THE WRITTEN REPORT BY TEAM SERBIA II ON THE CASE OF MR. FRANZ K.

The CJEU should reject the request of the President of Themisburg Regional Court

In the present case, judge of the Themisburg Regional Court Arno V. decided to refer the preliminary question in the case against Franz K. to the Court of Justice of the EU. However, the newly nominated president of this court Jana G. demanded from the Court of Justice to "immediately" return the request for the preliminary ruling without review of it on the merits. We submit that the Court of Justice should reject the request of Jana G. and that it should render the judgment in this case.

The jurisdiction of CJEU to give a preliminary ruling on the interpretation or validity of EU law is exercised on the initiative of the national courts and tribunals. Status as a court or tribunal is interpreted by the Court as an autonomous concept of EU law. The Court takes account of a number of factors such as whether the body making the reference is established by law, whether it is permanent, whether it applies rules of law and whether it is independent. We sumbit that the same these criteria which are assessed to determine whether certain body is entitled to request the preliminary ruling should be valid also in relation to determination whether certain judicial body or formation is entitled to withdraw the request.

In its judgment following seven requests of Polish courts for preliminary ruling[1], the CJEU dealt with the issue of secondment of judges by a Minister of Justice, who also occupies the position of Public prosecutor general, to higher courts without publicly known criteria, and with the possibility to terminate the secondment at any moment without stating reasons for such decision. The CJEU held that EU law must be interpreted as precluding such provisions of domestic law since they violate the right to an independent court.

The situation with Jana G. is almost identical with the difference that she was nominated as a president of the Themisburg Regional Court which makes this case even more serious. In that regard, the ECHR held in the case of *Zolotas v. Greece*[2] that the mere fact that a president of the court has been nominated by the executive power is not sufficient to find that his independence has been breached, as long as one designated, he is not subject to any pressure, does not receive any instructions from the executive and exercise his functions in all independence.

[1] CJEU, Joined Cases C-748/19 to C-754/19, judgment, 16 November 2021, para. 78-84
[2] ECtHR, Zolotas v. Greece, App. no. 38240/02, 06 June 2005, para 24.

In the present case, it is obvious that presidents of courts in the Kingdom of H. are not independent from the executive power, due to the fact that Minister of Justice is not only entitled to nominate the judges as court presidents, but also to remove the presidents of the courts, as well as to terminate their secondment at any time and that decision does not need any reasoning, nor there is appeal against it. In that regard, the independence of the presidents of the courts has been breached due to the fact that Minister of Justice could influence the court presidents and pressure them with his power to remove them. Thus, presidents of courts would always be working in fear of the termination of their mandate. In the case of Mr Franz K, the Minister of Justice prematurely terminated mandate of the previous president of the Regional Court in Themisburg, which was about to finish in December 2022, on the 25 May 2020. The law allows Minister of Justice to do so, but only in the case of gross negligence of the duties, which in the present case has not been established. On the contrary, it can be concluded that the president of the court was removed because he did not want to take actions against judge Arno V. which would violate the principle of independence of judiciary.

Furthermore, judge Jana G. was seconded to regional court in clear violation of domestic legal provisions – she was seconded for a period of fulfiling the function of the president of court, whose term of office is 4 years, while according to domestic law secondment may last for a specified period for up to two years, or for an unspecified period. Therefore, Jana G, acting as a president of Themisburg Regional Court, is nominated under the circumstances which imply that her decisions cannot be regarded as decisions issued by an independent court established by law. Furthermore, we submit that the CJEU should decide that withdrawal of request must be done by the same judicial formation which sent the request, that is to say by a judge to whom the case is assigned. For these reasons, we submit that the CJEU should decline the request by president of court Jana G, since she does not represent an independent judge nominated to that position in accordance with law, and since presidents of courts should in any way not be entitled to make such requests for withdrawal.

VIOLATION OF THE RIGHT TO FAIR TRIAL

Mr. Franz K's right to fair trial has been violated on multiple account, due to the violation of the right to an independent tribunal established by law, the right to a quality interpretation, as well as due to the unfairness of the proceedings regarding police incitement.

The right to an independent tribunal established by law

We submit that Kingdom of H. has violated Franz K.'s right to an independent tribunal established by law due to the institution of two sets of disciplinary proceedings against judge Arno V, as well as due to the actions taken by Jana G, newly appointed president of the Themisburg Regional Court, with respect to the case at hand.

The Court of Justice of the European Union held in its judgment [3] concering disciplinary regime for judges in Poland that provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they have made a reference for a preliminary ruling to the Court of Justice cannot be permitted. It further held that not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before the Court, also constitutes a guarantee that is essential to judicial independence. Furthermore, in the order for interim measure [4] in another case concerning disciplinary liability of Polish judges, this Court held that national provisions from which it follows that the national judges may be subject to disciplinary proceedings because they have carried out a verification of compliance with the requirements of independence and impartiality of a tribunal previously established by law are, *prima facie*, contrary to the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights.

In the present case, two sets of disciplinary proceedings were initiated against judge Arno V. exactly for the reasons explained in the previous paragraph. The first set of proceedings was initiated after the Minister of Justice informed the High Justice Inspector that judge Arno V. "might have breached the judicial ethics by declaring the judges of the High Court illegal". However, from the facts of the case it is clear that judge Arno V. only conducted an assessment whether the newly established chamber of the High Court fulfils the requirements of the "Court" under Art. 47 of the Charter. It was his duty under the said article, as well as under Article 6 of the European Convention on Human Rights. Therefore, the disciplinary proceedings against him must not have been initiated. He did not violate any of the principles of judicial ethics, as he only stated his legal opinion in the decision. The purpose of it was to decide the case against Mr. K. properly, not to undermine the principles of domestic legal system.

[3] CJEU, European Commission v. Republic of Poland, judgment, C-791/19, 15 July 2021, para. 227
[4] CJEU, European Commission v. Republic of Poland, order, C-204/21, 14 July 2021, para. 229

Similarly, the second set of disciplinary proceedings was initiated after judge Arno V. rejected the order of the newly appointed president of the court Jana G. to withdraw the request for preliminary ruling, stating *inter alia* that she was not legally nominated President of the court. As previously explained, judge Arno V. had the right to examine whether certain judicial formation is established by law, and that should include the assessment whether the president of his own court is legally nominated, especially given all the circumstances under which Jana G. was nominated.

Furthermore, the right to an independent tribunal also implies internal judicial independence which requires that judges must be free from directives or pressures from fellow judges or those who have administrative responsibilities in the court, such as the president of the court. In the present case this principle was violated by the order to judge Arno V. to withdraw the request for preliminary ruling, as president of court must not give orders to judges hot to decide in cases which are allocated to them.

Likewise, the principle of internal independence has been violated by suspending judge Arno V. for one month and reassigning the case to another judge. The ECtHR held in *Moiseyev v. Russia* that although it is not the role of that Court to assess whether there are valid grounds for reassigning a case to a particular judge or court, the Court must be satisfied that such reassignment was compatible with the requirements of objective independence and impartiality.[5] In the present case, the reassignment of a case and suspension of judge Arno V. have been done in clear violation of the principle of independence, solely because judge Arno V. tried to protect the right to an independent tribunal established by law and because he did not allow pressures to influence his decisions.

The quality of interpretation in the court proceedings

The absence of the quality requirements, regarding the interpretation provided in the case against Mr Franz K. has been in violation of the Directive 2010/64 EU, as well as article 6, paragraph 3, subparagraph e, of the European Convention on Human rights, as it did not meet international standards required by these documents.

The 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, prescribes in the article 2 - the Right to interpretation, while in the first paragraph it is stated

[5] ECtHR, Moiseyev v. Russia, App. no. 62936/00, 9. October 2008, para. 176

as follows: “Member States shall ensure that suspected or accused persons who do not speak or 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, all court hearings and any necessary interim hearings.” In addition to that the paragraph 5 stipulates that Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

Paragraph 8 of the same article stipulates that 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 the same Directive concernes the quality of the interpretation and translation, and it provides that Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9), and that in order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevant authorities.

The right to assistance of an interpreter or translator during criminal proceedings is laid down in Article 6(3) of the ECHR. Pursuant to this provision, every defendant has the right to free assistance of an interpreter, if he does not understand or speak the language. In addition to this article, there is the obligation pursuant to Article 5(2) ECHR to promptly inform anyone who is arrested, in a language which he understands, of the reasons for his arrest and of any charge against him. A defendant can only defend himself properly if he has an idea of the things he is accused of.

The Convencion is intended to guarantee not the rights that are theoretical or illusory but the rights that are practical and effective, so the Court stated in the case of *Kamasinski v. Austria*[6] that the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to

[6] ECtHR, Kamasinski v. Austria, App. no. 9783/82, 19. December 1989

a degree of subsequent control over de adequacy of the interpretation provided. The interpreter must not only be competent, but his interpretation has to be of sufficient quality.

In *Cuscani v. United Kingdom*[7], Cuscani - a manager of an Italian restaurant whose command of English was poor - was prosecuted for tax evasion. Shortly before the hearing, the judge was informed of the fact that Cuscani had a poor command of the English language and that it would be impossible for him to understand the proceedings without the assistance of an interpreter. He then decided that an interpreter had to be present during the hearing. During the hearing, however, there was no interpreter, and Cuscani's lawyer convinced the judge to allow communications to take place via Cuscani's brother. Later, it was established that his brother had not translated anything during the hearing. The ECtHR has held that such assistance of interpreter violates the article 6, paragraph 3 of the Convention.

In the case brought against Mr. Franz K. the above mentioned criteria have not been met, due to the fact that the Kingdom of H. does not have an official register of translators and interpreters and according to the fact that the law of the state does not specify who may be appointed in criminal proceedings as an ad hoc translator or interpretor, nor according to what criteria, as only the certified translation of the documents is regulated. Thus, the Kingdom of H. did not fullfill the obligation to ensure that the interpretation and translation provided in criminal procedure against Franz K. have met the quality required under Article 2(8) and Article 3(9), of the Directive2010/64/EU of the European Parliament and of the Council of 20 October 2010. In addition to that, the failure of the domestic authorities to provide the interpretation that meets the sufficient standards of quality, in the criminal proceedings brought against Mr. Franz K, have violated the right to a fair trial – free assistance of interpreter, that is prescribed in the article 6, paragraph 3, subparagraph e of the Convention.

The right to be present at the trial

Mr Franz K's right to be present at the trial, as a part of the right to a fair hearing, was violated due to the fact that the criminal proceedings was conducted against him *in absentia*. The Directive 2016/343 of the European Parliament and of the Council od 9 March 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, in the article 8 prescribes that Member states shall

[7] ECtHR, Cuscani v. United Kingdom, App. no. 32771/96, 24 September 2002

ensure that suspects and accused persons have the right to be present at their trial. However the Directive enables the possibility of holding trials in the absence of suspects or accused persons in the article 8 paragraph 4, but only if the suspect or accused person cannot be located despite *reasonable efforts* having been made. In the case of Mr Franz K, no efforts have been made to locate the defendant, as the letter sent to the previously communicated address returned marked "unclaimed", cannot be said to be a reasonable effort to locate the accused. In order to comply with the requirements set in mentioned Directive, the authorities should have made several other efforts to locate the accused, such as for example to request from the Republic of A, the state Mr Franz K comes from, to try to locate him in its teritory. However, the authorities did nothing to establish the whereabouts of Mr. Franz K. in order to inform him in person about the date of the trial.

The police incitement

When assessing the right to a fair trial, the European Court of Human Rights, held that the compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole[8]. The cumulative effect of various procedural defects may lead to a violation of Article 6 even if each defect, taken alone, would not have convinced the Court that the proceedings were unfair.[9]

Although the European Court of Human Rights allows for the state authorities to use special investigative methods in cases of serious crime, in particular - undercover techniques, it sets in its case law that the use of such methods must be subject to clear restrictions and safeguards. Otherwise, the accused would be deprived of a fair trial from the very beginning.(Ramanauskas v Lithuania para. 54).Regarding the undercover agents, the European Court of Human Rights recognized such status to the State agents, but also to the private parties acting under the instructions and control of the State agents(Shannon v. United Kingdom (dec.)). However, there are strict requirements that the Court imposes on an undercover investigation for it to be legitimate. It is necessary for the State agents or the persons acting on their instruction to investigate criminal activity in an essentially passive manner. This means that they must not influence the subject of the investigation to commit an offence that would otherwise not been committed. (Ramanauskas v Lithuania para. 55).

In the case of Franz K. the informant Miss G. was authorized by the police and the Public Prosecutor's Office to investigate Franz K. on the basis of an information that he is

[8] ECtHR, Ibrahim and others v. UK, App no. 50541/08, 13 September 2016, para. 250
[9] ECtHR, Mirilashvili v. Russia, App no. 6293/04, 11 December 2008, para 165

allegedly smuggling cocaine. She made contact with Franz K. and offered him that they import cocaine via a port with a help of a dock worker. Franz K.said to Miss G. that he doesn't want to do anything with cocaine, but that he considers that ''marihuana is a different matter''. Although Franz K. didn't explicitly say that he intends to import drugs but he onsly expressed interest in a possibility of importing drugs, the informant repeatedly, in a period from January to August of 2018, offered him to meet with a dock worker and discuss the details of importing marihuana via port. After he met with the dock worker, he felt severely pressured by the informant to built contact with persons capable to prepare marihuana shipment from abroad. Eventually, after a year of repeated statements by the informant, he managed to meet a person with who he agreed to organize the importation of marihuana from Southern Europe via the port, with the help of the dock worker. From the mentioned facts of the case, it is evident that the informant pressured Franz K. into committing the offence in question by insistently prompting him. The informant had a direct influence on Franz K. to make a decision to import drugs. Not only that she suggested him to import drugs via port, but with her constant statements during a period of more than a year, she made a decisive influence on Franz K. to forma criminal intent. In addition, the informant was directly interested for Franz K. to import drugs, since she was being paid by the State authorities for each day of working as an informant, and was promised a bonus dependent on the quantity of the drugs seized in the case of Franz K. She didn't in fact investigate the alleged the accusations onthe account of Franz K. On the contrary, by acting on the instructions of the police, she led Franz K. to commit the offence charged.The fact that Franz K. was convicted by the first instance court in absentia, without an opportunity to challenge the lawfulness of the undercover investigation in the domestic proceedings, means that Franz K. trial before the first instance court was deprived of fairness required by Article 6 of the Convention.

The Power of the Prosecutor General to submit the extraordinary appeal against a decision requestioning the preliminary ruling of CJEU

In the case of Mr. Franz K, in the Kingdom of H. the Prosecutor general filed an extraordinary appeal to the High Court, against a decision requestioning the preliminary ruling of CJEU, on the ground that the questions referred are not relevant for the proceedings. As the CJEU stated in its case law, an appeal against a preliminary reference is not *per se* contrary to EU law (C-210/06 Cartesio). However, in the case of Mr Franz the reasons that the Prosecutor General stated in its appeal that the issues listed in the request for the

preliminary ruling are of no importance. In the case C-564/19 IS of the Court of Justice of the European Union No 207/21 from 23 November 2021, the ECJU held that the possibility of the higher instance domestic court to decide upon the appeal of the Prosecutor General, in which he stated that the questions referred by a lower court are not relevant and necessary for the resolution of the dispute in the main proceedings, is precluded by the EU law. Such a review of legality is similar to the review carried out in order to determine whether a request for a preliminary ruling is admissible, for which the Court of Justice has exclusive jurisdiction. The reason for that is the fact that Article 267 TFEU establishes the system of cooperation between the national courts and the Court of Justice, that would be interfered.