of national law must not be contrary to EU law, especially to the rights under Art. 47 of the Charter.

As the CJEU has already ruled, Article 267 TFEU and Article 47 (2) of the Charter must be interpreted as precluding national legislation, that prevents a national judge from making a request for a preliminary ruling to the Court of Justice.[3]

According to the general principle of primacy of EU law, such national legislation or acts taken under that legislation must than be left unapplied by the referring court.[4] In that context, the principle of primacy of EU law over national law also applies to acts of the national judiciary.[5] It can thus lead to a situation where the judge at the lower court is obliged to leave unapplied a ruling on procedure made by the higher national court if and as far as that latter ruling contradicts EU law.

1. No withdrawal by decision of the High Court

Furthermore, the ruling of the High Court of 27 June 2020, which declares the request for preliminary ruling to be unlawful, is of no importance concerning the admissibility of the present preliminary reference. Firstly, the decision of the High Court in the present case is of mere declaratory effect. Secondly, it does not require the referring court to withdraw the preliminary reference.

The Court first recalls, that national courts have the widest discretion in referring questions to the Court involving interpretation of relevant provisions of EU law. This discretion is an inherent part of the system of cooperation between the national courts and the Court of Justice established by Article 267 TFEU.[6] As a consequence, national rules imposed by legislation or case-law cannot interfere with that discretion or that obligation.[7]

[1] CJEU, judgment of 16.12.2008, C-210/06 – *Cartesio*, para. 96.
[2] Cf. for the general possibility of national redress measures against a preliminary procedure ECJ, case 65/81 – *Reina.*
[3] CJEU, order of 12.2.2019, C-8/19 PPU – *RH*, para. 48.
[4] CJEU, judgment of 23.11.2021, C-564/19 – *IS*, paras. 78f.
[5] I*bid*. paras. 79, 81.
[6]CJEU, judgement of 23 November 2021, *IS*, C-564/19, para 69.
[7]CJEU, judgement of 23 November 2021, *IS*, C-564/19, para 70.

In the present case, even though the High Court decision simply declares the initial request for a preliminary ruling unlawful and does not set aside the decision containing that request nor require the referring judge to withdraw the request and continue the main proceedings, the High Court, by reviewing the legality of that request, carried out a review of the initial request for a preliminary ruling similar to the review carried out by the Court of Justice in order to determine whether a request for a preliminary ruling is admissible.[8]

Even though Article 267 TFEU does not preclude an order for reference from being subject to a judicial remedy under national law, a decision of a supreme court, by which a request for a preliminary ruling is declared unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings is incompatible with that article, since the assessment of those factors falls within the exclusive jurisdiction of the Court to rule on the admissibility of the questions referred for a preliminary ruling.[9]

In addition, the effectiveness of EU law would be in jeopardy if the outcome of an appeal to the highest national court could have the effect of deterring a national court hearing a case governed by EU law from exercising the discretion conferred on it by Article 267 TFEU to refer to the Court of Justice questions concerning the interpretation or validity of EU law.[10] The declaration of the High Court is nevertheless liable to weaken both the authority of the answers that the Court will provide to the referring judge and the decision which he will give in the light of those answers.[11] Also, such a decision is likely to prompt the national courts to refrain from referring questions for a preliminary ruling to the Court, in order to preclude their requests for a preliminary ruling from being challenged by one of the parties on the basis of the High Court decision or from being the subject of an appeal in the interests of the law.[12]

Additionally, the Court has repeatedly held that, by virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, being able to prevent that.[13]

[8]CJEU, judgment of 23 November 2021, IS, C-564/19, para 71.
[9]CJEU, judgment of 23 November 2021, IS, C-564/19, para 72.
[10]CJEU, judgment of 23 November 2021, IS, C-564/19, para 73.
[11]CJEU, judgment of 23 November 2021, IS, C-564/19, para 74.
[12]CJEU, judgment of 23 November 2021, IS, C-564/19, para 75.
[13]CJEU, judgment of 18 May 2021, *Asociaţia "Forumul Judecătorilor din România" and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 245

As a consequence, a provision of national law which prevents the procedure laid down in Article 267 TFEU from being implemented must be set aside without the court concerned having to request or await the prior setting aside of that provision of national law by legislative or other constitutional means.[14]

It follows therefrom, that the principle of the primacy of EU law requires a lower court to disregard a decision of the supreme court of the Member State concerned if it considers that the latter is prejudicial to the prerogatives granted to that lower court by Article 267 TFEU.[15]

2. No Withdrawal by request of the newly appointed president of the regional court

There was no effective withdrawal of the preliminary ruling request by the President of the referring court. A request for a preliminary ruling may be withdrawn by the Court that referred the case for a preliminary ruling in the first place. In this respect the Court is not the institution in general – here the Themisburg Regional Court of Justice – but the specific court concerned with the case, hence Judge A.

Even if the President of the Court could withdraw the request herself, in the case at hand the President of the Court was seconded and appointed in breach of Art. 47 EUCh.

Art. 47 EUCh requires that the appointment procedure for judges is carried out in a manner as to ensure the judicial independence of the appointed judge. In particular, appointments shall be made based on merits to provide a safeguard against undue influence, such as political motivation.[16]

In the case at hand, judge Jana G. was appointed in an arbitrary manner and against existing national law. The national law provides that a secondment shall be made "*for a specified period of up to two years or for an unspecified period"*. Here, the appointment was made for four years. Also, the appointment decision was not reasoned and may not be challenged by appeal.

Further, in the view of the court, the appointment of judge Jana G. as president of the Themisburg is in violation with Art. 47 EUCh. Judge Jana G. was appointed to replace the former President of the Court whose term was prematurely terminated by the Minister of Justice who released a press statement stating his political motivation for the termination. In doing so, the Minister of Justice pointed out that the former president of the Court had not acted according to his wishes to "*prevent the unlawful actions by some rebellious judges*". In the following, Judge Jana G. did comply with the goal of the Minister of Justice to influence and sanction the so-called rebellious judge Arno V.

The replacement of the former president of the Court – without reasoning and legal remedies against the decision – as well as the appointment of judge Jana G. was unlawful. Judge Jana G. was appointed

[14]CJEU, judgement of 23 November 2021, IS, C-564/19, para 80.
[15]CJEU, judgement of 23 November 2021, IS, C-564/19, para 81.
[16] Cf. ECHR, CASE OF GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND, 1 December 2020, Para. 234.

in close connected in terms of time and context with the political motivation of the Minister of Justice to influence Judge Arno V.'s decision in the case at hand.

B. Merits

The relevant infringements of the right to a fair trial under Article 47 and the right of the defence under Art. 48 (2) of the EU Charter of Fundamental Rights (EUCh) are (I.) the use of Miss G. by the police in H. to motivate Franz K. to acquire drugs, (II.) the questioning by the police of Franz K. without a lawyer present, (III.) the use of an interpreter during the questioning and (IV.) the conviction of Franz K. in absentia. These potential infringements find their equivalent in Art. 6 ECHR. Articles 47 and 48 (2) EUCh as well as Art. 6 ECHR have also found more specific interpretations in Directives 2010/64/EU, 2012/13/EU and 2013/48/EU. Those infringements will be discussed in detail below.

Under Article 52(3) of the Charter, rights enshrined therein which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') must be given the same meaning and, at the very least, the same scope as those laid down by the Convention. The Convention thus formulates a minimum standard of human rights protection also under EU law.

The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union.

According to Article 6(2) of the TEU, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, in its Opinion 2/13, the CJEU concluded that accession under the proposed accession agreement would not be in line with EU primary law. The ECHR as such is thus not a source of EU law, and EU law is interpreted autonomously by the CJEU.[17] However, the CJEU regularly refers to judgments of the ECtHR for guidance as to the interpretation of the ECHR.[18]

I. Use of Miss G.

Miss G. was used as an informant by the police in H to act as an agent arranging the acquisition of drugs by Franz K. The aim was to procure evidence of drug related offenses against Franz K. The ECtHR has ruled that the admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them; however, the ECtHR must ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair.[19] While the use of undercover agents in organised crime might be an appropriate measure, the right to a fair

[17] CJEU, Opinion 2/13, para.166.
[18] See for example CJEU (GC), 5 June 2018, C-612/15 – *Kolev and Others*, par. 106.
[19] ECtHR, 23 October 2014, 54648/09 – *Furcht v. Germany*, para. 46.

administration of justice it is subject to clear restrictions and safeguards. The public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset.[20] As a subjective test, police incitement occurs where the officers involved do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution.[21] Miss G. was a private person and thus not an immediate agent of the state. However, using private citizens as assistance cannot liberate the police as a state agency from following its duties under the ECtHR. Miss G. was actively approached by the police, was remunerated for her efforts to incriminate Franz K. and instructed to establish direct contact between Franz K. and an undercover officer who offered to import Marihuana. As Miss G. thus acted under the instruction and control of the police, the use of Miss G by the police constituted entrapment within the meaning of Art. 6 ECHR.

II. Questioning without a lawyer present

After Franz K. was arrested by the police on 29 September 2019, he requested the assistance of a lawyer and an interpreter. He was then questioned without a lawyer being present and was informed about the suspicions against him.

Directive 2013/48/EU lays down minimum rules concerning the rights of suspects and accused persons to have access to a lawyer in criminal proceedings. In particular, Article 3(1) of that directive requires the Member States to ensure that suspects and accused persons have that right in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively. As is stated in recital 12 of that directive, the aims of that directive include the promotion of the right to be advised, defended and represented laid down in the second paragraph of Article 47 of the Charter and of the rights of the defence guaranteed by Article 48(2) of the Charter. Article 48(2) of the Charter corresponds to Article 6(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and has the same meaning and scope as the latter, in accordance with Article 52(3) of the Charter.[22] The European Court of Human Rights indicates that, while the right of access to a lawyer that is laid down in Article 6(3) ECHR implies that it should be open to the person concerned to use a lawyer of his own choice, that possibility is not, however, absolute and may be subject to certain

[20] *Ibid*, para. 47.
[21] ECtHR (GC), 5 February 2008, 74420/01 – *Ramanauskas v. Lithuania*, para. 55.
[22] CJEU (GC), 5 June 2018, C-612/15 – *Kolev and Others*, par. 105.

restrictions, provided that those restrictions prescribed by law, pursue a public interest objective and are proportionate to that objective.[23]

Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused.[24]

However, it is possible for access to legal advice to be, exceptionally, delayed. Whether such restriction on access to a lawyer is compatible with the right to a fair trial is assessed in two stages. First, the Court evaluates whether there were compelling reasons for the restriction. Then, it weighs the prejudice caused to the rights of the defence by the restriction in the case.[25]

Having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice are permitted only in exceptional circumstances, such as to avert serious adverse consequences for life, liberty or physical integrity in a concrete situation.[26]

During the first questioning of Franz K. no such exceptional circumstances were given. Therefore, the denial of access to a lawyer, especially after a direct request from the suspect, was not justified and represents an infringement of the right to defence under all above-mentioned articles of the Directive, the EUCh and the ECHR.

III. Use of an interpreter

As a citizen of A living in H without speaking H, Franz K. requested an interpreter during his questioning by the police. The police had recourse to an interpreter, but it is not clear whether the interpreter and Franz K. understood each other. Furthermore, there is no information on the selection process and qualification of the interpreter.

Recitals 5 of Directive 2010/64/EU states:

(5) Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [, signed at Rome on 4 November 1950,] and Article 47 of the [Charter] enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the right of defence. This Directive respects those rights and should be implemented accordingly.

[23] Ibid, 106.
[24] ECtHR, 27 November 2008, 36391/02 – *Salduz v. Germany*, para. 53 et seq.
[25] ECtHR, 13 September 2016, 40531/09 – *Ibrahim and Others v. United Kingdom*, para. 257.
[26] Ibid, 258 et seq.

Article 2 of that Directive, entitled ‘Right to interpretation’, reads as follows:

1. Member States shall ensure that suspected or accused persons who do not speak understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning. (…) 8. Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

Article 5 of that directive, entitled ‘Quality of the interpretation and translation’, provides:

1. Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8).

These measures have not been met with regard to the use of the interpreter during the questioning of Franz K. No verification process for interpreters was established in H and the selection process was not put on a procedural basis. This constitutes an infringement of the Directive and by extension of Articles 47 and 48 (2) EUCh. The equivalent in the ECHR of Art. 6 (3) (e) has also been infringed, especially because the police did not use of Joseph K. as an interpreter, who is a friend of the suspect and capable of speaking both the language of A and H. This would have been sufficient to meet the requirement under the ECHR.[27]

IV. In absentia conviction

The right of suspects and accused persons to be present at their trial is enshrined in Article 8(1) of Directive 2016/343, the possibility of organising the criminal trial *in absentia* is made subject by Article 8(2) of that directive to those persons “having been informed, in due time, of the trial and the consequences of non-appearance.” Franz K. was not informed about the trial at all, as the letter informing him after his questioning was returned marked “unclaimed” as his address changed when he left the country of H. Even if he had received a letter, it is doubtful whether that information would have been valid due to the insufficient translation procedure.

Concerning the ECHR, although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person “charged with a criminal offence” is entitled to take part in the hearing.[28] Moreover, sub-paragraph (c) of paragraph 3 guarantees to “everyone charged with a criminal offence” the right “to defend himself in person”.

[27] ECtHR, 15 June 2004, 60958/00 – *S.C. v. United Kingdom*.
[28] ECtHR, 1 March 2006, 56581/00 – *Sejdovic v. Italy*, para. 81.

The ECtHR has held that the reopening of the time allowed for appealing against a conviction in absentia, where the defendant was entitled to attend the hearing in the court of appeal and to request the admission of new evidence, entailed the possibility of a fresh factual and legal determination of the criminal charge, so that the proceedings as a whole could be said to have been fair.[29] As the appeal of the conviction of Franz K. has not yet been heard, an infringement of Article 6 ECHR cannot be identified. Insofar, in the case of Franz K., a violation of Art. 6 ECHR with regard to in-absentia judgments as interpreted by the ECtHR is theoretically possible but could only be determined after the conclusion of the proceedings.[30]

C. Addendum: The question of disciplinary proceedings/position of the presidents of courts

The CJEU has not directly been seized with the question whether the disciplinary proceedings against judge Arno were lawful under EU law.

However, in order to give full meaning and effectiveness to the preliminary reference procedure read in conjunction with Art. 267 TFEU, the CJEU must be in a position to adjudicate on the legality of the disciplinary proceedings and the suspension against judge Arno.[31] Disciplinary proceedings leading to a situation where the referring judge would effectively be deprived from giving a final judgment, e.g. by being suspended, would deprive the preliminary reference procedure of its effectiveness. As it is a dialogue procedure, it requires that the referring judge is and remains in a position to apply the preliminary ruling of the CJEU to the concrete case and to deliver his final judgment on substance, thereby giving effect to the ruling of the CJEU.

The legality of such disciplinary procedure must be assessed under the standard of the second subparagraph of Article 19(1) TEU read together with Article 47 of the Charter and Article 267 TFEU.

As the CJEU held, even the mere prospect of being the subject of disciplinary proceedings as a result of making a reference, or deciding to maintain that reference, is likely to undermine the effective exercise of their discretion to make a reference to the Court by the national judges.[32] This must be even more true in a case such as the one of judge Arno, where disciplinary proceedings already took place – even on two occasions – and lead to the suspension of the referring judge. In the light of the foregoing, Article 267 TFEU must be interpreted as precluding disciplinary proceedings from being brought against a national judge on the ground that he or she has made a reference for a preliminary ruling to the Court of Justice.

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[29] *Ibid*, para 85.
[30] That also distinguishes the case from the case of *Sejdovic v. Italy*, para 81, where naturally as in every ECtHR proceeding all national remedies were already unsuccessfully taken.
[31] See also CJEU, judgment of 26.3.2020, C-558/18 et al – *Miasto Łowicz*, para. 58, where the court found such disciplinary proceedings illegal even where the preliminary reference questions were in fact inadmissible.
[32] Cf. CJEU, judgment of 23.11.2021, C-564/19 – *IS*, para. 90.

Furthermore, the requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary.[33]

Regarding the position of presidents of courts, judicial independence requires that individual judges are not only free from undue influences outside the judiciary, but also from within.[34] Thereby, internal judicial independence requires that they be free from directives or pressures in particular from those who have administrative or even disciplinary responsibilities in the court, such as the president of the court.[35]

It shall be noted that the organizational duties of the president of the court, such as the assignment of cases, in principle do not in themselves interfere with the judicial independence provided that the assignment is unrelated to the merits of specific cases. However, the issuance of directives on how to treat specific individual cases is generally susceptible to violate the principle of judicial independence. This is particularly true if the non-compliance with such directives can lead to an unfavorable treatment of the respective judge, such as the institution of disciplinary proceedings or the suspension of a judge from his duties.

In light of the above-mentioned principles, the tribunal in the Franz K. case before the Themisburg Regional court did not fulfill the criteria of impartiality and independence as laid down in Art. 6(1) ECHR and Art. 47 EUCh. In particular, the newly appointed president did try to unduly influence judge Arno V. by instructing him to withdraw the request for a preliminary ruling before the ECJ. In that respect, even though judge Arno V. did in fact not withdraw the request, the circumstance that (i) disciplinary proceedings were initiated against him following a notice of the court's president and (ii) that he was suspended and replaced by a different judge, is sufficient to violate the principles of independence and impartiality.

[33] CJEU, judgment of 25 July 2018, C-216/18 PPU - *LM*, para. 67.
[34] Cf. CJEU, Case C-64/16 - *Associação Sindical dos Juízes Portugueses,* 27 February 2018, Para. 44 et seq.
[35] Cf. ECHR, CASE OF AGROKOMPLEKS v. UKRAINE, 6 October 2011, Para. 128 et seq.