

Anonymised version

Translation

C-758/19 — 1

Case C-758/19

Request for a preliminary ruling

Date lodged:

16 October 2019

Referring court:

Polymeles Protodikeio Athinon (Greece)

Date of the decision to refer:

18 June 2019

Applicant:

OH

Defendant:

ID

[...]

The Polymeles Protodikeio Athinon (Court of First Instance, Athens, Greece)

[...]

Sat in open court on 10 January 2019 to hear the case between:

APPLICANT: OH [...], resident in Athens [...]

DEFENDANT: ID [...], resident in Kifissia, Attica [...]

[Or. 2] The applicant requests that the court uphold his action dated 13 September 2017, [...] [procedural matters].

[...]

HAVING CONSIDERED THE CASE FILE

THE COURT HELD IN ACCORDANCE WITH THE LAW

According to Article 343 of the Treaty on the Functioning of the European Union, the European Union is to enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Union. The same is to apply to the European Central Bank and the European Investment Bank. Furthermore, Article 11 of the Protocol of 8 April 1965 on the privileges and immunities of the European Union, which is now attached to the Treaty as Protocol No 7, states that, in the territory of each Member State and whatever their nationality, officials and other servants of the Union shall: (a) subject to the provisions of the Treaties relating, on the one hand, to the rules on the liability of officials and other servants towards the Union and, on the other hand, to the jurisdiction of the Court of Justice of the European Union in disputes between the Union and its officials and other servants, be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They are to continue to enjoy this immunity after they have ceased to hold office [...]. Article 17 [Or. 3] of that Protocol states that privileges, immunities and facilities are to be accorded to officials and other servants of the Union solely in the interests of the Union and that each institution of the Union is to be required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Union. Finally, Article 19 of the Protocol states that Articles 11 to 14 are to apply to members of the Commission. Consequently, the aforesaid provision of Article 343 TFEU accords to the Union such privileges and immunities as are necessary for the performance of its tasks and are therefore linked to the exercise of the powers conferred on it. The aforesaid Protocol of 8 April 1965 specifies their extent and content. The Court of Justice has held that the privileges and immunities provided for in that Protocol are of a functional, and therefore relative, character as they seek to prevent interference in the functioning and independence of the European Union. Consequently, immunity from legal proceedings as provided for in Protocol No 7 to the TFEU does not preclude jurisdiction of the national courts of the Member States from the outset, but it is necessary to consider whether each dispute falls within the jurisdiction of an EU judicial authority. Thus, it has been found that, although a garnishee order served on the Communities may, in certain circumstances, interfere with their functioning and independence, leave to serve a garnishee order on the Commission for rent owed by it to the garnishor may ultimately be granted (order of 11 April 1989, *SA Générale de Banque v Commission*, C-1/88 SA, 1989 [ECR] 857, paragraphs 9 and 15, and judgment of 19 March 2010, *Gollnisch v Parliament*, T-42/06, [2010] ECR II-1135, paragraph 94). It has also been found in the same context that the institutions cannot rely on the aforesaid immunities or privileges in order to refuse to provide national judicial authorities with evidence and information collected [Or. 4] in connection with infringements of EU law, as such refusal would be a breach of the duty of cooperation required of the institutions under Article 4(3) TEU and Article 19 of the Protocol (see order of 13 July 1990, *Zwartveld*, 2/88,

ECR 1-3365, paragraphs 20 and 21 [...]). Furthermore, the Civil Service Tribunal of the European Union found in Joined Cases F-124/05 and F-96/06 (judgment of 13 January 2010) that the immunity from legal proceedings provided for by Article 11 (ex Article 12) of the Protocol on privileges and immunities protects permanent and other officials from prosecution by the authorities of the Member States for acts performed in their official capacity. Furthermore, the Court has found, in interpreting Article 8 of the Protocol concerning the immunity of members of the European Parliament, that, in order for the opinion expressed by the MEP to be covered by immunity, it must have been expressed in the exercise of his duties; that does not apply in the case of a statement made by an MEP on the premises of the European Parliament for which he has been prosecuted in his Member State of origin for the criminal offence of false charges. In the case of statements made by an MEP for which he has been prosecuted in his Member State of origin, it must be held that the immunity provided by Article 8 of the Protocol is capable of definitively preventing national courts and judicial authorities from exercising their respective jurisdictions in the field of prosecutions and penalties for criminal offences for the purpose of ensuring the observance of law and order in their territory and, as a corollary, capable of thus denying the persons damaged by those statements any judicial remedy whatsoever, including, as the case may be, claiming compensation before the civil courts for the damage suffered (judgments in *Patriciello*, C-163/10, [2001] ECR I-7565, paragraphs 18 and 34, and in *Gollnisch*, paragraph 58). Finally, it has also been found that the Court has no [Or. 5] jurisdiction to hear an action for liability in tort (non-contractual liability) simply because the harmful act took place on the premises of the European Parliament (judgment of [22] March 1990, *Le Pen*, C-201/89). Furthermore, Article 3(2) of the Kodikas Politikis Dikonomias (Code of Civil Procedure, 'the KPolD') exempts foreign nationals with immunity from legal proceedings from the jurisdiction of the Greek courts, except in disputes concerning rights *in rem* to immovable property. It is accepted that that provision only applies to foreign and not to Greek nationals [...] [national case-law]. Also, according to Article 24 of the KPolD, Greek nationals who enjoy the privilege of immunity from legal proceedings and government officials appointed to posts abroad fall under the jurisdiction of the court of the district in which they were resident prior to their assignment and, if they had no residence prior to their assignment, of the courts in the capital of the State. However, that provision may be contrary to the aforesaid higher-ranking rules of EU law enacted in Article 343 TFEU and Articles 11, 17 and 19 of the aforesaid Protocol (*Costa*, 6/64), which expressly confer the privilege of immunity from legal proceedings on officials, staff and members of the Commission, whatever their nationality. Moreover, according to Articles 13 and 17 TEU, the Commission is by definition a collegiate EU institution; therefore, its members (Commissioners) cannot be construed as having the status of diplomats or ambassadors of the Member State of which they are nationals so that the Vienna Convention of 24 April 1961 (ratified under Legislative Decree 503/1970) is considered to apply to them, and consequently, it is considered that, for that reason, the privilege of immunity from legal proceedings in the courts of their home Member State, that is to say, of the

Member State of which they are nationals, does not operate. Finally, under Article 267 TFEU, the Court of Justice of the European Union has jurisdiction to give preliminary rulings concerning (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies [Or. 6] of the Union. Consequently, where such a question is raised before a national court, that court may, if it considers that a decision on that question is necessary to enable it to give judgment, request the Court to give a ruling thereon [...] [national case-law].

The applicant contends in his action as follows. On the basis of his academic qualifications, his career and his experience acquired in Greece and abroad, he accepted an offer in 2004 to act as special legal advisor to the Ministry of Health, in which the defendant represented the political leadership. Between then and 2014 he provided services to the defendant (dealing with both his professional and his personal affairs) that were exceptionally beneficial to the defendant in all the duties assigned to the latter (bid for Presidency of the Hellenic Republic, Ministry of Defence, Ministry of Foreign Affairs). As a result of their excellent cooperation and the efficient performance of his duties, the applicant followed the defendant to Brussels when he was appointed as Commissioner of the European Union, where the applicant acted as deputy director of his office. In that position, he dealt with the migration, home affairs and citizenship portfolio allocated to the defendant's office and, at the same time, was entrusted with matters relating to security and crime prevention, as well as the defendant's personal affairs. In September 2015, the defendant removed him from all responsibilities in connection with the above matters and assigned him responsibilities for drugs policy and the promotion of citizenship actions, which he considered to be beneath his professional and scientific standing. Nonetheless, even though he continued to provide the defendant with exemplary services, in April 2016 the latter asked him to resign without cause and told him that, if he refused, he would sign his letter of dismissal from the European Commission. In late April 2016, the Directorate of Human Resources of the European Commission notified him that his employment [Or. 7] relationship with the European Commission had been terminated on the grounds of the defendant's loss of confidence in him; as a result, he was not granted the right to a hearing before the aforesaid department adopted that decision. He lodged a complaint against that decision, which was dismissed, and he contested the decision before the Court of Justice of the European Union. In expressing defamatory complaints concerning his loss of confidence in the applicant and the applicant's inadequate performance of his duties, the defendant insulted his dignity and personal character without any cause whatsoever and without giving him the opportunity to plead his defence, as an inevitable consequence of which his employment relationship with the European Commission was terminated. The above culpable conduct on the part of the defendant caused the applicant immense material damage, as he lost his salary from the European Commission for the period from 1 November 2016 to 31 October 2019, totalling EUR 452 299.32, and non-material damage, as the allegations against him damaged his reputation, future and career within the European Union and its bodies. Therefore, he requests that provisionally enforceable judgment be delivered ordering the defendant (a) to

make good the material damage caused to him in the specific circumstances referred to in his action totalling EUR 452 299.32, with legal interest from service of the statement of claim; (b) to make good the non-material damage caused by his unlawful and tortious conduct and pay the applicant financial compensation totalling EUR 600 000; and (c) to withdraw the false and defamatory complaints that slighted the applicant and pay his court costs.

The action, with the aforesaid content and claims, has been brought against the Commissioner who, although he is a Greek national, has the privilege of immunity from legal proceedings under the aforesaid legal provisions of Article 343 TFEU and Articles 11, 17 and 19 of the above Protocol. The Directorate-General for Human Resources and Security of the European Commission states on this point in the adduced certificate dated 22 December 2017 that, '[Or. 8] as a member of the Commission, ID, the Commissioner for Migration, Home Affairs and Citizenship, is immune from legal proceedings in respect of acts performed by him in his official capacity, including his words spoken or written, in accordance with Articles 11 and 19 of Protocol No 7 on the privileges and immunities of the European Union. Immunity may be waived by the College of Commissioners at the request of a national court, unless waiver of such immunity is contrary to the interests of the Union'.

In the present case, no criminal proceedings are pending against the defendant Commissioner for which waiver of immunity has to be requested by the competent national judicial authority; however, a civil action has been brought against him seeking payment of damages and financial satisfaction for non-material damage caused to the applicant, as recounted above.

On the basis of the legal considerations set out under section I of this judgment, the court finds that a question has arisen of the interpretation of the not entirely unequivocal provisions of Article 343 TFEU, read in conjunction with Articles 11, 17 and 19 of the Protocol, for which (interpretation) the Court of Justice of the European Union has exclusive jurisdiction under Article 267 TFEU. To that end, the court considers that the taking of a final decision should be deferred [...] in order that the following questions of interpretation may be submitted to the Court of Justice of the European Union for a preliminary ruling: [...] [reiteration of the questions referred that are set out below in the operative part].

[Or. 9] ON THOSE GROUNDS, THE COURT

Defers a final decision on the action.

Refers [...] the following questions of interpretation to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union:

(1) Are the terms 'immunity from legal proceedings' and 'immunity', as formulated and for the purpose which they serve in Article 11 of the Protocol, identical?

(2) Does the immunity from legal proceedings/immunity envisaged in Article 11 include and cover, in addition to criminal prosecutions, civil claims made in actions against members of the Commission by injured third parties?

(3) Is waiver of the Commissioner's immunity from legal proceedings/immunity also possible in the context of a civil action brought against him, such as the action under consideration? If it is, who must initiate the waiver procedure in question?

(4) Do the Courts of the European Union have jurisdiction to rule on a non-contractual claim in tort, such as that at issue here, against a Commissioner?

Deliberated upon and decided in Athens on 18 June 2019.

[...]

WORKING DOCUMENT