

**THEMIS COMPETITION**  
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**• ACCESS TO JUSTICE •**

**“KAFKA'S TRIAL”**

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## **I introductory**

Access to justice<sup>1</sup> complements the rule of law by creating space for those with economic, social and cultural disadvantages to benefit from judicial services. We are convinced that the decision of the Hight court of the 27 June 2020. Jeopardized our common long-term interests in protecting the values on which Europe exists, namely the values of democracy, the rule of law and human rights. The fairness of the proceedings must be considered as a whole, through an enumeration and review of all stages of the proceedings, as well as the possibilities granted to the applicant. In order for the state to be truly based on "rule of law", it is not enough to merely guarantee the rights and freedoms of citizens, but also to realize them, in a way to effectively protect them. Guaranteeing and implementation of an adequate protection mechanism contributes to the real realization of guaranteed human rights, which in this case, unfortunately, was lacking. Respect for the right to a fair trial is essential for the functioning of a democratic society, and as such it is guaranteed trough many international instruments, however it is the fact that as the legal norm it saw the daylight on European land by the adoption of the European Convention on Human Rights and further consolidated its in of the International Covenant on Civil and Political Rights and Freedoms, also as of the UN Universal Declaration of Human Rights. Additionally, the afore mentions was once again underlined as mandatory and necessary for the survival of civil nations by Article 47 of the EU Charter of Fundamental Freedoms (all in connection with Article 51 and Article 52 (3) of the Charter). The European Court of Human Rights and the EU Court of Justice, interpreting these basic norms in their decisions, provide a wide range of true meaning of access to the legal system and protection of basic human and political rights of individuals.

## **II Statement of the facts**

Franz K. is a citizen of Republic of A, but he lives and works in the Kingdom of H – both member states of EU. Franz does not speak language of the state Kingdom of H. The police of the Kingdom of H have hired Miss G to be the person who will be the undercover investigator - informant in the case of Franz K, who was suspected for cocaine trafficking. After Miss G managed to impress Franz, after some time (during which time Franz refused such a job), he accepted her offer to trade,

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<sup>1</sup> The notion of access to justice is not the precision of conventional legal terminology, but fulfilling the long-standing practice of the European Court of Justice, this notion has become a symbol of legal procedure in the state system of state body and deep life of freedom of state body and deep life.

but expressly refusing the cocaine trade, accepting the marijuana trade. After more than a year and several failures (of which the police were aware), Franz managed to meet Marc W through an acquaintance of his friend Josef K and to organize (with both of them) the import of 10 kg of marijuana together. All of them were arrested and questioned. Franz requested a lawyer (a lawyer was not present when giving notice of rights on the suspicions against him) and an interpreter. During the questioning, a interpreter was present, but there was no information on how he (interpreter) was chosen, what his competencies and expertise were, and whether the interpreter and Franz K understood each other. Franc was tried in absentia and fined, as were the other two co-accused. During appeal procedure judge Arno have asked for the preliminary question to the CJEU in Luxemburg on the compatibility of the domestic legal system with the relevant EU Law, also raising the issue of incompliance of the domestic law and practice in the Kingdom of H with the European standards of the fair trial regarding the police incitement. The Prosecutor General who is at the same time the Minister of Justice of Kingdom of H filed to Hight Court the extraordinary appple against a decision ordering a reference for a preliminary ruling, point out that that it is not important for the case and all of them should be reviewed by the Hight court. The Prosecutor General also acting in his capacity as the Ministry of Justice, have initiated of the first disciplinary procedure against Judge Arno removed the President of the Court of T. Also, on the same time the Prosecutor General nominated Judge Jana G of the Themisburg district court for the position of President of the Regional court. The new President of court Jana G ordered judge Arno V to with draw the request for the preliminary ruling, which he was reject. The Hight court ruled that the request for a preliminary ruling was unlawful. Judge Arno was suspended for one month, and the new acting judge in the case of Franz K and others was judge Gregory B, who was transferred from the civil division (where he tried for 18 years) to the criminal, by his without his consent. For the end judge Jana G – as president of the Court decide to demand from the court of Justice in Luxemburg to immediately return the request for the preliminary ruling issued by Arno V.

### **III The observed injuries**

*Each judge must be reminded at the beginning of the trial of his or her responsibility to ensure that the guarantees set out in the Charter of the Fundamental rights of the EU as well as European Convention on Human Rights are respected and to check at the end whether he or she has*

*performed this task. Thus, Judge Arno V., respecting the Charter 's and the Convection 's requirements of his profession but also moral and ethical principles - asked a very clear question to himself (which initiated the proceedings before the European Court of Justice) whether Franz K had the right to a fair trial under Article 6 of European Conventions and 47 of EU Charter. As a judge within the legal system of a member state of the European Union, he had a legal and legitimate basis to request a preliminary decision from the EU Court of Justice.*

### **1. The police incitement**

The human right to a legal trial must not be sacrificed under any circumstances to the demands of social expediency and state policy - the fight against the drug market. By simply applying the proportionality test “the three step test” there was no proportionality between the legitimate aim pursued and the legally protected good - a fair trial. First of all, the standards of European law regarding the use of a vulnerable institute of criminal law are clear - undercover investigator<sup>2</sup> in keeping with the general prohibition of entrapment, the actions of undercover agents must seek to investigate ongoing criminal activity in an essentially passive manner and not exert an influence such as to incite the commission of a greater offence than the one the individual was already planning to commit without such incitement. Any extension of the investigation must be based on valid reasons, such as the need to ensure sufficient evidence to obtain a conviction, to obtain a greater understanding of the nature and scope of the suspect’s criminal activity, or to uncover a larger criminal circle. The use of undercover agents must thus be restricted and accompanied by appropriate safeguards.<sup>3</sup> Moreover, while the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest cannot justify the use of evidence obtained as a result of police incitement, so that would expose the accused to the risk of being definitively deprived of a fair trial from the outset.<sup>4</sup> Relying on Article 6, he complained that he had not received a fair trial due to the fact that he was incited to commit an offence by plain-clothes police officers acting on their own initiative as agents provocateurs and without judicial supervision.<sup>5</sup> As a matter of fairness, the sentence imposed should reflect the offence which the

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<sup>2</sup> While the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest cannot justify the use of evidence obtained as a result of police incitement, as this would expose the accused to the risk of being definitely deprived of a fair trial from the outset (Ramanauskas v. Lithuania [GC], § 54)

<sup>3</sup> In case Teixeira de Castro v Portugal (1998.)

<sup>4</sup> Ramanauskas v Lithuania, judgment of 5 February 2008 at paragraphs 53-54

<sup>5</sup> As in the case Vaniane v. Russia case, the Court found that the police had no prior evidence that the suspect was a drug dealer and that there was nothing to suggest that the offence would have been committed in the absence of the

defendant was actually planning to commit. Thus, although it would not be unfair to convict the person, it would be unfair for him or her to be punished for that part of the criminal activity which was the result of improper conduct on the part of State authorities. Judge Arno is in the court records, and especially taking into account the incompatible regulation of domestic law with the law of the EU and the case law of the European Court, he had sufficient grounds to conclude that police actions incited Franz K to commit a crime. The socially acceptable goal is certainly for the perpetrators of criminal acts to be held accountable for their illegal actions, but in a way that will guarantee them that they will investigate their guilt and responsibility through a fair procedure. In this particular case, already in the first step - the pre-investigation procedure, Franz K did not have a real trial, because the police agents had enough information and certainty that he was not able to commit the crime without the "help" of the provocateur's agent. Until that moment, he had not committed any crimes related to drug trafficking, and the entire investigation was launched on suspicion of trafficking in cocaine.

## ***2. The Importance of the quality of interpretation in the court proceeding***

According to Article 2 of Directive 2012/13/EU, the obligation to provide a person with information on their rights applies "from the time persons are made aware by the competent authorities that they are suspected or accused of having committed a criminal offence". At the same time, each judge is responsible for the proper treatment of defendants who fall into the category of vulnerable. In this case, it is a foreign citizen who does not understand the language of the country in which he was arrested and tried, and the decision was made in his absence. If it is shown or there are reasons to believe that the accused has insufficient knowledge of the language in which the information is given, the authorities must provide him with a translation.<sup>6</sup> Directive 2010/64/EU requires Member States to take concrete measures to ensure that the interpretation and translation provided is 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 defense." Article 2 (4) of the directive unequivocally states that "Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and

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police collaborator's intervention. These are, in fact, the most important two elements that ECHR relies on in order to determine if the offence was committed as a result of incitement.

<sup>6</sup> Brozicek v. Italy, § 41; Application no. 10964/84)

whether they need the assistance of an interpreter.” Directive 2010/64/EU requires Member States to take concrete measures to ensure that the interpretation and translation provided is 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 defense. Member States shall endeavour” to establish a register or registers of independent translators and interpreters who are appropriately qualified, which should, when appropriate, be made available to legal counsel and relevant authorities.

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

The implementation and enforcement of EU law takes place primarily at national level. Article 4 (3) of the Treaty on European Union (TEU) requires EU Member States to take appropriate measures to ensure the fulfilment of obligations arising from EU law. This is the principle of sincere cooperation. Additionally, Article 19 of the TEU requires Member States to provide sufficient remedies that ensure effective legal protection in the fields covered by EU law. Thus, national courts are the primary guarantors of EU law, but to ensure its consistent application they can ask the CJEU to rule on issues of interpretation through the preliminary ruling procedure.<sup>7</sup> This creates a dialogue between national courts and the CJEU. The CJEU is the guardian of the EU’s unique legal order, which includes clear fundamental rights obligations. Individuals may be able to pursue annulment actions to review the legality of EU law (including issues of fundamental rights), but the conditions on filing such applications are restrictive. Individuals generally have to show “direct and individual concern.”<sup>8</sup> According to the CJEU, this system for judicial review of acts by EU institutions is complete.<sup>9</sup> Having in mind the above, judge Arno V., as a single-judge formation in the Regional Court of Themisburg, during appeal procedure in the case of Franz K. and others, was fully entitled to request the Court to give a ruling thereon, *argumentum a fortiori* due to the fact that questions which were raised before appellate court are those questions of which is necessary to enable its to give final judgment. It is true that Prosecutor General has according to new domestic law the right that in one month question any court's decision in a such an

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<sup>7</sup> Art. 267, Treaty on the Functioning of the EU (TFEU), Art. 288, OJ 2012 C 326.

<sup>8</sup> TFEU, Art. 263 (4). For an example illustrating the complexity of this area of law, see CJEU, C-583/11 P, Inuit Tapiriit Kanatami and others v. European Parliament and Council of the European Union, 3 October 2013.

<sup>9</sup> *Ibid.*, particularly para. 92.

extraordinary way, but the decision of Judge Arno requesting the preliminary ruling of CJEU cannot be qualified in that sense. This is for the reason that this request represents exactly a procedural right guaranteed to judges precisely in the situations in which it exists incompatibility of the domestic legal system and the relevant EU standard, as if it is a matter of previous legal issues. It is the only judge who is competent to assess whether these issues are essential for the case, so that the assessment in that sense by Prosecutor General, who is at the same time the Minister of Justice of Kingdom of H., was inadmissible. The necessity of deciding on this request of Judge Arno by the CJEU and not by the High Court reflected in that that this Court does not fulfill the requirements neither of the „Court“ under Article 47 of the Chapter of Fundamental Rights, nor of the „Tribunal“ under Article 6 of the European Convention on Human Rights.

First of all, the chamber of the High Court is composed of 9 judges who were selected by the Judicial Council, whose members are selected by the Parliament, nor by their peers. Furthermore, for a court/tribunal to be regarded as established by law, it must satisfy a series of conditions such as the independence of its members and the length of their terms of office, impartiality and the existence of procedural safeguards.<sup>10</sup> To further emphasize our viewpoint, we will point to the CJEU's opinion on the question of impartiality and independence of a court in the case of A.K. and others. In this case, the CJEU stated that: “the objective circumstances in which that court was formed and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law.”<sup>11</sup>

#### **4. Legal aid**

Article 6 is prescribed the right *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.* In the fact that Franz requested the assistance of a lawyer during the

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<sup>10</sup> ECtHR, Coeme and others v. Belgium, Appl. no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgement of 22 June 2000, at paragraph 99, Decision available at <https://hudoc.echr.coe.int/>

<sup>11</sup> A. K. and Others v Sąd Najwyższy, ECLI:EU:C:2019:982, at paragraph 171.

questioning and that the lawyer was unable to attend, and that Franz was informed of the suspicion against him (in absence of a lawyer) - thereby violating the right to legal aid.<sup>12</sup>

**5. *The institution of secondment of judges by the Minister of Justice, the position the President of the courts, the disciplinary of the President of courts.***

*Article 6 of the Convention on Human Rights guarantees that decision of a person's civil rights and obligations or a criminal charge against that person, shall be passed by an impartial and independent court, established on the basis of law. This further means that the court must be primarily independent of the other authorities.<sup>13</sup> The composition of court has to such to provide a fair judgment to be rendered, and it must inevitably be in accordance with the law. The European law, in scope of human rights, allows a judicial body under the national law of a Member State to be set up by the executive as well as by the legislative authority:*

*External independence<sup>14</sup> – the fact that the Minister of Justice removed President of the Court (in spite with the fact that the 4-year term of office should finish in December 2022) and nominated judge Jana for the position of the President of Themisburg Regional Court for a 4 years term of office (having in mind that the domestic law of K of H prescribes that the Ministry of Justice may second a judge to higher instance court “for a specified period up to two years...”) speaks in favor of the fact that this is an inappropriate influence of the authorities on the judiciary. Also, the fact that the President of the Court removed from that position, before expiration of the mandate, may cause justified fears among judges that their terms may be terminated prematurely and without good reason in what way there is an inappropriate influence on the future actions of judges by the*

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<sup>12</sup> Article 3(2) of Directive 2013/48/EU

<sup>13</sup> Also in the light of EU Law whether a judge appointed in such circumstances constitutes an independent and impartial tribunal established by law, within the meaning of the second subparagraph of Article 19(1) TEU, Article 267 TFEU, the second subparagraph of Article 47 of the Charter, and Article 6(1) ECHR. the outcome of the case

<sup>14</sup> In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence. The rules applicable to the status of judges and the performance of their duties as judges must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals (see, to that effect, judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C 824/18, EU:C:2021:153, paragraphs 119 and 139 and the case-law cited



authorities.<sup>15</sup> Namely, it is allowed for the executive to appoint judges,<sup>16</sup> but only if those judges are free from any influence or pressure while performing the judicial function.<sup>17</sup>

*Internal independence* – fact that the new Court President Jana G was order to judge Arno to withdraw the request for the preliminary ruling... and the fact that after the refusal (of judge Arno to do it) and fact that the another disciplinary proceeding was initiated by High Justice Inspector - points to the undue influence of the President of the court on the work of judges within the court, which further indicates the lack of internal independence within the court (judges in their work must remain independent in relation to the president). The disciplinary proceedings (agents judge Arno) were conducted with the intention of intimidating the judge, which also has an undue influence on the work of judges.<sup>18</sup>

Also, the fact the President of Court suspend judge Arno for one month, and that the assigned judge Gregory B, who (by her decision) was transferred without his consent from the civil chamber to criminal represents an inappropriate influence on the work of a judge within the court. A judge cannot be transferred to second chamber without his consent. The principle of irremovability of judges under the European standards on the independence of the judiciary and rule of law notes as follows - Judges, whether appointed or elected, shall have tenure until a mandatory retirement age or the expiry of the term of office. The basic principle of judicial independence is that the permanence of office is guaranteed until the moment when a judge is legally obliged to retire, or until the expiration of a time-limited term.<sup>19</sup> The European Charter confirms that this principle also applies to the appointment or appointment to another position or location without the consent of

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<sup>15</sup> independence from other branches of government executive and legislative (*Beaumartin v. France*, § 38).

<sup>16</sup> That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C 824/18, EU:C:2021:153, paragraphs 116 and 118 and the case-law cited).

<sup>17</sup> *Flux v. Moldova* (no. 2), § 27).

<sup>18</sup> The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary (judgment of 20 April 2021, *Repubblika*, C 896/19, EU:C:2021:311, paragraphs 63 and 64 and the case-law cited).

<sup>19</sup> Principles I (2) (a) (ii) and (3), and Principles VI (1) and (2), Recommendation No. R (94) 12 to Member States on the Independence, Efficiency and Role of Judges (1994)

the judge, except when it comes to the reorganization of the court, or when the change is temporary. Taking into account the circumstances of the case, there is a clear inadmissible intention on the part of judge Jane to transfer an experienced civilian judge to the Criminal Division (with the intention that Franz K get an inexperienced acting judge).

*The right to a natural judge* – in relation to the parties in the proceedings, there was also a violation of the right to a natural judge, which is closely related to the right to an impartial tribunal - The assignment of cases within the court should follow objectively and in advance established criteria to protect the right to an independent and impartial judge. On the he should not be influenced by the wishes of the parties to the case or by anyone, in any way interested outcome of the proceedings.

#### **IV Court conclusion**

In view of the above, the European Court of Justice gives a preliminary opinion, in accordance with Article 267 TFEU, that there has been a violation of Article 6 of the ECHR and Article 47 of the EU Charter in the proceedings before the District Court. Namely, Franz K was not tried before an independent impartial tribunal, he did not have the right to a fair hearing, his right to conduct the proceedings in a language he knew was not respected, nor the right to legal aid in the first phase of the proceedings - when reasons for his arrest and of charge against him.

It is recommended that the State regulate its legislation regarding the election of judges, by guaranteeing the independence and permanence of the judicial function, by completely excluding the Minister of Justice from the process of electing judges, and that a judge may object when transferred to another department.

Having in mind all the above, this decision was made.

#### **On behalf court**

*Aleksandra Lozić*

*Mina Vulić*

*Milica Jovanović*