

Case C-71/20

Request for a preliminary ruling

Date lodged:

12 February 2020

Referring court:

Østre Landsret (Denmark)

Date of the decision to refer:

10 February 2020

Respondent:

Anklagemyndigheden

Appellant:

VAS Shipping ApS

S146600L-JJ

EXTRACT

FROM

THE RECORDS OF THE ØSTRE LANDSRET

ORDER

Made on 10 February 2020 by the 20th Chamber of the Østre Landsret (Eastern Regional Court)

[...]

Anklagemyndigheden (Public prosecutor)

v

VAS Shipping ApS

(formerly Sirius Shipping ApS)

[...]

In the criminal appeal proceedings pending before it, the Østre Landsret has decided to refer a question concerning the interpretation of Article 49 of the Treaty on the Functioning of the European Union (TFEU) to the Court of Justice of the European Union, pursuant to Article 267 TFEU.

A. Facts of the case

- 1 The case concerns whether VAS Shipping ApS (formerly Sirius Shipping ApS) should be found guilty, in criminal proceedings, of infringing Paragraph 59(4) of the Udlændingeloven (Law on foreign nationals), in conjunction with Paragraphs 59(5) and 61 thereof, by, as managing part owner, having allowed vessels to enter Danish ports with foreign crew members, despite the fact that those crew members did not hold a work permit or were not exempted from holding one.
- 2 The Danish-registered partnership VAS Shipping ApS, which is the managing owner within the meaning of Paragraph 103 of the Søløven (Law on shipping) in respect of four part-owner shipping companies, consisting of various Swedish limited companies (part owners), is charged before the Østre Landsret with having, in the period from 22 August [OR. 2] 2010 to 22 August 2011, by entering Danish ports on more than 25 occasions with four vessels registered in the Danish International Shipping Register (DIS), engaged crew members from third countries (that is to say countries outside the EU and EEA), despite the fact that those crew members did not hold a work permit or were not exempted from the requirement to hold such a permit under Paragraph 14 of the Udlændingeloven.
- 3 VAS Shipping ApS is wholly owned by the Swedish company Sirius Rederi AB and registered [...] in Denmark. The company was formed on 16 March 2010 and is managed by a director resident in Sweden and three board members, two of whom are resident in Denmark. According to the information provided, all the company's board meetings are held in Denmark and all the meetings of the part-owner shipping companies have been held in Denmark since the four vessels in question were registered in the DIS.
- 4 The four part-owner shipping companies, consisting of the part owners (limited companies) established in Sweden, chose to carry on their shipping business in Denmark by having the four vessels in question registered in the DIS and designating the Danish-registered partnership VAS Shipping ApS as managing owner, whereafter that company had, under Paragraph 104 of the Søløven, mandatory authority to conclude any legal transactions normally concluded by a shipping company. The four vessels are thus an instrument by which the part-owner shipping companies pursue economic activity in Denmark and registration

in the DIS cannot therefore be separated from the exercise of the freedom of establishment (see Case C-221/89, *Factortame and Others*).

- 5 VAS Shipping ApS stated that that no seaman who is a third-country national leaves the vessel at any time during entries into Danish ports and that all work on land is performed by Danish land-based personnel employed by the port of call.
- 6 The facts of the case, including whether and how many third-country nationals were on board the four vessels, the period during which they were present, and on how many occasions the vessels concerned entered Danish ports, are disputed.

B. Proceedings to date [org. 3]

- 7 The Byretten i Odense (Odense District Court) delivered a judgment in the case at first instance on 4 May 2018 and ordered VAS Shipping ApS to pay a fine of DKK 1 500 000. The Byretten found that VAS Shipping ApS had infringed the provisions of the Udlændingeloven and that the provisions of the Udlændingeloven constituted a restriction on freedom of establishment under Article 49 TFEU, in conjunction with Article 54 thereof, but that the restriction was justified by overriding reasons in the public interest and did not go further than was necessary. The grounds of the decision of the Byretten i Odense state as follows:

‘It is concluded that the provisions of the Udlændingeloven concerning vessels entering Denmark at the material time were such that a vessel with foreign crew with no work permit could enter Danish ports on 25 occasions per year from May 2015, or on 28 occasions per year if three entries were related to shipyard visits and solely to such visits. The four vessels covered by the prosecution had employed foreign nationals without a work permit at the time stated in the prosecution. As the rules were administered, it was solely the entry of the vessels that was decisive. If the foreign nationals were on the vessel on the 26th or 29th occasion respectively that the vessel entered Danish ports, those concerned should have had a work permit. Thus, on the 26th or 29th occasion respectively the vessels could be regarded as vessels which had become a Danish place of work, for which a work permit was required.

Sirius Shipping ApS was the managing owner of the four vessels and, in the period from 22 August 2010 to 22 August 2011, could enter Danish ports only on 25 occasions because it had engaged foreign workers without a work permit on the vessels. It has been established that the vessels entered Danish ports on more than 25 occasions during that period.

The witness Jan Anker gave a statement regarding the automatic identification system (AIS) and the Byretten found that that statement tallied with the recordings made by the vessels. The AIS may be regarded as comprehensive and far more reliable than Lloyd’s Register of Shipping. In so far as there are any discrepancies between the two, the Byretten found that the AIS could be taken as the basis for

the vessel's position, also in the light of the fact that the party prosecuted could have submitted, as evidence in rebuttal, logbooks and other records, which it did not do. Nor did the party prosecuted establish that there had been shipyard visits among the entries, which could have been proven or demonstrated by invoices and logbooks.

The vessels were registered in Denmark and may be regarded as operated by Sirius Shipping ApS, and the vessels were flagged and thus deemed established in Denmark (see in that regard the agreement between the part-owner shipping companies which was submitted with regard to the vessel Lotus and, according to the statement by the lawyer Ringsted, presumably had the same wording as the agreements between the part-owner shipping companies in respect of the other vessels). The vessels may therefore be regarded as being operated in Denmark and Sirius Shipping may be regarded as the party which engaged and remunerated those on board the vessels. There are therefore grounds for bringing a prosecution against Sirius Shipping ApS, which is thus the correct party to be held liable in this case. The company was therefore required to comply with the Danish rules applicable in that respect.

Various minor errors in the crew lists were found, which were presumably due to the way in which the crew's names were entered, since the list had been processed by humans. It has essentially been established [OR. 4] that the lists are correct and that the shipping company infringed the rules in that respect.

It may be regarded as common ground that the rules of the Udlændingeloven in that respect and the associated regulation etc. constitute a restriction on foreign companies which wish to become established in Denmark and thus a restriction on freedom of establishment under Article 49 TFEU, in conjunction with Article 54 TFEU. In accordance with the case-law developed by the Court of Justice of the European Union, it may be concluded that restrictions on freedom of establishment which are applicable without discrimination on grounds of nationality may be justified by overriding reasons in the general interest, provided that they are proportionate, that is to say that they are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective. Given the context in which the rules of the Udlændingeloven governing third-country crews were introduced, it is justified not to undermine the Danish labour market, since Philippino labour has a competitive advantage over Danish labour on account of wage levels, and it may be regarded as being a restriction which is justified by overriding reasons in the general interest and does not go beyond what is necessary for attaining that object. The work permit requirement is an effective means of ensuring the stability of the labour market and thus avoiding disruption to the national labour market. Consequently, the Byretten found that the restrictions were lawful and there were no grounds for referring a question to the Court of Justice for a preliminary ruling.

The fact that it is incumbent on the public prosecutor to establish that there was justification for imposing restrictions on the freedoms enshrined EU law in no way affects the above statement regarding the reasons for the restrictions.

In the present case there are aggravating factors in the prescription of the penalty. Foreign seafarers are paid less than Danish seafarers, that is to say a financial gain is obtained. It may be concluded that the infringement was deliberate and committed by several vessels and that the foreign nationals concerned did not have the right to be resident in Denmark. However, there is some uncertainty as to the number of seafarers who were on board and the extent to which the vessels entered Danish ports. It may further be observed that the duration of the proceedings was extremely long on account of the complicated nature of the case and issues of EU law therein, the fact that there were contacts between various departments and the public prosecutor and the prosecuted party's lawyer, and, finally, the appeal concerning the lawyer Ringsted's status during the proceedings.

On the basis of an overall assessment, it is deemed appropriate to fix the fine at DKK 1 500 000 on the basis of Paragraph 59(4) of the Udlændingeloven, in conjunction with Paragraphs 59(5) of 61 thereof.

C. The provisions of EU law

- 8 The relevant rules of EU law are Articles 49, 52 and 54 of the Treaty on the Functioning of the European Union.

D. The provisions of Danish law [org. p.5]

- 9 The relevant provisions at that time, namely Paragraphs 13, 14, 59 and 61 of the Udlændingeloven, as consolidated by Law No 1061 of 18 August 2010, were worded as follows:

Paragraph 13. A foreign national shall have a work permit to take paid or unpaid employment, to be a self-employed person or in order to provide services for consideration or otherwise in Denmark. A work permit shall also be required for employment on a Danish vessel or aircraft which, as part of regular services or otherwise, calls regularly at Danish ports or airports. However, reference is made to Paragraph 14.

Subparagraph 2. The Minister for Refugee, Immigration and Integration Affairs shall lay down more detailed provisions on the extent to which work permits are required to work in territorial waters or on the continental shelf.

Paragraph 14. The following foreign nationals shall be exempted from the work permit requirement:

- (1) Foreign nationals who are nationals of another Nordic country within the meaning of Paragraph 1.
- (2) Foreign nationals covered by EU rules within the meaning of Paragraphs 2 and 6.
- (3) Foreign nationals with a permanent residence permit.
- (4) Foreign nationals with a residence permit under Paragraphs 7, 8, 9, 9 b, 9 d or 9 e.
- (5) Foreign nationals with a residence permit under Paragraph 9 c(1), where the permit was granted immediately after a residence permit under Paragraph 9 b.
- (6) Foreign nationals with a residence permit under Paragraph 9 c, where the permit was granted to a foreign national who applied for a residence permit under Paragraph 7.
- (7) Foreign nationals with a residence permit under Paragraph 9 c(1), where the permit was granted by virtue of a family tie with a person resident in Denmark.
- (8) Foreign nationals with a residence permit under Paragraph 9 c(4), where the work is naturally linked to the foreign national's residence in Denmark on the basis of that residence.

Subparagraph 2. The Minister for Refugee, Immigration and Integration Affairs may determine that other foreign nationals are to be exempted from the work permit requirement.

'Paragraph 59.

...

Subparagraph 4. Any person who employs a foreign national without the required work permit or in breach of the conditions laid down for a work permit shall be liable to a fine or a term of imprisonment of up to two years.

Subparagraph 5. The fact that the infringement was committed deliberately or as a result of gross negligence, that a financial gain was obtained or sought by the infringement for the person concerned himself or for others, or that the foreign national does not have the right to be resident in Denmark shall be regarded as an aggravating circumstance in determining the penalty under subparagraph 5.'

'Paragraph 61. Criminal liability may be attributed to companies etc. (legal persons) under the rules laid down in Chapter 5 of the Criminal Code.'

- 10 At the time when the circumstances which gave rise to the prosecution occurred, Paragraph 33 of the Regulation on foreign nationals (bekendtgørelse nr. 270 af 22. marts 2010 om udlændinges adgang her til landet (Regulation No 270 of 22 March 2010 on foreign nationals' access to Denmark)) stated as follows:

'Paragraph 33. The following foreign nationals shall be exempted from the work permit requirement:

... [OR. 6]

(4) Personnel on Danish cargo vessels in international traffic which enter Danish ports on no more than 25 occasions, calculated continuously over the previous year, irrespective of the calendar year, where a work permit is required for that purpose, under Paragraph 13(1) and (2) of the Udlændingeloven.

...'

- 11 As is clear, Paragraph 14(1) of the Udlændingeloven lists a number of categories of foreign nationals who are exempted from the work permit requirement under Paragraph 13(1) thereof. The provision was supplemented at the material time by Paragraph 33 of the Regulation on foreign nationals, which also refers to various categories of foreign nationals who are exempted from the work permit requirement, including the category referred to in Paragraph 33(4).
- 12 Paragraph 33(4) of the Regulation on foreign nationals specifies the criterion 'regularly' in Paragraph 13(1) and (2) of the Udlændingeloven so that a work permit is required only if a Danish vessel enters Danish ports on more than 25 occasions, calculated continuously over the previous year.
- 13 Paragraphs 103 to 104 of the Søloven (most recently consolidated by Law No 1505 of 17 December 2018), is worded as follows:

'Paragraph 103. A managing owner shall be selected for a ship owned by part owners.

Subparagraph 2. A person, a limited company or a responsible company may be selected as managing owner, provided that party meets the conditions laid down in Paragraph 1(2) and 1(3) respectively.'

'Paragraph 104. In relation to third parties, the managing owner shall, by virtue of his or its capacity, be entitled to conclude any legal transactions normally concluded by a shipping company. The managing owner may therefore engage, dismiss and instruct the master, take out ordinary insurance, and receive monies paid to the shipping company. The managing owner shall not, without special authorisation, sell or mortgage the vessel or charter out the vessel for more than one year.'

- 14 The rules governing the Danish International Shipping Register, at the time at which the circumstances which gave rise to the prosecution occurred, are set out in Law No 273 of 11 April 1997, as amended by Law No 460 of 31 May 2000, Law No 526 of 7 June 2006 and Law No 214 of 24 March 2009, and are worded as follows:

‘Paragraph 10. Collective agreements on pay and working conditions for crew on ships entered in this register shall expressly state that they apply only to such employment.

Subparagraph 2. Collective agreements as referred to in subparagraph 1, which are entered into by a Danish trade union, can cover only persons who are resident in Denmark [OR. 7] or who, under EU law or other international obligations entered into, are to be treated in the same way as persons deemed to be resident in Denmark.

Subparagraph 3. Collective agreements as referred to in subparagraph 1, which are entered into by a foreign trade union, can cover only persons who are members of the trade union concerned or persons who are nationals of the country in which the trade union is established, provided that they are not members of another trade union with which an agreement as referred to in subparagraph 1 has been concluded.

Subparagraph 4. The Law on the Labour Court shall also apply to cases to which a foreign trade union is party.’

- 15 At the time when the circumstances which gave rise to the prosecution occurred, the visa rules laid down in Regulation No 270 of 22 March 2010 on foreign nationals’ access to Denmark applied. Paragraphs 13, 16 and 19 thereof were worded, inter alia, as follows:

‘Paragraph 13. Foreign nationals shall have their passport or other travel documents stamped (endorsed) before entry, unless the person concerned is exempted from having a visa under Paragraph 14’

‘Paragraph 16. A uniform visa valid for all Schengen countries may be issued, provided that the following conditions are fulfilled:

- (1) The person concerned must be in possession of a valid passport or other travel document granting the right to travel to Denmark and the other Schengen countries. If the passport is valid only for travel to one or more Schengen countries, the validity of the visa shall be limited to that country or those countries. It is not necessary to state in the passport or otherwise that the passport is not valid for return to the issuing country.
- (2) The person concerned must have sufficient means of subsistence for the period of the intended stay in the Schengen countries and for the return to their country of origin or domicile or for travel to a third country, into which

they are certain to be admitted, or be in a position to acquire such means lawfully.

- (3) Unless there are particular reasons to the contrary, the person concerned shall be in possession of travel insurance to cover any expenses that might arise in connection with repatriation for health reasons, urgent medical attention and emergency hospital treatment or death, during his or her intended stay. The travel insurance shall cover all Schengen countries and cover the entire duration of the intended stay or transit. The minimum amount of insurance cover shall be EUR 30 000. If an application has been made for a visa for more than two entries into the Schengen countries, the travel insurance shall cover only the period of the first intended entry and intended stay in the Schengen countries. In that case, the person concerned shall sign the declaration appearing on the visa application that he or she is aware of the need to have travel insurance at the time of future entry into and stay in the Schengen countries.

...’

Paragraph 19. ...

... [OR. 8]

Subparagraph 5 The Department for Foreign Nationals may grant a permit to re-enter to a foreign national lawfully resident in Denmark.

Subparagraph 6. Upon delegation from the Department for Foreign Nationals, the police may, in particular at the border, issue a visa for a stay of up to 15 days with one entry or a visa for transit under subparagraph 4(1). Subparagraph 4(2) and (3) shall apply *mutatis mutandis*. A visa as referred to in subparagraph 1 may not be issued if the foreign national is a person for whom an alert has been issued in the Schengen Information System or is prohibited from entering Denmark. Upon delegation from the Department for Foreign Nationals, the police may, in specific cases, grant a permit to re-enter pursuant to subparagraph 5.’

- 16 Paragraphs 10 and 11 of Circular No 70 of 10 August 2010 on the issuing of visas at the border to seafarers in transit subject to visa requirements set out the rules on issuing visas to seafarers. The provisions are worded, inter alia, as follows:

‘Paragraph 10. Where a seafarer disembarks from a vessel which has entered a Danish port, or is expected to enter a Danish port, with a view to crossing an external border within the Schengen area, the following procedure shall be followed if he or she is to be issued with a visa on disembarkation:

- (1) The shipping company or the broker shall notify the police in the police district in which the port of call is situated that the seafarer subject to visa requirements will disembark in the port of call and subsequently cross an external border within the Schengen area. ...

- (2) The police in the police district in which the port of call is situated shall check as soon as possible and as far as possible that the information provided by the shipping company or broker is correct and whether the conditions laid down in Paragraph 5 are satisfied. As part of that investigation, the police shall check the seafarer's route within the Schengen area.

...'

'Paragraph 11. Where a seafarer disembarks from a vessel which has entered a Danish port, or is expected to enter a Danish port, and embarks on another vessel in another port within the Schengen area, the following procedure shall be followed if he or she is to be issued with a visa on disembarkation:

- (1) The shipping company or the broker shall notify the police in the police district in which the port of call [is situated that the seafarer subject to visa requirements will disembark in the port of call] in order to embark on another vessel in another port within the Schengen area. ...
- (2) The police in the police district in which the port of call is situated shall check as soon as possible and as far as possible that the information provided by the shipping company or broker is correct and whether the conditions laid down in Paragraph 5 are satisfied. As part of this investigation the police shall check the seafarer's route within the Schengen area.
- (3) The police in the police district in which the port of call is situated shall, by telephone, fax, email or other means, ask the border control authority, at the port where the seafarer is to embark on the other vessel, to check that the vessel on which the seafarer is to embark has entered or is expected to enter. Information on fax numbers and other contact information for the border control authority at the external borders of the Schengen area shall be available and kept up to date on the police intranet.

...? [OR. 9]

E. Uncertainties relating to EU law and the arguments of the parties

Uncertainties relating to EU law

- 17 Under the first paragraph of Article 49 TFEU, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are to be prohibited (primary establishment). Such prohibition is also to apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State (secondary establishment). Under the second paragraph of Article 49 TFEU,

freedom of establishment is to include — subject to the provisions relating to the free movement of capital — the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected (see, for example, Case C-212/97, *Centros*, paragraph 19, and Case C-170/05, *Denkavit Internationaal and Denkavit France*, paragraph 20).

- 18 Under the first paragraph of Article 54 TFEU, freedom of establishment encompasses companies or firms (i) formed in accordance with the law of a Member State and (ii) having their registered office, central administration or principal place of business within the European Union.
- 19 For the purposes of the provisions of the chapter on establishment (and services), the abovementioned companies are to be treated in the same way as persons who are nationals of the Member States.
- 20 A company or firm which falls within the scope of Article 54 TFEU may therefore set up agencies, branches or subsidiaries and carry on other forms of secondary establishment in other Member States without either the State of origin or the host State being entitled to restrict its right to do so.
- 21 The concept of ‘establishment’ within the meaning of Article 49 TFEU is not defined more precisely in the Treaty, but, in accordance with the case-law of the Court of Justice, involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period (see, for example, C-161/07, *Commission v Austria*, paragraph 27, and Case C-221/89, *Factortame and Others*, paragraph 20). In that case, the Court of Justice further ruled that the registration of a vessel does not necessarily involve establishment within the meaning of the Treaty, in particular where the vessel is not used to pursue **[OR. 10]** an economic activity or where the application for registration is made by or on behalf of a person who is not established, and has no intention of becoming established, in the State concerned. However, the Court of Justice observed by extension that where the vessel constitutes an instrument for pursuing an economic activity which involves a fixed establishment in the Member State concerned, the registration of that vessel cannot be dissociated from the exercise of the freedom of establishment (See Case C-221/89, *Factortame and Others*, paragraphs 21 to 22).
- 22 It is common ground between the parties that the work permit requirement laid down in Paragraph 13(1) of the Udlændingeloven, in conjunction with Paragraph 33(4) of the Regulation on foreign nationals, may constitute a restriction on freedom of establishment within the meaning of Article 49 TFEU.
- 23 The objective of ensuring the stability of the labour market and thereby avoiding disruption to it can, in principle, justify restrictions on freedom of movement (see

Case C-18/17, *Danieli & C. Officine Meccaniche SpA*, judgment of 14 November 2018).

Arguments of the Anklagemyndigheden

- 24 The rules of Paragraph 13(1) of the Udlændingeloven, in conjunction with Paragraph 33(4) of the Regulation on foreign nationals, constitute a non-discriminatory restriction on freedom of establishment since they are intended to ensure the stability of the labour market and thus to avoid disruption to it.
- 25 The Danish rules are proportionate, that is to say appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective. The Anklagemyndigheden therefore considers that the restriction on freedom of establishment is compatible with EU law.

Arguments of VAS Shipping ApS

- 26 The work permit requirement is not necessary to satisfy an overriding reason in the public interest, including the objective of ensuring the stability of the labour market and thus avoiding disruption to it. Sirius Shipping ApS therefore considers that the Danish rules at issue in this case are contrary to EU law.
- 27 The rules are not appropriate for ensuring the stability of the labour market. That is because, inter alia, (1) the rules do not cover vessels registered in other countries' shipping registers, (2) the crew must, in any event, have a work permit to work in the territory of the port [**OR. 11**] or elsewhere in Danish land territory, (3) the rules do not prevent third-country nationals from entering a Danish port on more than 25 occasions because the sole decisive factor is how often the vessel concerned enters a Danish port, and (4) the Danish visa rules effectively meet the abovementioned objective of ensuring the stability of the labour market.
- 28 On the one hand, the Danish rules are narrow in scope and, on the other, are very restrictive for shipowners who are obliged to change their employment policy.

F. Background to the question referred by the Østre Landsret

- 29 In a number of judgments, the Court of Justice has ruled on the factors which, under the TFEU, are to be included in an assessment of the proportionality of restrictions on an employer's freedom to choose workers.
- 30 However, that case-law mainly concerns the relationship with rules on services. Consequently, the earlier decisions of the Court of Justice do not provide reliable guidance for assessing the relationship between the Danish rules at issue and Article 49 TFEU on the freedom of establishment.

- 31 The Østre Landsret therefore considers that a ruling on whether Article 49 TFEU precludes rules similar to the Danish rules imposing a work permit requirement on third-country nationals working on vessels flagged in Denmark and owned by nationals of another EU Member State is necessary to enable it to give a ruling in the present case.
- 32 Consequently, the Østre Landsret has decided to stay the criminal appeal proceedings in order to make a reference for a preliminary ruling to the Court of Justice, pursuant to Article 267 TFEU.
- 33 In the light of the foregoing, the Court of Justice is requested to answer the question set out below.

It is hereby ordered that: **[OR. 12]**

The Østre Landsret request the Court of Justice of the European Union to answer the following question:

Question 1

Does Article 49 TFEU preclude legislation of a Member State which requires third-country crew members on a vessel flagged in a Member State and owned by a shipowner who is a national of another EU Member State to have a work permit, unless the vessel enters ports of the Member State on at most 25 occasions calculated continuously over the previous year?

(Sign.)

[...]