

Case C-824/19

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:

12 November 2019

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

31 October 2019

Appellants in the appeal in cassation:

TC

UB

Respondents in the appeal in cassation:

Komisija za zashtita ot diskriminatsia

VA

Other parties to the proceedings:

Varhovna administrativna prokuratura

Subject matter of the main proceedings

Appeals in cassation against the fines imposed on two judges for discriminating against a blind person, based on the characteristic of ‘disability’, who did not allow her to participate as a court assessor in judicial criminal proceedings.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of Article 5(2) of the United Nations Convention on the Rights of Persons with Disabilities and of Article [2](1), (2) and (3) and Article 4(1) of

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Article 267 TFEU

Questions referred

1. Does the interpretation of Article 5(2) of the United Nations Convention on the Rights of Persons with Disabilities and of Article [2](1), (2) and (3) and Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation lead to the conclusion that it is permissible for a person without the ability to see to be able to work as a court assessor and participate in criminal proceedings, or:
2. Is the specific disability of a permanently blind person a characteristic which constitutes a genuine and determining requirement of the activity of a court assessor, the existence of which justifies a difference of treatment and does not constitute discrimination based on the characteristic of ‘disability’?

Provisions of international law cited by the referring court

- 1 United Nations Convention on the Rights of Persons with Disabilities, in force since 3 May 2008, approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 23) — Articles 1, 4, 5 and 27.

Provisions of EU law cited

Article 21 of the Charter of Fundamental Rights of the European Union

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), recitals 6, 17, 23 and 37, Articles 1 to 4 and Article 18.

National legislation cited by the referring court

Konstitutsia na Republika Bulgaria (Constitution of the Republic of Bulgaria, DV No 56 of 13 July 1991) — Article 6 (Equality before the law; Impermissibility of restrictions of rights on the basis of certain characteristics) and Article 48 (Right to work; Obligation of the State to establish requirements for the realisation of the right to work, in particular for persons with mental and physical disabilities)

Zakon za zashtita ot diskriminatsia (Law on protection against discrimination, DV No 86 of 30 September 2003) — Article 4 (Prohibition on discrimination based on listed characteristics, including disability), Article 7 (Cases which do not constitute discrimination, including a difference of treatment of persons which is

based on a characteristic related to any of the discriminatory grounds referred to in Article 4 of the law where, by reason of the nature of the particular profession or particular activity concerned or of the context in which it is carried out, such a characteristic constitutes a genuine and determining occupational requirement, the objective is legitimate and the requirement does not go beyond what is necessary in order to achieve the objective), Article 40 (Tasks of the Komisia za zashtita ot diskriminatsia [Commission for protection against discrimination]), Article 50 (Procedures before the Commission) and Article 68 (Possibility of judicial review of the decisions of the Commission).

Zakon za sadebnata vlast (Law on the judiciary, ‘the ZSV’, DV No 64 of 7 August 2007) — Article 66 (Inclusion of court assessors in the formation of the court competent at first instance; Rights and obligations of court assessors) and Article 67 (Requirements imposed on court assessors in relation to age, registered address, education, absence of convictions for intentional criminal offences and absence of mental illnesses).

Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, ‘the NPK’, DV No 86 of 28 October 2005) — Article 1 (Objectives of the Code of Criminal Procedure), Article 8 (Inclusion of court assessors in the formation of the court; Equality of rights for court assessors and judges), Article 13 (Obligation of the court to take all measures necessary to establish the objective truth), Article 14 (Decision-making by the court based on its own conviction, which relies on an objective, comprehensive and complete assessment of all the facts and circumstances) and Article 18 (Principle of immediacy — the court bases its decisions on evidence that it gathers and evaluates itself).

Brief summary of the facts and procedure

- 2 The proceedings before the administrative authority, the Komisia za zashtita ot diskriminatsia (Commission for protection against discrimination; ‘the KZDiskr.’), were initiated on the basis of the complaint lodged by VA against Judge UB at Sofiyski rayonen sad (Sofia District Court; ‘the SRS’) and against the President of the SRS, which was TC at that time.
- 3 VA, the complainant [in the proceedings] before that Commission, is restricted permanently and for the rest of her life in her ability to work owing to the loss of her sight. She completed her law studies and passed the aptitude test in law in 1977. She was employed at the Sayuz na slepite (Association for the Blind) and in the organisations of the European Blind Union. In 2014, she was admitted as a court assessor in a procedure conducted by the Stolichen obshtinski savet (Sofia City Council) and allocated to the SRS. On 25 March 2015, she was sworn in as a court assessor at that court. As evidenced by a protocol of 23 March 2015 on the allocation of court assessors to the panels of the court by lot, VA was allocated to the Sixth Criminal Chamber as a court assessor. According to information provided by the President of the SRS, VA did not participate in a single oral

procedure in criminal proceedings in the period from 25 March 2015 to 9 August 2016, the date of the entry into force of the amendment to Article 72 ZSV, by which the electronic allocation of court assessors was introduced.

- 4 In the complaint by way of which the administrative proceedings before the KZDiskr. were initiated, and also in the present proceedings, VA asserts that UB, in her capacity as judge of the Sixth Criminal Chamber of the SRS, to whom she was assigned as a court assessor, did not allow her to participate in judicial criminal proceedings. VA also submits that, by letter of 29 May 2015, she contacted the President of the SRS and requested that she be assigned to a different judge in order to be able to exercise her right to work as a court assessor, but her letter did not receive a reply. She takes the view that Judge UB and the President of the SRS discriminated against her based on her disability.
- 5 In her submissions submitted in the course of the proceedings before the KZDiskr., Judge UB stated that the nature of the duties arising from the tasks of the court assessor in criminal proceedings and the requirement to have certain specific physical characteristics related to the ability of the judicial panel to exercise its powers did not fall within the scope of the anti-discrimination provision of Article 4(2) ZZDiskr.. UB puts forward arguments in favour of the application of point 2 of Article 7(1) ZZDiskr., according to which, by reason of the nature of the duties of a court assessor, a difference of treatment of VA which was based on a characteristic related to the discriminatory ground of ‘disability’ constituted a genuine and determining requirement that was objectively justified and pursued a legitimate objective, namely observance of the principles of the NPK, which laid down the tasks of court assessors.
- 6 TC submitted written observations in which arguments in favour of the applicability of point 2 of Article 7(1) ZZDiskr. were put forward, according to which the nature of VA’s ‘disability’ impaired the performance of her specific tasks as a court assessor and would lead to a violation of the principle of immediacy and of the principles of establishing the objective truth and the equal participation of the public in criminal proceedings.
- 7 By decision of 6 March 2017, the KZDiskr. found that TC and UB discriminated against VA based on the characteristic of ‘disability’ pursuant to Article 4(2) in conjunction with Article 4(1) ZZDiskr. and point 7 of Paragraph 1 of the Dopolnitelnite razporedbi na ZZDiskr. (Additional provisions for the ZZDiskr.). Accordingly, a fine of 250 leva (BGN) was imposed on TC and 500 leva (BGN) was imposed on UB pursuant to Article 80(1) ZZDiskr.. Pursuant to point 6 of Article 47 ZZDiskr., TC and UB were recommended not to commit any violations of the existing law on protection against discrimination in the future. VA’s complaint concerning her alleged discrimination based on the characteristic of ‘gender’ was dismissed as unsubstantiated.
- 8 TC and UB contested this decision of the KZDiskr. before the Administrative sad Sofia grad (Sofia City Administrative Court). The latter found that the contested

decision of the KZDiskr. constituted a lawful administrative act and dismissed the actions.

- 9 The Administrative Court took the view that, given the legal prohibition on a difference of treatment based on certain characteristics protected by law and the right of individuals, enshrined in Article 26 ZZDiskr., to equal conditions of access to a profession or an activity, to opportunities to exercise them and develop themselves in them irrespective of the characteristics pursuant to Article 4(1), it was impermissible to impose restrictions ‘as a matter of principle’ or to restrict access to the exercising of a particular profession or particular activity — that of a court assessor in the present case — based on the assumption that the disability concerned would render it impossible for that profession or activity to be exercised to the full extent. In fact, the specific nature of the criminal procedure required that, in exercising their powers, court assessors respected the principles of criminal procedure relating to immediacy, the establishment of the objective truth and the formation of an inner conviction by the competent panel of the court. However, the court at first instance took the view that the effect of this specific nature must not be so absolute as to restrict the right of access to a particular profession or particular activity as enshrined in the ZZDiskr. specifically and in Bulgarian law in general. The assumption that the existence of an illness or disability deprived, in any event, a person of certain capacities constituted unjustified and discriminatory treatment. This was also supported by the fact that, following the entry into force of the amendment to Article 72 ZSV on 9 August 2016, by which the electronic allocation of court assessors was introduced, VA took part in a large number of the main hearings in criminal proceedings, for which she received remuneration.
- 10 An appeal against the judgment at first instance was brought before the Varhoven administrativen sad (Supreme Administrative Court). The latter considers that an interpretation of provisions of EU law is necessary for a correct decision in the dispute.

Brief summary of the positions of the parties

- 11 The main objection raised by the appellant in cassation UB is that the substantive law, namely the ZZDiskr., had not been correctly applied in the present case, specifically as a result of the absolutisation by the court at first instance of the right of access to a particular profession or particular activity, as enshrined in provisions of Bulgarian and international law, thus putting the Law on protection against discrimination at odds with a superior law, the NPK, and the principles of criminal procedure laid down therein, namely with the principle of immediacy pursuant to Article 18 NPK and with the principle of establishing the objective truth pursuant to Article 13 NPK, which she, as a criminal judge, must observe when examining cases at the District Court and according to which she must ensure that all members of the panel of the court handle evidence in the same way

such that each member of the panel of the court has an immediate impression of the conduct of the parties to the proceedings.

- 12 The appellant in cassation TC takes the view that the contested judicial decision was erroneous, as it held that point 2 of Article 7(1) ZZDiskr. was not applicable. He asserts that the present case fell within the scope of that provision. Furthermore, taking into account the exercise of the activity of court assessors and their duties, it was to be assumed that persons whose disabilities would lead to a breach of the principles of immediacy, of establishing the objective truth and the formation of an inner conviction by the panel of the court, as laid down by law and in the Constitution of the Republic of Bulgaria, could not participate actively and to the full extent.

Brief summary of the basis for the reference

- 13 The referring court finds that VA is a natural person with a disability owing to the permanent loss of her sight.
- 14 National law provides for a system of legislation which, in principle, ensures the protection of persons with disabilities and prohibits any discrimination based on the characteristic of ‘disability’. On the other hand, provision is made for exceptions which justify a difference of treatment which is based on a characteristic related to one of the discriminatory grounds where, by reason of the nature of the particular profession or particular activity concerned or of the context in which it is carried out, such a characteristic constitutes a genuine and determining occupational requirement, the objective is legitimate and the requirement does not go beyond what is necessary in order to achieve the objective.
- 15 The referring court takes the view that it is unclear to what extent the difference of treatment, based on a disability, of a person with that disability when carrying out the activity of a court assessor is permissible in light of the provisions of the UN Convention, the Charter of Fundamental Rights of the European Union and Directive 2000/78/EC.
- 16 Although the difference of treatment is based on the characteristic of ‘disability’, which is worthy of protection, it is related to the requirements and the application of the principles of criminal procedure; such legislation and case-law may run counter to the requirement that all persons with disabilities must be provided with equal employment opportunities.
- 17 In assessing the necessity of the reference for a preliminary ruling, the referring court also took account of the requirement that Directive 2000/78/EC must be interpreted in accordance with the UN Convention. This requires, in relation to the present case, equal and effective legal protection against all discrimination against persons with disabilities on any grounds whatsoever, and not only on the basis of

certain personal characteristics worthy of protection, as provided for in the secondary law of the European Union.

- 18 The provisions of international law and the secondary law of the European Union require uniform and identical interpretation of the applicable provisions, which falls within the competence of the Court of Justice of the European Union.
- 19 For the reasons set out above, the Supreme Administrative Court takes the view that it is necessary to stay the proceedings and to refer a request for a preliminary ruling to the Court of Justice of the European Union with the questions set out above.

WORKING DOCUMENT