Case C-341/19

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:

30 April 2019

Referring court:

Bundesarbeitsgericht (Germany)

Date of the decision to refer:

30 January 2019

Defendant, appellant and further appellant in the appeal on a point of law:

MH Müller Handels GmbH

Applicant, respondent and further respondent in the appeal on a point of law:

MJ

Subject matter of the main proceedings

Equal treatment in employment and occupation, freedom of religion in connection with the wearing of a headscarf in the workplace

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Can established indirect unequal treatment on grounds of religion within the meaning of Article 2(2)(b) of Directive 2000/78/EC, resulting from an internal rule of a private undertaking, be justifiable only if, according to that rule, it is prohibited to wear any visible sign of religious, political or other philosophical beliefs, and not only such signs as are prominent and large-scale?

2. If Question 1 is answered in the negative:

   (a) Is Article 2(2)(b) of Directive 2000/78/EC to be interpreted as meaning that the rights derived from Article 10 of the Charter of Fundamental Rights of the European Union and from Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms may be taken into account in the examination of whether established indirect unequal treatment on grounds of religion is justifiable on the basis of an internal rule of a private undertaking which prohibits the wearing of prominent, large-scale signs of religious, political or other philosophical beliefs?

   (b) Is Article 2(2)(b) of Directive 2000/78/EC to be interpreted as meaning that national rules of constitutional status which protect freedom of religion may be taken into account as more favourable provisions within the meaning of Article 8(1) of Directive 2000/78/EC in the examination of whether established indirect unequal treatment on grounds of religion is justifiable on the basis of an internal rule of a private undertaking which prohibits the wearing of prominent, large-scale signs of religious, political or other philosophical beliefs?

3. If Questions 2(a) and 2(b) are answered in the negative:

   In the examination of an instruction based on an internal rule of a private undertaking which prohibits the wearing of prominent, large-scale signs of religious, political or other philosophical beliefs, must national rules of constitutional status which protect freedom of religion be set aside because of primary EU law, even if primary EU law, such as, for example, Article 16 of the Charter of Fundamental Rights, recognises national laws and practices?

Provisions of EU law cited

Charter of Fundamental Rights of the European Union ('the Charter'), specifically Articles 10 and 16

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, specifically Articles 2 and 8

Provisions of national law cited

Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany; 'the GG'), specifically Articles 4 and 12

Bürgerliches Gesetzbuch (German Civil Code; 'the BGB'), specifically Paragraph 134

Gewerbeordnung (Code governing the exercise of artisanal, commercial and industrial professions; 'the GewO'), specifically Paragraph 106

Allgemeines Gleichbehandlungsgesetz (General Law on Equal Treatment; 'the AGG'), specifically Paragraphs 1, 3 and 7

Brief summary of the facts and procedure

1 The parties are essentially in dispute as to whether the instruction not to wear an Islamic headscarf in the workplace is lawful.

2 The defendant is a company established under German law which operates drugstores in Germany. The applicant is a practising Muslim. She has been employed by the defendant as a sales assistant and cashier since 2002.

3 After her return from parental leave in 2014, unlike before, she wore a headscarf. She did not comply with the defendant's request for the headscarf to be removed in the workplace. She was thereupon initially no longer employed at all and later entrusted with a different activity for which she did not have to remove her headscarf. However, on 21 June 2016, she was asked to remove the headscarf. Following her refusal to do so, she was sent home. In July 2016, she received the instruction to appear in the workplace without any prominent, large-scale religious, political and other philosophical signs ('the disputed instruction').

4 The applicant thereupon filed an action for a ruling declaring that the disputed instruction is ineffective. She is also demanding remuneration.

5 The action was successful at first and second instance. With the appeal on a point of law, the defendant continues to seek the dismissal of the action.

Principal arguments of the parties in the main proceedings

6 The applicant considers the disputed instruction to be ineffective, as it infringes her constitutionally-protected freedom of religion. She states that she wears the headscarf exclusively in order to meet a religious requirement which she considers to be mandatory. This, she submits, is covered by freedom of religion.

7 The defendant's wish, based on the freedom to conduct a business, to pursue a policy of neutrality does not, the applicant submits, have unconditional priority over freedom of religion. Rather, an examination of proportionality must be carried out.

8 The case-law of the Court of Justice does not, in the applicant's view, preclude that opinion. EU law contains merely minimum requirements, with the result that

a difference in treatment permissible under EU law may be impermissible under national law, as is the case here.

9 The defendant considers the instruction to be lawful. It states that it has always imposed a dress code, according to which, inter alia, headgear of any kind should not be worn in the workplace. Since July 2016, all sales branches have been subject to the rule under which it is prohibited to wear prominent, large-scale religious, political and other philosophical signs in the workplace. The defendant's aim in this is to maintain neutrality in the undertaking. The intention is, inter alia, to avoid conflicts amongst employees. Such problems, attributable to differing religions and cultures, have already occurred in three cases in the past. However, they did not relate to the wearing of a headscarf or any other religious sign.

10 The defendant takes the view that its opinion is supported by the judgment of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203), in which the Court of Justice attached to the freedom to conduct a business, protected by Article 16 of the Charter, greater weight than to freedom of religion. In respect of the effectiveness of a prohibition on religious expression, there is no need to demonstrate that economic disadvantages would occur and that customers would stay away. A different conclusion cannot be derived from national fundamental rights.

Brief summary of the basis for the request

11 The reference for a preliminary ruling is necessary, as the resolution of the dispute depends on questions of EU law which the Court of Justice has not yet conclusively settled.

Relevant national law

12 At national-law level, the disputed instruction is based on the first sentence of Paragraph 106 of the GewO, according to which the employer may 'further specify the content, place and time of the work at its reasonable discretion'. This right of instruction does not apply without restriction. Firstly, an instruction must be consistent with the exercise of 'reasonable discretion', as is directly apparent from the wording of the provision. Secondly, according to the case-law of the referring court, the Bundesarbeitsgericht (Federal Labour Court), the instruction must not be in breach of a statutory prohibition. In the present case, such a prohibition could be constituted by Paragraph 7, in conjunction with Paragraph 1, of the AGG, according to which employees may not be placed at a disadvantage on the ground of, inter alia, their religion. There is also a prohibition on indirect discrimination which, under Paragraph 3(2) of the AGG, is to be taken to occur where apparently neutral provisions would place persons at a particular disadvantage in comparison with others on the ground of, inter alia, their religion, unless those provisions are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

13 Should the disputed instruction be in breach of Paragraph 7 of the AGG, it would be ineffective pursuant to Paragraph 134 of the BGB, according to which a legal transaction which is in breach of a statutory prohibition is void and ineffective.

14 The fundamental rights enshrined in the GG are also to be considered when the national provisions mentioned are being examined. It is in particular necessary to examine whether the disputed instruction and the underlying general rule which the defendant invokes constitute an impermissible limitation of the freedom of religion protected by Article 4(1) and (2) of the GG.

15 According to established case-law of the Bundesverfassungsgericht (Federal Constitutional Court), the fundamental rights protection also has an indirect effect on the legal relations between private persons. When interpreting legal provisions, the courts must take account of fundamental rights as value decisions under constitutional law, in particular when interpreting general clauses under civil law and indeterminate legal concepts. In this case, fundamental rights which may be in conflict with one another are to be understood and balanced in terms of their interaction depending on the circumstances of the individual case.

16 It also emerges from the case-law of the Federal Constitutional Court that the wearing of an Islamic headscarf comes within the scope of protection of freedom of religion within the meaning of Article 4(1) and (2) of the GG. This fundamental right covers both the internal freedom to believe or not to believe and the external freedom to express and spread the belief. This includes the right of the individual to base his/her entire behaviour on the teaching of a faith and to act in accordance with that belief. Muslim women who wear a headscarf typical of their faith may also rely on this protection when performing their work. The fact that there are a variety of opinions in Islam regarding what is known as the coverage requirement is irrelevant.

17 However, freedom of religion may be limited by conflicting fundamental rights. The employer's freedom to conduct a business, which is protected by Article 12(1) of the GG, is to be taken into account in the present case. According to corresponding case-law of the Federal Constitutional Court and the referring court, conflicting fundamental rights are to be limited in such a way as to become as effective as possible for all parties concerned. However, in this connection, the referring court requires that the employer should demonstrate genuine dangers that the further employment of the worker concerned who wears an Islamic headscarf will lead to specific operational disruption or economic losses. Mere suppositions and fears are not enough.

Applicable provisions of EU law and of the ECHR

18 An interpretation of the relevant provisions of the GewO and the AGG solely from the angle of national fundamental rights falls short. It is in particular necessary to note that the provisions of the AGG serve to transpose Directive 2000/78 into German law. The interpretation of Article 2(2)(b) of Directive

2000/78 is therefore important for the understanding of the term 'indirect discrimination' within the meaning of Paragraph 3(2) of the AGG. The field of application of the Charter is also opened up, as the AGG implements EU law (see the first sentence of Article 51(1) of the Charter). Both freedom of religion protected by Article 10 of the Charter and the freedom to conduct a business enshrined in Article 16 thereof are relevant here.

19 With regard to Article 10 of the Charter, it is also to be considered that, in accordance with the Explanations relating to the Charter, the right guaranteed therein corresponds to the right guaranteed by Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and, under Article 52(3) of the Charter, has the same meaning and the same scope as that right. According to the case-law of the European Court of Human Rights ('the ECtHR'), the wearing of religious clothing, such as a headscarf, is behaviour protected by Article 9 of the ECHR (see, inter alia, ECtHR, 18 September 2018, *Lachiri v Belgium*, CE:ECHR:2018:0918JUD000341309, paragraph 31). The state courts dealing with a private employer's headscarf ban must sufficiently protect the right deriving from Article 9 of the ECHR and must strike a fair balance between the rights of the parties concerned and those of others. In the case of a dress code, the employees' right to express their belief is to be weighed up against the employer's desire to project a certain corporate image (ECtHR, 15 January 2013, *Eweida and Others v United Kingdom*, CE:ECHR:2013:0115JUD004842010, paragraphs 84, 91 and 94).

First question referred

20 In the opinion of the referring court, the disputed instruction constitutes an indirect difference in treatment of the applicant (in the sense of potential disadvantaging or discrimination pursuant to Paragraph 3(2) of the AGG and Article 2(2)(b) of Directive 2000/78), as the instruction based on a general rule places the applicant at a particular disadvantage in comparison with other persons on the grounds of her religion. It is important for the resolution of the dispute whether the instruction, in accordance with the exception provided for in Article 2(2)(b)(i) of Directive 2000/78, is objectively justified by a legitimate aim and whether the means of achieving that aim are appropriate and necessary.

21 In agreement with the Court of Justice, the referring court assumes that an employer's wish to project an image of neutrality towards customers is covered by the freedom to conduct a business protected under Article 16 of the Charter and therefore constitutes a legitimate aim (see judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraph 38).

22 However, in view of the aforementioned judgment and the judgment of 14 March 2017, *Bougnaoui and ADDH* (C-188/15, EU:C:2017:204), it is in question whether only a comprehensive prohibition covering any visible form of religious expression is capable of pursuing the aim of a corporate neutrality policy or

whether, as in the present case, a prohibition restricted to a prominent, large-scale sign is also sufficient, as long as it is implemented in a coherent and systematic manner.

23 The decision of the Court of Justice in the *G4S Secure Solutions* case was based on a rule which prohibited the wearing of visible signs of political, philosophical or religious beliefs. That decision is referred to in the judgment of the Court of Justice in the *Bougnaoui and ADDH* case. For the referring court, it is not clearly apparent therefrom whether the Court of Justice only took account of the circumstances of relevance in the *G4S Secure Solutions* case and referred thereto in the judgment delivered on the same day in the *Bougnaoui and ADDH* case or whether there is a universally applicable statement in the comments. It is for this reason that the first question is referred.

Referred Questions 2(a) and 2(b)

24 Questions 2(a) and 2(b) concern the examination of appropriateness within the meaning of Article 2(2)(b)(i) of Directive 2000/78. If the Court of Justice concludes that a prohibition limited to prominent, large-scale signs may also be capable of pursuing the company's neutrality policy aim, it will then be necessary to examine whether the prohibition is necessary and appropriate.

25 The referring court assumes that a rule such as that referred to by the defendant is limited to what is strictly necessary (see judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraph 42), as it prohibits only the wearing of prominent, large-scale signs and is directed solely at workers who interact with customers.

26 Whether the prohibition is also appropriate within the meaning of Article 2(2)(b)(i) of Directive 2000/78 cannot be assessed without referring the matter to the Court of Justice.

27 Firstly raised for the referring court is the fundamental question of whether a balancing of the opposing interests can be performed within the scope of the examination of appropriateness. If that is the case, it raises the further question of whether this balancing of the conflicting interests — here Article 16 of the Charter, on the one hand, and Article 10 of the Charter or Article 9 of the ECHR, on the other — is to be performed upon examination of the appropriateness of a rule establishing a prohibition on expression or only upon application of the rule in the individual case, for example where an instruction is issued to the employee or notice of termination is given.

28 If the rights deriving from the Charter and the ECHR can be taken into account in the assessment of appropriateness within the meaning of Article 2(2)(b)(i) of Directive 2000/78, the referring court is of the opinion that the freedom of religion protected by Article 10 of the Charter and Article 9 of the ECHR is to be given

precedence. The rule invoked by the defendant prohibits without sufficient cause, inter alia, the wearing of prominent, large-scale religious symbols.

29 The applicant may also refer to the protection by these rights in relation to the defendant, that is to say, in the relationship of private entities (see judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 49).

30 It is true that, under Article 52(1) of the Charter, limitations of the freedom of religion are possible. Therefore, like the ECtHR, the referring court assumes that a balancing of the conflicting interests must be carried out. However, in the present case, freedom of religion outweighs the aim, protected by Article 16 of the Charter, of a corporate neutrality policy, as the disruption argued by the defendant is not of sufficient significance to support a prohibition on expression.

31 In addition, in the opinion of the ECtHR, freedom of religion constitutes a precondition of the pluralism which is essential for democracy. Conflicts between people of one faith and people of a different or no faith should be resolved, not by way of elimination, but by preservation of religious diversity (ECtHR, 16 December 2004, *Supreme Holy Council of the Muslim Community v Bulgaria*, CE:ECHR:2004:1216JUD003902397, paragraph 93).

32 In the event that the Court of Justice should conclude that conflicting rights deriving from the Charter and the ECHR cannot be considered in the scope of the examination of appropriateness, this raises the further question of whether national constitutional law, in particular the freedom of faith and creed protected by Article 4(1) and (2) of the GG, may constitute a more favourable rule within the meaning of Article 8(1) of Directive 2000/78. Under that provision, Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in the Directive.

33 Without reference to the Court of Justice, the referring court is unable to assess under which conditions a more favourable provision within the meaning of the Directive is to be assumed. The question arises as to whether this only includes national rules aimed at providing protection against discrimination or whether it also covers provisions which, like the freedom of faith and creed deriving from Article 4(1) and (2) of the GG, are intended to protect the area of civil liberties. As far as can be seen, this question, which is the subject of controversial discussion in the legal literature, has still not been settled in the case-law of the Court of Justice.

34 The referring court assumes that civil liberties also come into consideration as more favourable provisions within the meaning of Article 8(1) of Directive 2000/78, as long as they ultimately raise the standard of protection under discrimination law.

35 Should the Court of Justice take the opposite view, the freedom of faith and creed safeguarded by Article 4(1) and (2) of the GG would, however, not constitute a more favourable provision within the meaning of Article 8(1) of Directive

2000/78 and could not be taken into account in the scope of the examination of appropriateness.

The third question referred

36 The third question referred concerns the relationship between EU law and national constitutional law. If the Court of Justice should answer Questions 2(a) and 2(b) in the sense that neither rights deriving from the Charter and the ECHR nor national constitutional provisions can be included in the examination of whether there is impermissible discrimination on the grounds of religion, the question arises for the referring court as to whether EU law — here Article 16 of the Charter — therefore generally rules out the inclusion of national fundamental rights in the examination of whether an instruction by the employer is effective.

37 The question of the inapplicability of national law is always raised when EU law confers on individuals a right on which they may rely as such in disputes between them in a field covered by EU law and it is impossible to interpret the national law in conformity with EU law (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 75 and 76). Such a subjective right has a direct effect (see, in relation to Article 31(2) of the Charter, judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraphs 67 and 69 et seq.). If there is no subjective right with a direct effect in the private-law relationship, there can only be a compensation claim against the Member State if 'pure' directive law without underlying directly effective primary law was not properly implemented (see judgments of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 43 et seq., and of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 43).

38 From the point of view of the referring court, only Article 16 of the Charter, and not Directive 2000/78, comes into consideration as a subjective right in this sense in the main proceedings. As far as can be seen, the question of whether an individual can invoke Article 16 of the Charter within the scope of a dispute conducted exclusively between private entities has still not been settled in the case-law of the Court of Justice. It is true that there is case-law on the identically worded reservation in Article 27 of the Charter, in which reference is made to EU law and 'national laws and practices'. In the opinion of the Court of Justice, it follows therefrom that this article must be cast in concrete terms through provisions of EU law or national law, with the result that a national rule which does not comply with a directive is not to be disapplied solely on the basis of that article (judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 44 et seq.). However, without a request for a preliminary ruling the referring court is unable to assess whether the case-law delivered in relation to Article 27 of the Charter may be transferred to the freedom to conduct a business protected by Article 16 of the Charter.

39 The referring court itself understands EU law as meaning that Article 16 of the Charter and the priority of application of EU law do not preclude inclusion of

national constitutional rights in the examination of an instruction such as that at issue in the present case. Should the Court of Justice share this view, the freedom of faith and creed protected by Article 4(1) and (2) of the GG could be taken into account. In the opinion of the referring court, the disputed instruction would be ineffective in this case, as the freedom to conduct a business is given less weight than the applicant's freedom of religion within the scope of the act of balancing to be performed. The appeal on a point of law would therefore be unsuccessful. If Article 16 of the Charter were to preclude consideration of national fundamental rights, the appeal on a point of law would, by contrast, be well founded. The third question referred is therefore material to the decision.