

Anonymised version

Translation

C-914/19 — 1

Case C-914/19

Request for a preliminary ruling

Date lodged:

12 December 2019

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

19 September 2019

Appellant:

Ministero della Giustizia (Ministry of Justice), in the person of the Minister currently responsible

Respondent:

GN

Intervening parties:

HM

JL

JJ

Published on 28/11/2019

...

ITALIAN REPUBLIC

The Consiglio di Stato (Council of State)

acting in its judicial capacity (Fourth Chamber)

has made the following

EN

ORDER

In the appeal (General Roll No 10319 of 2018) brought by the Ministero della Giustizia (Ministry of Justice), in the person of the Minister currently responsible ...

v

GN ...

intervening parties:

HM, JL and JJ, who did not enter an appearance;

seeking variation

of judgment No 10885 of the T.A.R per il Lazio (Regional Administrative Court, Lazio, Italy), sitting in Rome, First Chamber, of 12 November 2018.

[OR. 2]

...

1. The respondent, who is over the age of 50, brought an action before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio; ‘the TAR’) against the decreto del Direttore Generale del Ministero della Giustizia (Decree of the Director-General of the Ministry of Justice) of 21 April 2016, which launched a competition based on tests for 500 notarial positions, in so far as it set a maximum age for participation of 50 as at the date of that decree.

By additional grounds, the respondent challenged the decree which excluded her from the written tests because she was 50 years of age at the date of the call for candidates.

During the proceedings, the respondent — by way of a protective measure from the TAR — was admitted to take part in the written and oral tests of that competition, and passed them.

The TAR, by judgment No 10885 of 2018, declared that the action could not proceed because the applicant (now the respondent) no longer had an interest in its outcome, given that she had passed the competition.

The Ministero della Giustizia (Ministry of Justice) appealed against that judgment, taking the view that the TAR should have dismissed the action and should not have attached relevance to the respondent passing the competition tests, which the protective measure permitted her to take pending a judgment.

The respondent raised objections and contended that the Ministry’s appeal should be dismissed; she reintroduced under Article 101(2) of the codice del processo

amministrativo (Code of administrative procedure) the claims that had not been examined and asked, in the alternative, that the question set out in her written pleadings be referred to the Court of Justice for a preliminary ruling.

[OR. 3]

The respondent also asserted that the number of candidates declared to have passed the competition (419) is fewer than the number of posts advertised (500) and that no candidate in a lower position on the reserve list requested the notarial position assigned to her, therefore there are no other interested parties.

Judgment was reserved at the public hearing on 19 September 2019.

2. By interim judgment No 8152 of 28 November 2019, the Fourth Chamber of the Consiglio di Stato (Council of State):

- upheld the appeal brought by the Ministry of Justice against the declaration that the action brought at first instance could not proceed and, by way of variation of the contested judgment, declared that the action brought at first instance was able to proceed;

- rejected the respondent's claims that the provisions on the age limit of 50 years — set out in the competition notice — conflict with national law;

- with reference to the claims reintroduced under Article 101(2) of the Code of administrative procedure that those same provisions of the competition notice are incompatible with EU law, decided to stay proceedings and refer the question as set out below to the Court of Justice of the European Union for a preliminary ruling under Article 267(2) and (3) TFEU;

- reserved all further decisions until final judgment.

3. In the abovementioned judgment No 8152 of 2019, the referring court found the provisions of the competition notice to comply with Italian law currently in force, since Article 1(3)(b) of legge n. 1365 del 1926 (Law No 1365 of 1926) (replaced by Article 13 of d.lgs. n. 166 del 2006 (Legislative Decree No 166 of 2006)) provides that in order to be admitted to the competition for notaries candidates must not have reached the age of 50 at the date of the notice of competition.

4. The respondent claimed that the age limit imposed by the notice (contested by the action at first instance) on which the exclusion provisions (contested by the additional grounds) are based, infringe the principle of non-discrimination on grounds of age derived from EU law, codified in Article 21 **[OR. 4]** of the Charter of Fundamental Rights of the European Union and Article 10 TFEU and provided for by Article 6 of Council Directive 2000/78/EC of 27 November 2000, transposed into national law by D.Lds. N. 216/2003 (Legislative Decree No 216/2003).

The respondent argued that, given that there is an obligation to interpret national law in conformity with EU law, even where there are doubts over how to construe the legislation currently in force, the interpretation that allows the age limit provided for in Article 1 of Law No 1365 of 6 August 1926 to be considered now repealed should be preferred, since any other interpretation would be irreconcilable with directly effective European laws.

The respondent also argued that, under Article 6 of Directive 2000/78/EC, a difference of treatment based on age may be compatible with the directive only if objectively and reasonably justified by a 'legitimate aim', and if that difference of treatment is proportionate to and appropriate for achieving the objectives pursued, whereas the law that establishes the age limit for access to the notary profession (Law 1365/1923), if that rule is held to be still in force, contains no justification for the rule; and there is even less justification found in legislative rules regarding other professions, which rather reveal manifest contradictions with respect to other comparable activities, such as that of judge or State Counsel, any provisions limiting access to such professions on the basis of age having been repealed some time ago.

In the alternative, the respondent requested that, in the event that there are doubts as to the correct interpretation of the EU rules, the Consiglio di Stato (Council of State) — the court of last instance — refer a question to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU.

5. The Ministry of Justice responded in detail, stating that it is not unreasonable for the legislature to choose to place an age limit on participation in the competition for notaries, as admitting professionals who had already reached a certain age to the roles would run counter to the **[OR. 5]** need to ensure the stability of public duties being performed for a significant period of time, without affecting the budgetary balance of the welfare system for notaries, by preventing access to those not far from retirement age.

6. Also of relevance are the following EU rules:

- Article 21 of the Charter of Fundamental Rights of the European Union, which prohibits discrimination on the ground of age;

- Article 10 of the Treaty on the Functioning of the European Union, according to which, in defining and implementing its policies and activities, the Union aims to combat discrimination based on age.

- Article 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation states that Member States may provide that differences of treatment on grounds of age will not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Against that background, as stated above, Article 1(3)(b) of Law No 1365 of 1926, as replaced by Article 13 of Legislative decree No 166 of 2006, provides that in order to be admitted to the competition for notaries, candidates must not have reached the age of 50 at the date of the notice of competition.

7. The referring court considers that the respondent's arguments do not allow national law to be disapplied, since the reasons for the possible conflict with EU law are not immediate and are not sufficiently clear, precise and unconditional.

In the first place, Article 2 of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications establishes that the directive applies to all Member State nationals wishing **[OR. 6]** to pursue a regulated profession, including liberal professions, in a Member State other than that in which they obtained their professional qualifications, on either a self-employed or employed basis (paragraph 1), while the directive does not apply to notaries who are appointed by an official act of government (paragraph 4).

Accordingly, it is necessary first of all to ascertain whether the national law of a Member State regulating access to exercise the profession of notary in that Member State must necessarily be harmonised with EU law.

In addition, the abovementioned Article 6 of Council Directive 2000/78/EC of 27 November 2000, headed 'Justification of differences of treatment on grounds of age', establishes that Member States may provide that differences of treatment on grounds of age will not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

8. However, the referring court considers that there are doubts as to the compatibility of Article 1(3)(b) of Law No 1365 of 1926, as replaced by Article 13 of Legislative Decree No 166 of 2006, with the relevant EU law concerning differences of treatment on grounds of age.

Indeed, it could be held that that provision of national law, in so far as it admits to the competition for notary posts only candidates who have not yet reached 50 years of age at the date of the notice of competition, is not based on any objective and reasonable justification underpinned by a legitimate aim.

In other words, it could be held that the Italian State's statutory rules introduce age discrimination as regards the possibility of fulfilling notarial functions, without there being a legitimate aim, leading to a disparity that is not permitted under the relevant EC directive.

9. Therefore, it is necessary, pursuant to Article 267(2) and (3) TFEU, to refer **[OR. 7]** to the Court of Justice of the European Union for a preliminary ruling the question that is relevant to the outcome of the present dispute, that is to say, if the

Court of Justice finds that the national law of a Member State regarding access to the profession of notary in that Member State must be harmonised with EU law, ‘do Article 21 of the Charter of Fundamental Rights of the European Union, Article 10 TFEU and Article 6 of Council Directive 2000/78/EC of 27 November 2000, in so far as they prohibit discrimination on the basis of age for access to employment, preclude a Member State from imposing an age limit on access to the profession of notary’.

... [standard wording]

Thus decided in Rome, in closed session, on 19 September 2019 ...

[OR. 8]

... [names of the signatories]

WORKING DOCUMENT