

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 14023/19
Rado VRACKO
against Austria

The European Court of Human Rights (Fourth Section), sitting on 6 September 2022 as a Committee composed of:

Armen Harutyunyan*, President,*
Jolien Schukking*,*
Ana Maria Guerra Martins*, Judges,*
and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to:

the application (no. 14023/19) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 6 March 2019 by a Slovenian national, Mr Rado Vracko ("the applicant"), who was born in 1962 and lives in Hoce, and who was represented by Mr R. Vouk, a lawyer practising in Klagenfurt;

the decision to give notice of the application to the Austrian Government ("the Government"), represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs;

the information given to the Slovenian Government regarding their right to intervene in the proceedings pursuant to Article 36 § 1 of the Convention and the fact that the Slovenian Government did not express a wish to exercise that right;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case concerns the applicant's complaint under Article 6 § 1 of the Convention that the refusal of the domestic courts to grant his request for a preliminary ruling from the Court of Justice of the European Union (CJEU) rendered the proceedings unfair.

2. The applicant is the managing director of a Slovenian company that had taken on a contract to build a grandstand for a ski event in Austria in 2016. During an inspection by the Austrian tax authorities, twelve employees of the applicant's company were unable to present all the documents required by the Austrian Labour Contract Law Amendment Act (*Arbeitsvertragsrechts-Anpassungsgesetz*; hereinafter "AVRAG").

3. On 12 July 2016, the Zell am See District Administrative Authority issued penalty notices against the applicant imposing fines of 18,000 euros (EUR) and costs of EUR 1,800 in total. The Salzburg Regional Administrative Court (*Landesverwaltungsgericht*) dismissed an appeal by the applicant. The Constitutional Court (*Verfassungsgerichtshof*) declined to deal with the applicant's subsequent appeal.

4. In an appeal (*außerordentliche Revision*) to the Supreme Administrative Court (*Verwaltungsgerichtshof*), the applicant asked the court to seek a preliminary ruling from the CJEU on the question of the compatibility of the AVRAG and the penalty notices with European Union (EU) law. On 22 October 2018, the Supreme Administrative Court rejected the applicant's appeal and his request for a preliminary ruling to be sought from the CJEU. It gave brief reasoning for its decision, referring to its decision of 20 September 2018 (case no. Ra 2018/11/0118), which, in turn, referred to its judgment of 28 February 2017 (case no. Ra 2016/11/0164), and held that the applicant had not specified the reasons why the fines imposed deviated from EU law or were not in line with the case-law of the CJEU.

5. The applicant complained in particular that the domestic courts had not sought a preliminary ruling from the CJEU and had not dealt with his arguments in that regard even though the legal questions he had raised had not yet been answered by the CJEU.

THE COURT'S ASSESSMENT

6. It is not disputed between the parties, and the Court sees no reason to hold otherwise, that Article 6 of the Convention is applicable to the present case.

7. The general principles on the question of whether domestic courts have an obligation under the Convention to seek a preliminary ruling from the CJEU and for assessing whether the domestic courts have duly reasoned their decision not to seek a preliminary ruling have been summarised in *Ullens de Schooten and Rezabek v. Belgium* (nos. 3989/07 and 38353/07, §§ 54-62,

20 September 2011), *Harisch v. Germany* (no. 50053/16, §§ 33-36, 11 April 2019) and *Sanofi Pasteur v. France* (no. 25137/16, §§ 67-70, 13 February 2020).

8. In accordance with these principles, the Convention does not guarantee, as such, the right to have a case referred by a domestic court to the CJEU for a preliminary ruling. A domestic court's refusal to grant a referral may, however, infringe the fairness of proceedings within the meaning of Article 6 § 1 of the Convention where the refusal proves to have been arbitrary, for instance where the refusal was not duly reasoned (see *Harisch*, cited above, § 33). In the specific context of the third paragraph of Article 234 of the Treaty establishing the European Community (Article 267 of the Treaty on the Functioning of the European Union), this means that national courts against whose decisions there is no remedy under national law, which refuse to refer to the Court of Justice a preliminary question on the interpretation of EU law that has been raised before them, are obliged to give reasons for their refusal in the light of the exceptions provided for in the case-law of the CJEU. They will thus be required, in accordance with the latter's *Cilfit* case-law, to indicate the reasons why they have found that the question is irrelevant, that the EU law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (see *Ullens de Schooten and Rezabek,* cited above, § 62, and *Sanofi Pasteur*, cited above, § 67).

9. The obligation for domestic courts to provide reasons for their judgments and decisions serves to enable the parties to understand the judicial decision that has been given, which is a vital safeguard against arbitrariness, and to demonstrate to the parties that they have been heard (*Harisch*, cited above, § 33).

10. It is acceptable for the national superior courts to dismiss a complaint by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue, or by simply endorsing the reasons for the lower court's decision (ibid., § 35).

11. The Court must therefore examine whether the Supreme Administrative Court, in its decision of 22 October 2018, provided sufficient reasons for its refusal to seek a preliminary ruling from the CJEU in the applicant's case. The Court will do so by examining the arguments raised by the applicant in his request for such a preliminary ruling to be sought, which will be grouped into three sets of arguments, and the Supreme Administrative Court's response to each of them.

12. In his first set of arguments the applicant maintained that the AVRAG was a disproportionate restriction on the freedom to provide services, and thus contrary to Article 16 of Directive 2006/123/EC, as the obligation to keep documents available for inspection, including a German translation, extended beyond the documents listed in Article 9 of Directive 2014/67/EU, and

domestic law would not allow the submission of documents at a later stage upon request.

The Supreme Administrative Court responded to that set of arguments by referring to its decision of 20 September 2018 (case no. Ra 2018/11/0118), which stated that Article 9 § 1 of Directive 2014/67/EU allowed for control measures and merely listed specific measures by way of example. That decision, in turn, referred to the Supreme Administrative Court's judgment of 28 February 2017 (case no. Ra 2016/11/0164), in which it had found the obligation to keep wage documents available to be unobjectionable under EU law, relying on the CJEU's ruling of 18 July 2007 (case no. C-490/04) to the effect that the obligation to keep a German translation of wage documents at the worksite (and thus not merely to submit them later) was a legitimate restriction of the freedom to provide services which was aimed at ensuring the social protection of employees and the effective monitoring of such protection. In view of that reasoning, it follows that the Supreme Administrative Court, by way of reference to its earlier decisions, provided comprehensible reasons for its standpoint that there were no unsettled legal issues of EU law, and a preliminary ruling by the CJEU was therefore unnecessary.

13. The applicant's second set of arguments centred on the alleged violation of the freedom to provide services resulting from the sanctions provided for by law, which in his submission were disproportionate. He argued that they aimed to prevent providers of services from other EU countries from providing services in Austria, which was contrary to recital 12 of Directive 2006/123/EC and Article 20 of Directive 2014/67/EU. Moreover, the sanctions did not distinguish between missing and incomplete documents. The sanctions had thus been discriminatory and had to be considered disproportionate controls contrary to recital 12 of Directive 2006/123/EC. Another Austrian court had requested a preliminary ruling, largely because it had had concerns about the compatibility of these sanctions with EU law.

The Supreme Administrative Court again responded to these arguments by referring to its earlier decision of 20 September 2018 (case no. Ra 2018/11/0118), in which it had held that the domestic regulations provided for four different levels of penalties, which were graduated according to the degree of wrongdoing and culpability and each of which allowed for a broad margin of appreciation in sentencing. The Supreme Administrative Court did not see any contradiction with the CJEU's judgment of 9 February 2012 (case no. C-210/10), which had been based on a different set of facts, namely a flat-rate fine regardless of the severity of the infringements. The Supreme Administrative Court thus considered the Austrian provisions on sanctions proportionate and in line with EU law. As regards the fact that another court had initiated the preliminary ruling procedure, the Court agrees with the Supreme Administrative Court's view

that the mere reference thereto did not adequately specify the alleged infringement of EU law. It therefore appears that the Supreme Administrative Court also dealt with the applicant's second set of arguments sufficiently.

14. Lastly, the third set of arguments were comprised of the applicant's remaining claims that the fines imposed on him were disproportionate, violating Articles 18 and 56 of the Treaty on the Functioning of the EU and Article 49 § 3 of the Charter of Fundamental Rights of the EU, that domestic law was discriminatory as the provisions in question did not equally apply to Austrian providers of services, and lastly that the obligation to keep documents which contained sensitive data available at the worksite violated EU data protection law.

In its decision, the Supreme Administrative Court comprehensibly referred to the fact that the applicant had only hinted at legal concerns and had not further specified the alleged infringement of EU law or of the CJEU's case-law. In the absence of any further explanations by the applicant in this context, the Court is satisfied that the Supreme Administrative Court's response to his arguments was adequate.

15. Under these circumstances, the Court cannot agree with the applicant's contention that the domestic proceedings were unfair within the meaning of the Court's case-law. It is evident from the above that the Supreme Administrative Court, though partly by referring to its previous judgments, addressed the applicant's arguments. In essence, it found that a number of the questions the applicant wished to submit for a preliminary ruling had already been addressed by the CJEU while others were not relevant as the applicant had failed to substantiate them, thus giving reasons in the light of the CJEU's *Cilfit* case-law (see paragraph 8 above). Its reasoning enabled the applicant to understand the decision and thus respected the procedural guarantees under Article 6 § 1 of the Convention. The Court does not need to examine whether the decision of the Supreme Administrative Court was correct as it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law (see *Ullens de Schooten and Rezabek*, cited above, § 61). In conclusion, no sign of arbitrariness can be detected in the Supreme Administrative Court's decision of 22 October 2018 rejecting the applicant's request for a preliminary ruling to be sought from the CJEU. The application is therefore manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 29 September 2022.

Ilse Freiwirth Deputy Registrar	Armen Harutyunyan President