

Case C-38/20**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:**

27 January 2020

Referring court:

Tribunal Superior de Justicia de Andalucía (Spain)

Date of the decision to refer:

20 December 2019

Appellant:

ZP

Respondent:

Delegación del Gobierno en Melilla

Subject matter of the main proceedings

The dispute in the main proceedings seeks to ascertain whether a decision in which the Delegación del Gobierno en Melilla (Office of the Spanish Government's Regional Representation in Melilla) imposes on Mr ZP a financial penalty and the obligation to demolish a number of buildings, and which is based on Spanish legislation restricting access to property ownership by foreign nationals in certain areas on account of national defence requirements, is lawful.

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

The request for a preliminary ruling concerns the compatibility with Articles 18 TFEU, 49 TFEU, 63 TFEU and 65 TFEU of Spanish legislation restricting access to property ownership by foreign nationals in certain areas on account of national defence requirements. The legal basis is Article 267 TFEU.

Questions referred for a preliminary ruling

1) Are Articles 18, 49, 63 and 65 TFEU to be construed as precluding national legislation such as that made up of Articles 18, 4 and 29 of Law 8/1975 of 12 March 1975 on areas and facilities of national defence interest, and Article 37 of Royal Decree 689/1978 of 10 February 1978 laying down the rules governing areas and facilities of national defence interest, which implements Law 8/1975 of 12 March 1975 on areas and facilities of national defence interest, in so far as it imposes serious restrictions on the exercise of the right to own property by foreign nationals, including the requirement to obtain military authorisation in order to exercise that right in full, failure to comply with which attracts the imposition of an administrative penalty from the application of which Spanish nationals are excluded in any circumstances, in the case where such restrictions are imposed on third-country nationals engaging in activities subject to limitations in conjunction with nationals of the European Union?

2) If the answer to the foregoing question is in the affirmative, are Articles 18, 49, 63 and 65 TFEU to be construed as precluding national legislation such as that made up of Articles 18, 4 and 29 of Law 8/1975 of 12 March 1975 on areas and facilities of national defence interest, and Article 37 of Royal Decree 689/1978 of 10 February 1978 laying down the rules governing areas and facilities of national defence interest, which implements Law 8/1975 of 12 March 1975 on areas and facilities of national defence interest, in so far as it imposes serious restrictions on the exercise of the right to own property by foreign nationals, including the requirement to obtain military authorisation in order to exercise that right in full, failure to comply with which attracts the imposition of an administrative penalty from the application of which Spanish nationals are excluded in any circumstances, if such restrictions are justified on overriding reasons in the general interest relating to national defence, regard being had *exclusively* to the significance of the public interest in relation to national defence that lies in safeguarding enclaves of particular strategic importance?

Case-law and provisions of EU law relied on

Articles 18 TFEU, 49 TFEU, 63 TFEU and 65 TFEU.

Judgment of the Court of Justice of 31 March 1993, *Kraus* (C-19/92, EU:C:1993:125).

Judgment of the Court of Justice of 24 November 1998, *Bickel and Franz* (C-274/96, EU:C:1998:563). Paragraphs 15 and 16.

Judgment of the Court of Justice of 4 July 2000, *Haim* (C-424/97, EU:C:2000:357).

Judgment of the Court of Justice of 13 July 2000, *Albore* (C-423/98, EU:C:2000:401; ‘*Albore*’). Paragraph 22.

Judgment of the Court of Justice of 1 February 2001, *Mac Quen* (C-108/96, EU:C:2001:67).

Judgment of the Court of Justice of 20 September 2001, *Grzelczyk* (C-184/99, EU:C:2001:458; ‘*Grzelczyk*’). Paragraph 31.

Judgment of the Court of Justice of 11 July 2002, *D’Hoop* (C-224/98, EU:C:2002:432).

Judgment of the Court of Justice of 11 March 2003, *Dory* (C-186/01, EU:C:2003:146). Paragraph 31.

Judgment of the Court of Justice of 26 January 2006, *Commission v Kingdom of Spain* (C-514/03, EU:C:2006:63).

Judgment of the Court of Justice of 10 March 2009, *Hartlauer* (C-169/07, EU:C:2009:141).

Judgment of the Court of Justice of 4 June 2009, *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344; ‘*Vatsouras and Koupatantze*’).

Judgment of the Court of Justice of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-507/07 and C-571/07, EU:C:2010:300).

Case-law and provisions of national law relied on

Law 8/1975 of 12 March 1975 on areas and facilities of national defence interest (BOE No 63 of 14 March 1975, p. 5275). Articles 2, 3, 4, 6, 9, 11, 18 and 29.

Royal Decree 689/1978 of 10 February 1978 laying down rules on areas and facilities of national defence interest, and implementing Law 8/1975 of 12 March 1975 on areas and facilities of national defence interest (BOE No 89 of 14 April 1978, p. 8569). Articles 37 and 91.

Brief description of the facts and the main proceedings

- 1 Mr ZP, a national of a non-EU Member State, owns 50% of a plot of land. The remaining 50% is owned by Mr TG, a national of the Netherlands.
- 2 On 25 February 2016, the Office of the Spanish Government’s Regional Representation in Melilla adopted a decision imposing on Mr ZP a penalty of EUR 10 000 and an obligation to demolish the properties illegally built on the aforementioned plot of land in breach of the legislation governing areas of national defence interest, for having carried out building work in an area classified as a limited foreign property ownership area without obtaining the required prior military authorisation. The aforementioned decision makes Mr TG jointly and

severally liable for payment of the amount of the penalty imposed in his capacity as joint landowner and joint building developer.

- 3 Mr ZP brought an action against the decision of the Office of the Spanish Government's Regional Representation in Melilla of 25 February 2016 seeking reconsideration; that action was dismissed by decision of Office of the Spanish Government's Regional Representation in Melilla of 22 April 2016.
- 4 Mr ZP brought an administrative-law action against the decision of the Office of the Spanish Government's Regional Representation in Melilla of 22 April 2016 before the Juzgado de lo Contencioso-Administrativo n.º3 de Melilla (Administrative Court No 3, Melilla). That court dismissed that action and confirmed the administrative decisions against which it had been brought.
- 5 Mr ZP lodged an appeal against the judgment of the Juzgado de lo Contencioso-Administrativo n.º3 de Melilla (Administrative Court No 3, Melilla) before the referring court.

Main arguments of the parties to the main proceedings

- 6 Mr ZP bases his appeal on: 1) an error in the assessment of the evidence, which, in his view, shows that the buildings located on the plot of land situated in the national defence interest area pre-dated the acquisition of the land; and 2) an infringement of the principle of proportionality that follows, in his opinion, from the failure to carry out an appropriate assessment of the circumstances of the case, which show that he did not commit the offence intentionally, and, to that end, seeks to have the fine reduced and the demolition order cancelled.
- 7 The Abogacía del Estado (Spanish State Legal Service) contends that the appeal should not be upheld, since, in its view, the assessment of the evidence was correct.
- 8 The referring court asked the parties whether it was appropriate to submit a request for a preliminary ruling to the European Court of Justice, given that the decision under appeal not only imposes a penalty on Mr ZP but also makes Mr TG, a Netherlands national, jointly and severally liable for payment of that fine in his capacity as joint landowner and joint building developer. In the view of the referring court, that circumstance may constitute an infringement of the principle of non-discrimination against Member State nationals in connection with the fundamental freedoms of establishment and the free movement of capital.
- 9 Mr ZP's counsel was in favour of a reference being made for a preliminary ruling. The Spanish State Legal Service was opposed to such a reference being made.

Brief description of the grounds for the request for a preliminary ruling

- 10 The referring court considers that the answer to its request for a preliminary ruling on the compatibility with EU law of Articles 4, 18 and 29 of Law 8/1975 of 12 March 1975 on areas and facilities of national defence interest ('Law 8/1975') and Article 37 of Royal Decree 689/1978 of 10 February 1978 laying down the rules governing areas and facilities of national defence interest ('Royal Decree 689/1978') will be crucial to the resolution of the dispute in the main proceedings, given that a ruling declaring that national legislation to be incompatible with the fundamental freedoms enshrined in the EU Treaties would make it impossible to apply that legislation owing to the primacy of EU law.
- 11 As regards the **first question**, the referring court notes that the relevant national rules establish a regime for exercising the right to own property which is more restrictive for foreign nationals than it is for Spaniards, inasmuch as it makes full enjoyment of the right to own property on land situated in military-interest areas classified as 'limited foreign property ownership areas' subject to military authorisation. In particular, property construction is subject to administrative authorisation by the military authorities. Failure to comply with that duty triggers the imposition of a financial penalty, amounting in this instance to EUR 10 000, and the obligation to demolish any properties constructed.
- 12 Those conditions, to which Spanish citizens are not subject, may give rise to limitations on the exercise of the freedom of establishment, given that the buildings at issue in the dispute in the main proceedings are units for storing goods. The free movement of capital may also be adversely affected, inasmuch as the national legislation may make economic investment in the form of the purchase of land carrying such a military classification unattractive to foreign EU nationals.
- 13 Mr ZP, a national of a non-EU Member State, is being penalised for building properties without the military authorisation required of foreign nationals, but he has engaged in that conduct in association with a Netherlands national who owns 50% of the land and is credited with having contributed 50% of the investment in the construction project. The referring court asks whether it is possible to apply the rule prohibiting discrimination against EU nationals to that situation, inasmuch as this has the effect of benefiting a third country national who enters into an association with an EU national, in particular because the EU national suffers the consequences of the imposition of the penalty by virtue of being jointly and severally liable for payment of the fine and having in any event to bear the adverse effects of the demolition of the properties built. This would ensure the effectiveness of the EU national's status as a Union citizen, given that the right to equal treatment is one of the basic components of Union citizenship (judgments in *Grzelczyk* and *Vatsouras and Koupatantze*). It would also preserve the effectiveness of the fundamental freedoms involved by ensuring that these are not restricted in accordance with criteria that discriminate on grounds of nationality.

- 14 If not, it could be concluded that a third-country foreign national may be subject to a separate, restrictive regime in respect of national defence interest areas, and to the penalties which any infringement of that regime gives rise, on overriding public-interest grounds relating to national defence, the EU national being required to suffer the adverse consequences arising from his decision to enter into an association with a third-country foreign national.
- 15 If the view were taken that the participation of an EU national triggers the application of the rule prohibiting discrimination against the activity in its entirety and against all those participating in it, this might call into question the Spanish legislation on which the penalty imposed is based, and, for this reason, the administrative decision at issue might have to be annulled and the appeal lodged upheld.
- 16 As regards the **second question**, the referring court notes that, given the findings of the judgment in *Albore*, a restriction of the fundamental freedoms enshrined in the Treaties which is applied in a manner that discriminates against the nationals of other Member States would constitute an infringement of EU law unless that difference in treatment were specifically justified in such a way as to show that ‘non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures’.
- 17 Consequently, the second question raised by the referring court, in the event that the answer to the first is in the affirmative, is whether a measure such as that provided for in Article 18(c) of Law 8/1975 and Article 37 of Royal Decree 689/1978, which subjects only foreign nationals to the requirement to obtain military authorisation in order to enjoy the right of construction associated with the right to own property, may be regarded as justified solely on the basis of particularly compelling national defence grounds such as those obtaining in the situation at issue here, which are characterised by the fact that the plot of land in question is situated in the military-interest area of the Autonomous City of Melilla, that city’s status as such being based on its strategic importance as a historical Spanish sovereign enclave located in North Africa and surrounded along its entire border by the Kingdom of Morocco, and are specifically provided for in the national implementing legislation defining such enclaves as having a unique status and as being of importance to national defence; or whether that assessment must necessarily be supplemented by a specific analysis of the need to extend the application of measures aimed at protecting the external security of the State to citizens of EU Member States.
- 18 If the view were taken that the particularly compelling nature of the duly justified national defence grounds is not sufficient to meet the standard of appropriateness and proportionality allowing measures that restrict fundamental freedoms, even if they are discriminatory, to be imposed, the absence of any analysis as to the extent of the particular risk that EU citizens pose to such objectives may preclude the

application to the case of the national rules in question and make it necessary to annul the administrative decision at issue in the main proceedings.

- 19 Finally, the referring court considers that Union citizenship status (Article 20 TFEU), combined with the expansion of the principle of mutual trust that results from the establishment of the Schengen area, with the common external borders of which the dispute in the main proceedings is concerned because of the proximity to them of the land at issue, calls for an interpretation that will resolve that court's uncertainties with respect to the validity of general clauses which discriminate against EU nationals on the basis of overriding reasons in the public interest and which are still in force in national provisions having the status of law.

WORKING DOCUMENT