

Anonymised version

Translation

C-253/19 — 1

Case C-253/19

Request for a preliminary ruling

Date lodged:

26 March 2019

Referring court:

Tribunal da Relação de Guimarães (Portugal)

Date of the decision to refer:

14 February 2019

Applicants at first instance and appellants on appeal:

MH

NI

Defendants at first instance and respondents on appeal:

OJ

Novo Banco SA

Tribunal da Relação de Guimarães (Court of Appeal, Guimarães)

2nd Civil Division

...

Summary

1 — The national court is required to refer to the Court of Justice any question relating to the interpretation and/or validity of provisions of EU law, where, under national procedural rules, it is the court of final instance, for which reason, in the Portuguese legal system, that requirement may apply both to the Supremo

Tribunal de Justiça (Supreme Court of Justice) and to the Tribunal da Relação (Court of Appeal), or indeed the court of first instance.

2 — Failure to comply with the duty to make a reference for a preliminary ruling may give rise to a situation in which the State fails to fulfil its obligations; that may result in an action being brought against it before the national courts by the injured party and/or in infringement proceedings under Articles 258 to 260 TFEU.

Order of the Tribunal da Relação de Guimarães (Court of Appeal, Guimarães)

Report:

MH and NI, who are married to each other and are habitually resident in ... Norfolk, United Kingdom, had applied to have themselves declared insolvent.

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The judgment under appeal stated that the court lacked the international jurisdiction to hear the applicants' petition on the ground that their centre of interests is in the place where they are habitually resident, that is to say, the United Kingdom, in accordance with the fourth paragraph of Article 3(1) of Regulation 2015/848 of the European Parliament and of the Council.

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The applicants lodged an appeal against that decision in which they made the following submissions:

- (a) The appellants seek to have themselves declared insolvent, relying on the relevant facts, specifically those set out in Articles 3 to 18 of the initial petition.
- (b) It is apparent from those facts that they cannot meet their outstanding debts.
- (c) They currently reside in the United Kingdom where they work.
- (d) All the transactions and contracts which gave rise to their insolvency were concluded in Portugal.
- (e) The only item of immovable property which they own is located in Portugal.
- (f) Notwithstanding the fact that they reside in the United Kingdom and the provisions of Article 84 of Regulation (EU) 2015/848 of the European Parliament and of the Council, it is clear that that provision does not in itself preclude the Portuguese courts from hearing the appellants' claims.

(g) In the present case, recital 30 of that regulation confers jurisdiction on the Portuguese courts to hear the appellants' petition.

(h) That is because the only asset which they own is located in Portugal, which means that the centre of their interests is based in that country.

(i) That situation ensures *ipso jure* that the national courts have international jurisdiction to hear the appellants' insolvency petition, inasmuch as the Portuguese courts have exclusive international jurisdiction over the seizure and sale of the property belonging to the appellants in order to wind up the estate.

(j) The appellants' claim may proceed only by way of an action brought on national territory for the simple reason that the asset making up their estate is located exclusively in Portugal.

(k) There is no connection between the appellants' current residence and the events that led to their insolvency, which occurred entirely in Portugal.

(l) In dismissing the petition for a declaration of insolvency, the order under appeal misinterpreted and misapplied the provisions relied on.

For those reasons, the present appeal must be upheld, the order under appeal must be set aside and the proceedings must be continued, with all the ensuing legal consequences.

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In view of the provisions of Article 635 of the Código do Processo Civil (Code of Civil Procedure), the subject matter of an appeal is delimited by the form of order sought therein, for which reason, in the present appeal, it is appropriate to ascertain whether the Portuguese courts have jurisdiction to open insolvency proceedings, as is requested by the appellants.

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It is appropriate to give a decision.

It is common ground that, since 2016, the applicants have been habitually resident in the United Kingdom where they are in paid employment. Their only immovable asset is located in Portugal.

In order to establish whether the Portuguese courts have jurisdiction to open the proceedings in question, it is necessary to refer to Regulation (EU) 2015/848 of the European Parliament and of the Council.

Article 3(1) of that regulation provides that *‘The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated have jurisdiction to open insolvency proceedings (“main insolvency proceedings”). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.*

...

In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual’s habitual residence ...’.

On the other hand, recital 30 of that regulation, which is relevant to the present case, states, inter alia: *‘In the case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption, for example where the major part of the debtor’s assets is located outside the Member State of the debtor’s habitual residence’.*

The judgment under appeal declared that the Portuguese courts do not have jurisdiction to open the insolvency proceedings since the applicants have their centre of interest in the place where they are habitually resident, that is to say, the United Kingdom.

The applicants argue that, since Portugal is where their only immovable asset is located, recital 30 of that regulation confers jurisdiction on the Portuguese courts to open the main insolvency proceedings.

Thus there is a doubt over the interpretation to be given to that regulation, which the scant case-law and legal writings cannot resolve.

As Justice Rosa Tching ... observes, the effectiveness of EU law and, to a large extent, the success of its very existence and development are dependent on the correct and uniform application of EU law by the national courts.

Article 267(a) and (b) of the Treaty on the Functioning of the European Union provides that the Court of Justice of the European Union is to have jurisdiction to decide on the interpretation of the Treaties and on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, and where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is to bring the matter before the Court of Justice.

It is only exempt from that obligation where it is found that ‘the question is irrelevant, that the provision of EU law in question has 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 over its interpretation’ (see Alessandra Silveira ... *Anotação aos acórdãos (TEDH) Ferreira Santos Pardal c. Portugal e (TJUE)*

Ferreira da Silva e Brito (ou do «grito do Ipiranga» dos lesados por violação do direito da União Europeia no exercício da função jurisdicional)) ...

Failure to comply with the duty to make a reference for a preliminary ruling may give rise to a situation in which the State fails to fulfil its obligations; that may result in an action being brought against it before the national courts by the injured party and/or in infringement proceedings under Articles 258 to 260 TFEU (see, on the question of the State's liability for breach of EU law due to judicial activities, judgments of the CJEU: *Köbler* (of 30 September 2003, C-224/01), *Commission v Italian Republic* (of 9 December 2003, C-129/00) and *Traghetti del Mediterraneo* (of 13 June 2006, C-173/03)).

Thus, the national court is required to refer to the Court of Justice any question relating to the interpretation and/or validity of provisions of EU law, where, under national procedural rules, it is the court of final instance, for which reason, in the Portuguese legal system, that requirement may apply both to the Supremo Tribunal de Justiça (Supreme Court of Justice) and to the Tribunal da Relação (Court of Appeal), or indeed the court of first instance.

In the present case, having regard to Article 14 of the Código da Insolvência e da Recuperação de Empresas (Insolvency and Business Recovery Code) (Law No 39/2003 of 22 August 2003, as amended by Decree-Law No 26/2015 of 6 February 2015), as a rule in insolvency proceedings, there will be no appeal against judgments of the court of appeal, given that such an appeal is only admissible where the judgment of the court of appeal conflicts with another handed down in the context of the same legislation, and the case-law has not been determined by the [Supremo Tribunal de Justiça] (Supreme Court of Justice).

Thus, since that exception does not arise, this court is the court of final instance.

In the light of the foregoing, it is appropriate to stay the proceedings in the present case pursuant to Articles 269(1)(c), first part, and 272(1) of the Code of Civil Procedure and to refer to the Court of Justice the following question on interpretation, as provided for in Article 234 of the EC Treaty:

Question:

- Under Regulation (EU) 2015/848 of the European Parliament and of the Council, do the courts of a Member State have jurisdiction to open main insolvency proceedings in respect of a citizen whose sole immovable asset is located in that State, while he, along with his family unit, is habitually resident in another Member State where he is in paid employment?

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