

Case C-256/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

26 March 2019

Referring court:

Verwaltungsgericht Wien (Vienna Administrative Court, Austria)

Date of the decision to refer:

27 February 2019

Appellant:

S.A.D. Maler und Anstreicher OG

Respondent authority:

Magistrat der Stadt Wien (City Council of Vienna, Austria)

Subject matter of the main proceedings

Whether the legal entity responsible for holiday entitlements in the construction sector has the power to collect payments from the appellant in connection with the holiday pay for its workers in implementation of Article 7 of Directive 2003/88/EC.

Subject matter and legal basis of the reference

The consequences under EU law of the lack of jurisdiction of a judge on the basis of an infringement of the rules on intra-court case allocation of cases with regard to Article 47 of the Charter of Fundamental Rights of the European Union and the obligations of the legislature to guarantee the possibility of invoking such an infringement.

Questions referred

(1) Are the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and the principle of effectiveness at least with regard to a national legal system which, for the purpose of safeguarding the independence and impartiality of the courts in its constitution, establishes a fundamental right to the allocation of cases to judges of cases according to a fixed allocation of cases determined in advance according to general rules to be interpreted as meaning that the legislature must ensure that this fundamental guarantee is effective and not merely theoretical?

(1)(a) Supplementary question: If Question (1) is answered in the negative:

Do the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and the principle of effectiveness in a national legal system which has enshrined the fundamental right of the fixed allocation of cases in the constitution impose any obligations to safeguard that right on the legislature and, if so, which?

(1)(b) Supplementary questions: If Question (1) is answered in the affirmative:

(1)(b)- (1) Do the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and the principle of effectiveness at least with regard to a national legal system which has enshrined the fundamental right of the fixed allocation of cases in the constitution demand non-compliance with an instruction or action concerning the allocation of files to a judge by a body with no jurisdiction under law regarding that instruction or action?

(1)(b)- (2) Do the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and the principle of effectiveness at least with regard to a national legal system which has enshrined the fundamental right of the fixed allocation of cases in the constitution demand that, under intra-court rules of procedure, a body dealing with the allocation of court files may be granted only a narrow scope of discretion, if any, determined in advance, with regard to the allocation decision?

(2) Are the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and the principle of effectiveness at least with regard to a national legal system which, for the purpose of safeguarding the independence and impartiality of the courts in its constitution, establishes a fundamental right to the allocation of cases to judges according to a fixed allocation of cases determined in advance according to general rules to be interpreted as meaning that a judge who has doubts (i) concerning the legality of an intra-court allocation of cases or (ii) concerning the legality of an intra-court decision implementing an intra-court allocation of cases and directly affecting the activity of that judge (in particular an allocation of cases decision) must, with regard to those doubts, be able to lodge an appeal (in particular at no financial cost to that judge) at a different court with full powers to review the legality of the act considered to be unlawful?

If not: Are there any other provisions to be guaranteed by the legislature which ensure that a judge is able to attain legal compliance with the statutory provisions concerning him in respect of the observance of the statutory (in particular intra-court) provisions regarding the allocation of cases?

(3) Are the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and the principle of effectiveness at least with regard to a national legal system which, for the purpose of safeguarding the independence and impartiality of the courts in its constitution, establishes a fundamental right to the allocation of cases to judges according to a fixed allocation of cases determined in advance according to general rules to be interpreted as meaning that a party to a court case which has doubts concerning (i) the legality of a provision of the intra-court allocation of cases that is prejudicial to the settlement of its case or (ii) the legality of the allocation of that case to a certain judge must, before the issuing of the court decision, with regard to those doubts, be able to lodge an appeal (which does not place an excessive financial burden on that party) at a different court with full powers to review the legality of the legal act considered to be unlawful?

If not: Are there any other provisions to be guaranteed by the legislature which ensure that a party, before the issuing of the court decision, is able to attain legal compliance with its fundamental right to observance of the 'lawful judge' principle [Article 83(2) of the Bundes-Verfassungsgesetz]?

(4) Are the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and the principle of effectiveness at least with regard to a national legal system which, for the purpose of safeguarding the independence and impartiality of the courts in its constitution, establishes a fundamental right to the allocation of cases to judges according to a fixed allocation of cases determined in advance according to general rules to be interpreted as meaning that the intra-court allocation of cases and the intra-court file registration are organised in such a transparent and comprehensible manner that the judge or a party is able, without particular effort, to check that the specific allocation of files to a judge or a certain panel of judges corresponds to the provisions of the intra-court allocation of cases?

If not: Are there any other provisions to be guaranteed by the legislature which ensure that a judge or a party is in a position to be able to obtain knowledge of the legality of a certain allocation of court cases?

(5) Are the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and the principle of effectiveness at least with regard to a national legal system which, for the purpose of safeguarding the independence and impartiality of the courts in its constitution, establishes a fundamental right to the allocation of cases to judges according to a fixed allocation of cases determined in advance according to general rules to be interpreted as meaning that the parties to a case and the judge in a court case must be able, without particular action on their

part, to acquaint themselves with the content of the case allocation rules and that the parties to a case and the judge must in this way be able to check the legality of the allocation of the case to a judge or certain panel of judges?

If not: Are there any other provisions to be guaranteed by the legislature which ensure that a judge or a party is in a position to be able to obtain knowledge of the legality of a certain allocation of court cases?

(6) What obligations to act are incumbent upon a judge, in view of his obligation under EU law to observe the procedural provisions under EU law, who, by virtue of an (out-of-court or intra-court) legal act which cannot be challenged, is obliged to perform an act which is contrary to EU law and infringes party rights?

Provisions of EU law cited

Second subparagraph of Article 19(1) TEU

Articles 31 and 47 of the Charter of Fundamental Rights of the European Union

Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time

Provisions of national law cited

Articles 83 and 135(2) of the Bundes-Verfassungsgesetz (Federal Constitutional Law of Austria; 'B-VG')

Paragraphs 14 and 18 of the Law on the Vienna Administrative Court

Paragraphs 2-3, 4-12, 22-23 and 24-29a of the Bauarbeiter-Urlaubs- und Abfertigungsgesetz (Construction Workers' Holiday and Severance Pay Law, BUAG)

Brief summary of the facts and procedure

- 1 Pending at the referring court is an appeal against the decision of the respondent authority of 19 June 2018, by which, pursuant to Paragraph 25(5) of the Bauarbeiter-Urlaubs- und Abfertigungsgesetz ('BUAG'), a decision was made on the appellant's opposition of 24 May 2018 to an arrears statement of 25 April 2018.
- 2 That arrears statement was based on a claim brought by the Bauarbeiter-Urlaubs- und Abfertigungskasse (Construction Workers' Holiday and Severance Pay Fund; 'BUAK') against the appellant, in connection with holiday pay entitlements

within the meaning of Article 7 of Directive 2003/88/EC, as the BUAK assumed that the appellant fell within the area of validity of the BUAG. The appellant objected that its company did not fall within the regulatory area of the BUAG, which meant that the contested decision unjustly encroached upon its rights to property.

- 3 In this connection, two appeals were allocated to the referring judge on 26 July 2018 as a single proceeding with just one case reference number. However, those two appeals were actually based on two separate official decisions relating to two separate, independent oppositions filed at different times.
- 4 As the registry of the referring court had (erroneously) classified those two appeals as just a single proceeding and therefore had not allocated them individually according to the appropriate allocation arrangement, the allocation was contrary to the provisions regarding the allocation of cases [Geschäfte or 'court business']. After the referring judge had notified the registry of this obvious mistake, a separate case number was also issued for the second appeal on 31 July 2018, with, however, this appeal being reallocated to the referring judge on the basis of an actually inapplicable provision on the allocation of cases.
- 5 Therefore, on 3 August 2017, the referring judge filed an 'objection of lack of jurisdiction' with regard to this incorrect allocation, whereupon the President of the court, without consulting the competent case allocation committee of the registry, issued an oral instruction to attach the appeal to a different case (already allocated to the referring judge), disregarding the provision on the allocation of cases requiring the reallocation of the file at issue. There was no documentation of this oral instruction; the referring judge only learnt of it by chance.
- 6 The Austrian legal system does not provide for a separate appeal against such action by the President of a court. Therefore, on 5 October 2018, the referring judge requested the finding that he had no jurisdiction to settle the appeal at issue, and stated that a decision nevertheless made by him would be unconstitutional and contrary to Article 6(1) ECHR, which meant that he would in this case be subject to penalties under employment, disciplinary, criminal and tort law.
- 7 By letter of 10 October 2018, the President of the Vienna Administrative Court informed the referring judge that he had jurisdiction and was obliged to settle the appeal at issue. The referring judge lodged an appeal against that decision at the Supreme Administrative Court. By order of 21 November 2018, the Supreme Administrative Court dismissed that appeal, because only a party to a case, not a judge put in charge of settling court files contrary to the statutory provisions, was authorised to raise the issue of the risk of his decision thereby being unconstitutional and contrary to ECHR.

Summary of the basis for the reference

- 8 If the judge in the present case were to assume that the allocation decision contrary to Article 6 ECHR and Article 47 of the Charter was not to be accepted due to the priority of application of Article 47 of the Charter and was therefore not to be implemented, and if he were therefore not to settle the court case unlawfully allocated thereto, he would have to fear serious consequences under criminal, employment and tort law. However, a judge also has to fear those consequences when he makes a decision despite being aware of his own lack of jurisdiction. There is therefore no alternative conduct of a judge which would lead to him not having to fear those consequences. Therefore, according to the Austrian legal system, a judge may not even assert that he has been unlawfully obliged to seriously infringe the provisions of the Austrian Federal Constitution, the ECHR and the Charter.
- 9 With regard to the first question of whether the legislature must ensure that the legally granted fundamental guarantee of a fixed allocation of cases is effective and not merely theoretical, the referring court states that the legislature, in the scope of its guarantee obligation according to the ECHR and EU law, has to ensure that the exercise of the respectively granted fundamental right actually takes place and is reasonably possible.
- 10 As far as can be seen, there is not yet any more detailed case-law of the Court of Justice on the question of how and to what extent this effectiveness provision must be legally configured with regard to the right, guaranteed by Article 47 of the Charter in conjunction with Article 6(1) ECHR, to a lawful allocation of jurisdiction to judges for judicial proceedings. The fact that this question is highly relevant at least in Austria is shown by the national legal situation described, which prevents a judge and any party from ensuring compliance with the statutory provisions regarding the allocation of jurisdiction.
- 11 With regard to the second question of whether a judge who has doubts concerning the legality of an intra-court allocation of cases or an (allocation) decision implementing this must be able to lodge a reasonable appeal at a different court with full power of review, the referring court states that, in connection with the fundamental guarantee obligations of the legislature, a holder of a fundamental right is also granted the right to an effective remedy. As a result of the national rules raised in the present request for a preliminary ruling, a judge is denied any right to such a remedy. The question therefore arises as to whether a judge affected by allocation decisions has, on the basis of the legal penalties to which he is subject in the event of non-compliance with an allocation decision, a fundamental right to the fundamental guarantees of Article 47 of the Charter. If not, the question arises as to whether and to what extent this judge at least indirectly, by virtue of Article 47 of the Charter, has special rights, such as in particular the right to require the review of an allocation decision that is contrary to the intra-court allocation of cases by an independent different court.

- 12 With regard to the third question, whether a party to a court case which has doubts concerning the legality of a provision of the intra-court allocation of cases that is prejudicial to the settlement of its case or concerning the legality of the allocation of that case to a certain judge must be able, before the issuing of the court decision, to lodge an appeal at a different court with full powers to review the legality of the legal act that is considered to be unlawful, the referring court refers to legal hurdles which can impede the exercising of the fundamental right to an effective remedy.
- 13 According to the clear and undisputed legal situation in Austria, there is, in administrative court proceedings, no remedy by which, before the issuing of the final decision, the question of the partiality or lack of jurisdiction of a judge can be reviewed. With regard to the case-law of the ECHR on this legal situation, this denial of the party right stated above appears to constitute a breach of Article 47 of the Charter.
- 14 With regard to the fourth question, whether the intra-court allocation of cases and file registration are organised in such a transparent and comprehensible manner that a judge or a party is able, without particular effort, to check that the specific allocation of files corresponds to the provisions on the intra-court allocation of cases, the referring court states that the case at issue is quite a typical case in respect of the actual impossibility of ascertaining the reasons for intra-court allocation decisions. As long as the legislature does not prescribe any enforceable provisions regarding comprehensible and easily accessible documentation of the allocation procedures, the right guaranteed in this case by Article 47 of the Charter is therefore only theoretical in nature, even in the event that the Court of Justice answers the two questions raised above in the affirmative.
- 15 In addition, according to the current practice, it is in fact completely impossible for a party to a case to gain knowledge of the procedures relating to allocation, as usually not even a judge is able to access that information. That also shows the central relevance of the clarification of the provisions imposed on the legislature by Article 47 of the Charter with regard to providing the necessary transparency and verifiability of allocation procedures.
- 16 With regard to the fifth question of whether the parties to a case and the judge must be able, without particular action on their part, to acquaint themselves with the content of the case allocation rules and review the legality of the allocation of the case, the referring court states that there is absolutely no scrutiny of specific allocations of court files, as usually not even a judge is able to gain knowledge of the allocation procedures. Therefore, the bodies dealing with the allocation of court files are not actually subject to any review. In addition, according to the current legal situation in Austria, the legality of the provisions of the intra-court allocation of cases cannot and may not be reviewed by any court.
- 17 In the scope of the court file allocation problems that are of vital significance for judges, the sixth question relates to what action must be taken by a judge who, by

virtue of a legal act which cannot be challenged thereby, is obliged to perform an act that is contrary to EU law and infringes party rights, in view of his obligation under EU law to comply with the procedural provisions under EU law.

- 18 As set out above, if files are allocated contrary to the provisions, a judge is compromised as, due to the lack of any opportunity to invoke this unlawfulness, he has to make a decision in contravention of the provisions of Article 47 of the Charter. However, it is even more problematic if the judge takes the case-law of the Court of Justice seriously and, as a result of the superseding effect of directly applicable EU law, considers the act of allocation that is obviously contrary to Article 47 of the Charter not to be fixed or not to be taken notice of. The party's rights guaranteed under Article 47 of the Charter are then particularly infringed, in this case as a result of the excessive duration of the case caused by the failure to perform the act. In such a case, the only option that remains for a judge is the filing of a request for a preliminary ruling, if it should happen that EU law is engaged by the specific allocated court case.