Judgment of 15 September 2021 - BVerwG 3 C 3.21

ECLI:DE:BVerwG:2021:150921U3C3.21.0

Recognition of a driving licence in categories A and B renewed in another Member State

Headnote

Section 3 (6) StVG in conjunction with section 13 first sentence no. 2 (c) and section 11 (8) first sentence FeV must be interpreted in conformity with EU law. Where the holder of a driving licence in categories A and B, renewed in the Member State of his or her normal residence, provides evidence that his or her fitness to drive such motor vehicles was examined there when his or her driving licence was renewed and that such examination corresponds to what must be successfully completed under German driver licensing law for obtaining a positive medical-psychological expert report, the driver licensing authority may not, when deciding on the right of the person concerned to make use of the right to drive in Germany again, infer the person's unfitness to drive from failure to produce the medical-psychological expert report required of it in accordance with section 11 (8) fist sentence 1 FeV. Providing such evidence is equivalent to presenting a positive medical-psychological expert report.

Sources of law

Driver Licensing Ordinance	FeV, *Fahrerlaubnis-Verordnung*	sections 11 (8) first sentence, 13 first sentence no. 2 (c) and (d), section 29 (3) first sentence no. 3 and third sentence, (4)
Road Traffic Act	StVG, *Straßenverkehrsgesetz*	sections 3 (6), 29 (1) second sentence no. 3 (a) and (5) first sentence, section 65 (3) no. 2
Directive 2006/126/EC		articles 2 (1), 7 (1) and (3), 11 (4) second subparagraph

Summary of the facts

The claimant seeks a declaration stating that he is entitled to drive motor vehicles in Germany under his Spanish driving licence for vehicles in categories A and B.

The claimant is a German national. He has had his normal residence within the meaning of section 7 of the Ordinance on the Admission of Persons to Road Traffic - Driver Licensing Ordinance (FeV, *Verordnung über die Zulassung von Personen zum Straßenverkehr - Fahrerlaubnis-Verordnung*) and article 12 (1) of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (OJ L 403 p. 18) in Spain since 1992 and an additional residence in K. In Germany he was convicted for driving under the influence of alcohol in 1987, 1990, 1995 and 2000; therefore, he had his German right to drive withdrawn once more in 1990. On 21 October 1992, the claimant was issued with a driving licence in Spain which, amongst others, included vehicles in categories A and B. Its validity had been extended several times there.

On 12 December 2008, the claimant was driving a motor vehicle during a temporary stay in Germany while having a blood alcohol concentration of 2.12 per mille. Therefore, he was sentenced to a fine for driving under the influence of alcohol by penal order (*Strafbefehl*) of 20 January 2009, final and binding since 24 January 2009, and he had his right to drive motor vehicles in Germany under his Spanish right to drive withdrawn on the ground that he was unfit to drive. A disqualification period of 14 months was determined for obtaining a new right to drive; it ended on 19 March 2010. His driving licence for vehicles in categories A, A1 and B issued in Spain on 22 October 2007 was confiscated and sent to the competent Spanish authorities. They returned the document to the claimant in the course of the disqualification period.

On 23 November 2009 - and thus also during the disqualification period - the claimant was issued in Spain with a new driving licence for vehicles in categories A1, A2, A and B, which, like his previous driving licence, was valid until 22 October 2012. On 15 October 2012, he obtained a driving licence in Spain for vehicles in categories A1, A2, A and B valid until 22 October 2014, on 18 September 2014, he obtained a driving licence for vehicles in categories AM, A1, A2, A and B valid until 22 October 2016 and on 6 September 2016, he obtained his current driving licence for vehicles in categories AM, A1, A2, A and B valid until 22 October 2021. On the driving licences, 21 October 1992 is indicated as the commencing date of validity for the said vehicle categories.

The claimant's application of 20 January 2014 to have "his Spanish right to drive ... of 21 October 1992, valid until 22 October 2014" recognised for the federal territory, was rejected by the defendant. The claimant had his Spanish right to drive withdrawn for drink-driving by penal order of 20 January 2009. After the expiry of the disqualification period, he had not acquired a new right to drive in Spain which could be recognised in Germany, rather, he was simply issued with replacement documents. Since the claimant had not produced the medical-psychological expert report which was rightly requested from him in order to clarify existing doubts regarding his fitness to drive, one could conclude that he was unfit to drive. The Regional Commissioner's Office (*Regierungspräsidium*) of K. rejected the claimant's objection (*Widerspruch*) on the same grounds.

His action remained unsuccessful at the lower instances.

By decision of 10 October 2019 - 3 C 20.17 - (...) the Senate suspended the proceedings and obtained a preliminary ruling from the Court of Justice of the European Union (CJEU, hereinafter Court of Justice) pursuant to article 267 (3) of the Treaty on the Functioning of the European Union - TFEU - (CJEU, judgment of 29 April 2021 - C-47/20 [ECLI:EU:C:2021:332] -).

Following this, the Senate dismissed the claimant's appeal on points of law.

Reasons (abridged)

11 (...) The judgment of the Court of Appeal is not based on a violation of law that is subject to an appeal on points of law (section 137 (1) of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)). The claimant is not entitled to a declaration stating that he is authorised to drive motor vehicles in Germany under his Spanish driving licence for vehicles in categories A and B. Under German driver licensing law, such authorisation is precluded by the fact that the right to make use of his Spanish right to drive in Germany was withdrawn by a final and binding decision for drink-driving while having a blood alcohol concentration of 2.12 per mille (section 29 (3) first sentence 1 no. 3 FeV). The corresponding entry has neither been deleted from the Register of Driver Fitness (section 29 (3) third sentence FeV) nor has the claimant submitted a positive medical-psychological expert report to the driver licensing authority in accordance with section 3 (6) of the Road Traffic Act (StVG, *Straßenverkehrsgesetz*) in conjunction with section 20 (1) first sentence and section 13 first sentence no. 2 (c) FeV (1.). Nor does anything to the contrary follow from the principle of recognition under EU law and the fact that the claimant's driving licence was renewed several times in Spain after the expiry of the disqualification period pursuant to article 7 (3) second subparagraph of Directive 2006/126/EC. As the Court of Justice ruled in its judgment of 29 April 2021 - C-47/20 [ECLI:EU:C:2021:332] - articles 2 (1) and 11 (4) second subparagraph of Directive 2006/126/EC do not preclude the authorities of a Member State from refusing, in such a situation, to recognise the validity of a driving licence in categories A and B which has been renewed in another Member State (2.). The conditions laid down in section 3 (6) StVG in conjunction with section 13 first sentence no. 2 (c) FeV, which a holder of a driving licence who has been withdrawn the right to drive a motor vehicle in Germany on account of drink-driving while having a blood alcohol concentration of 1.6 per mille or more during a temporary stay in Germany must fulfil in order to reacquire this right, do not exceed the limits of what is necessary to achieve the objective pursued by Directive 2006/126/EC - the improvement of road safety - when interpreted in conformity with EU law (3.).

12 The legal assessment of the request for a declaratory judgement sought by the claimant is governed by the legal provisions applicable at the time of the decision on the appeal on points of law. Accordingly, the Road Traffic Act in the version promulgated on 5 March 2003 (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 310, corrected p. 919), at the relevant time as last amended by article 4 of the Act of 7 May 2021 (BGBl. p. 850), the Ordinance on the Admission of Persons to Road Traffic (Driver Licensing Ordinance) of 13 December 2010 (BGBl. I p. 1980) as last amended by article 12 of the Act of 12 July 2021 (BGBl. I p. 3091) and Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (OJ L 403 p. 18) as last amended by Commission Directive (EU) 2020/612 of 4 May 2020 amending Directive 2006/126/EC of the European Parliament and of the Council on driving licences (OJ L 141 p. 9) apply.

13 1. The claimant, who, according to the factual findings of the Court of Appeal, does not have his normal residence within the meaning of section 7 FeV and article 12 (1) of Directive 2006/126/EC in Germany but in Spain, cannot base his request for a declaratory judgment on section 29 (1) first sentence FeV; according to this provision, holders of a foreign right to drive may, to the extent entitled by their licence, drive motor

vehicles on national territory if they do not have a normal residence within the meaning of section 7 FeV here. The right the claimant seeks to be granted is precluded by section 29 (3) first sentence no. 3 FeV, which stipulates that the right under subsection 1 does not apply, *inter alia*, to holders of a foreign right to drive who have had the right to drive on national territory withdrawn by a court with final and binding effect. This is the case with the claimant; on account of his drink-driving on 12 December 2008 while having a blood alcohol concentration of 2.12 per mille and the resulting unfitness to drive inferred by the criminal court, his Spanish right to drive was withdrawn by final and binding penal order causing a withdrawal of his right to make use of this right to drive on national territory (section 69b (1) first sentence of the German Criminal Code (StGB, *Strafgesetzbuch*)); under section 69b (1) second sentence StGB, the right to drive motor vehicles on national territory lapses upon the decision becoming final and binding.

14 The corresponding entry in the Register of Driver Fitness has not yet been deleted at the relevant time of the decision on the appeal on points of law. According to section 29 (3) third sentence FeV, section 29 (3) first sentence no. 3 and 4 shall only apply to a right to drive obtained within the EU or EEA if the measures referred to therein are entered in the Register of Driver Fitness and if they have not been deleted in accordance with section 29 StVG. Under section 29 (5) first sentence StVG, the entry relevant in this case is due to be deleted on 24 January 2024; under this provision, the ten year deletion period (section 65 (3) no. 2 fourth sentence StVG in conjunction with section 29 (1) second sentence no. 3 (a) StVG) for the withdrawal of a right to drive on grounds of unfitness does not begin until the right to drive is obtained or a new right to drive is obtained, but no later than five years after the decision adversely affecting the holder of the right has become final and binding. The penal order issued against the claimant became final and binding on 24 January 2009.

15 The claimant did also not obtain a new right to drive motor vehicles in Germany with his Spanish driving licence; he is also not entitled to reacquire this right. According to section 29 (4) FeV, the right to make use of a foreign right to drive on national territory following a decision referred to in subsection 3 no. 3 and 4 shall be obtained on application, if the grounds for withdrawal no longer exist. In this regard, section 3 (6) StVG stipulates that, for obtaining the right to make use of a foreign right to drive on national territory after previous withdrawal, the provisions on obtaining a new right to drive shall apply *mutatis mutandis* to persons with normal residence abroad. Pursuant to section 20 (1) first sentence in conjunction with section 13 first sentence no. 2 (c) FeV, the claimant must produce a - positive - medical-psychological expert report after drink-driving while having a blood alcohol concentration of 2.12 per mille; under this provision, the driver licensing authority orders that a medical-psychological expert report must be produced if a vehicle was driven in road traffic while having a blood alcohol concentration of 1.6 per mille or more. If the person concerned refuses to be examined or fails to provide the driver licensing authority with the required expert report by the time limit set, the driver licensing authority can then infer in its decision that the person concerned is unfit (section 11 (8) first sentence FeV). The claimant has so far failed to provide the defendant with a medical-psychological expert report, contrary to the request made to him.

16 2. Nor can the claimant derive a right to drive motor vehicles in categories A and B in Germany from the fact that his Spanish driving licence has (also) been renewed in Spain several times in accordance with article 7 (3) second subparagraph of Directive 2006/126/EC, most recently on 6 September 2016 until 22 October 2021, after the expiry of the disqualification period (see on the power to refuse to recognise a new driving licence issued by another Member State while the disqualification period was still running: CJEU, judgment of 19 February 2009 - C-321/07 [ECLI:EU:C:2009:104], Schwarz - para. 83 with further references, there on Directive 91/439/EEC, which was replaced by Directive 2006/126/EC). In this respect, the right asserted by the claimant does not result from the primacy of application of EU law and the principle to be inferred from article 2 (1) of Directive 2006/126/EC, in accordance with the established case-law of the Court of Justice, that driving licences issued by the Member States are to be mutually recognised without any formality (see, *inter alia*, CJEU, judgments of 23 April 2015 - C-260/13 [ECLI:EU:C:2015:257], Aykul - para. 45 and of 28 October 2020 - C-112/19 [ECLI:EU:C:2020:864], Kreis Heinsberg - para. 25, each with further references).

17 On that point, the Court of Justice stated in the preliminary ruling sought in the present proceedings (CJEU, judgment of 29 April 2021 - C-47/20 -):

"...

(42) Since, pursuant to the second subparagraph of article 7 (3) of Directive 2006/126, Member States are not required, when renewing a driving licence in categories AM, A, A1, A2, B, B1 and BE, to carry out an examination of the minimum standards of physical and mental fitness for driving as set out in Annex III to that Directive, the Member State in whose territory the holder of a licence for those categories that has only been renewed wishes to drive, after having been deprived, following the commission of a road-traffic offence in that territory, of the right to drive in that territory, may refuse, under the exception provided for in the second subparagraph of article 11 (4) of Directive 2006/126 and, therefore, by derogation from the principle of mutual recognition of licences referred to in paragraph 29 of this judgment, to recognise the validity of that licence where, after the expiry of any period of prohibition from applying for a new licence, the conditions laid down by national law for the restoration of the right to drive in that territory are not satisfied.

(43) In such circumstances, the obligation, laid down by Directive 2006/126, of mutual recognition by Member States of the validity of driving licences in categories AM, A, A1, A2, B, B1 and BE issued by other Member States cannot apply of its own motion to renewals of those driving licences, since the conditions for renewal may differ between Member States.

(44) While such an obligation of mutual recognition cannot depend on the verification, by the Member State in whose territory the holder of a driving licence issued and renewed in another Member State is temporarily staying, of the conditions under which that driving licence has been renewed, it must however be open to the licence holder who, after the expiry of any period of prohibition from applying for a new licence, wishes to have the right to drive in the first Member State again to provide evidence to the authorities of that Member State that his or her fitness to drive in accordance with the provisions of Annex III to Directive 2006/126 was checked when his or her licence was renewed in the second Member State and that, therefore, in accordance with the case-law cited in paragraph 35 of this judgment, the unfitness to drive established by the first Member State was lifted by the effect of that renewal, provided however that the purpose of the check corresponds with that of the check ordered by the legislation of that same Member State.

(45) It follows from the foregoing considerations that article 2 (1) and article 11 (4) second subparagraph of Directive 2006/126 do not, in principle, preclude the authorities of a Member State from refusing, in a situation such as that at issue in the main proceedings, to recognise the validity of a driving licence in categories A and B merely renewed in another Member State, pursuant to article 7 (3) of Directive 2006/126, the first Member State thus being competent to lay down the conditions with which the holder of the driving licence must comply in order to recover the right to drive in its territory.

(46) It is clear, in that regard, that allowing, in such a situation, the authorities of a Member State to make the recognition of the validity of a driving licence issued and renewed in another Member State subject to certain conditions, on account of the commission of a road-traffic offence in their territory, is liable to reduce the risk of road-traffic accidents occurring and thus meets the objective consisting in improving road safety pursued by Directive 2006/126, as recital 2 thereof recalls.

(47) It is however for the referring court to examine whether, in accordance with the principle of proportionality, the rules, provided for by the legislation of the first Member State, laying down the conditions with which the holder of a driving licence deprived as a result of unlawful conduct of the right to drive in its territory in which he or she was staying temporarily must comply in order to recover the right to drive in that territory, do not exceed the limits of what is appropriate and necessary to attain the objective pursued by Directive 2006/126, consisting in improving road safety (see, to that effect, judgment of 23 April 2015 - C-260/13 [ECLI:EU:C:2015:257], Aykul - para. 78), which would be the case in particular if they precluded that licence holder from being able to provide evidence that his or her fitness to drive, after the expiry of any period of prohibition from applying for a new licence, was checked in accordance with the provisions of Annex III to Directive 2006/126 when his or her licence was renewed in his or her Member State of normal residence and that the purpose of that check corresponds with that of the check ordered by the legislation of the first Member State.

..."

18 3. The required assessment of proportionality of the provisions of the Road Traffic Act and the Driver Licensing Ordinance on reacquiring the right to make use of a driving licence issued by another Member State, after unlawful conduct in Germany, shows that those provisions, when interpreted in conformity with

EU law, as called for in view of the judgment of 29 April 2021, do not exceed the limits of what is appropriate and necessary in order to achieve the objective pursued by Directive 2006/126/EC, namely the improvement of road safety.

19 a) According to the provisions laid down in section 3 (6) StVG as well as section 29 (3) first sentence no. 3 and third sentence FeV, which - as shown at the beginning - apply after the final and binding withdrawal of the claimant's right to drive a motor vehicle in Germany on account of drink-driving while having a blood alcohol concentration of 2.12 per mille, the exclusion from the right to drive in Germany does on the one hand cease to have effect when the corresponding entry in the Register of Driver Fitness has been deleted. In the present case, as shown, the entry is due for deletion 15 years after the penal order has become final and binding.

20 It is not necessary to decide whether this deletion period would be appropriate and necessary in itself (affirmatively CJEU, judgment of 23 April 2015 - C-260/13, Aykul - para. 81 on the deletion period of five years relevant in the proceedings at that time). This period is to be evaluated in a synopsis with the other legal options open to the person concerned to reacquire the right to drive motor vehicles in Germany with his driving licence issued in Spain. In its judgment of 23 April 2015, the Court of Justice took - with regard to the review of the appropriateness and necessity conferred upon the Member State - into account that the person concerned had the possibility to apply for a new right to drive motor vehicles in Germany with the right to drive obtained in the other Member State - at that time Austria (CJEU, judgment of 23 April 2015, see above, para. 80).

21 Under section 29 (4) FeV, the person concerned has the option - regardless of and already before the deletion of the entry on the withdrawal from making use of the right to drive in Germany - to apply for obtaining a (new) right to make use of his foreign right to drive on national territory following one of the decisions mentioned in section 29 (3) first sentence no. 3 and 4 FeV. According to this provision, the (new) right to drive shall be obtained if the reasons for the withdrawal - in this case alcohol abuse in the sense of a failure to separate alcohol consumption impairing the ability to drive from driving a vehicle in road traffic (see no. 8.1 of Annex 4 to the Driver Licensing Ordinance) - have ceased to exist.

22 Following the withdrawal of the right to drive a motor vehicle in Germany on account of drink-driving while having a blood alcohol concentration of 1.6 per mille and more, section 3 (6) StVG in conjunction with section 13 first sentence no. 2 (c) and section 11 (8) first sentence FeV require that the person concerned, who wishes to make use of a driving licence issued in another Member State in Germany again, submits to the driver licensing authority a positive medical-psychological expert report from an officially recognised driver fitness test centre (see section 11 (3) FeV).

23 Pursuant to no. 8.2 of Annex 4 to the Driver Licensing Ordinance, one may assume fitness to drive after the end of (alcohol) abuse; it may be deemed to exist within the meaning of this provision when the change in drinking behaviour has been consolidated. Thus, the subject matter of a medical-psychological examination under the requirements of the relevant German driver licensing law (see CJEU, judgment of 29 April 2021 - C-47/20 - para. 32 and 45) is also and precisely the expert examination of whether the person concerned has undergone a sufficiently consolidated change in his or her drinking behaviour.

24 In the deciding Senate's view, in order to prevent the threats to road safety resulting from the fact that drivers who are unfit to drive due to alcohol consumption participate in road traffic, no objection can be made, measured against the principle of proportionality, to the fact that a corresponding examination of the person concerned is carried out before he or she reacquired the right to drive motor vehicles in Germany. The very fact that the claimant had driven a motor vehicle in the past while having a blood alcohol concentration clearly exceeding the limit of 1.6 per mille specified in section 13 first sentence no. 2 (c) FeV, proves that he - at least at that time - belonged to the (risk) group of motorists that are more than others used to drink alcohol, which at the same time constitutes the increased risk of new unlawful conduct and thus, in the interest of road safety, a corresponding need for clarification and examination (see on the connection between a high blood alcohol level in a case involving drink-driving and the existence of a risk of repetition Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), judgment of 17 March 2021 - 3 C 3. 20 - (...) para. 18 et seqq.). Not least, no. 14.1 of Annex III to Directive 2006/126/EC (Minimum standards of physical and mental fitness for driving a motor vehicle), which contains the requirements for

driving motor vehicles in categories A, A1, A2, AM, B, B1 and BE with regard to alcohol, also stipulates that applicants who are dependent on alcohol or who are unable to separate driving from alcohol consumption will neither be obtained a right to drive nor will their right to drive be renewed.

25 b) If interpreted in conformity with EU law, German driver licensing law does not preclude the holder of a driving licence renewed in another Member State from providing evidence that his or her fitness to drive has been examined in the Member State of his or her normal residence upon renewal of his or her driving licence after the expiry of any disqualification period in accordance with Annex III to Directive 2006/126/EC and that such examination corresponds to that ordered by the German rules (see, on this criterion, CJEU, judgment of 29 April 2021 - C-47/20 - para. 47).

26 aa) In view of these statements by the Court of Justice in the judgment of 29 April 2021, section 3 (6) StVG in conjunction with section 13 first sentence no. 2 (c) and section 11 (8) first sentence FeV must however be interpreted in conformity with EU law. If the holder of the renewed driving licence in categories A and B provides evidence that his or her fitness to drive such motor vehicles was examined in the Member State of his or her normal residence when his or her driving licence was renewed and that this examination corresponds to that which must be successfully completed under German driver licensing law for obtaining a positive medical-psychological expert report, the driver licensing authority, in deciding on the right of the person concerned to make use of the right to drive in Germany again, may not rely on the failure to provide the medical-psychological expert report required by it under section 11 (8) first sentence FeV to infer unfitness to drive. Providing such evidence is equivalent to presenting a positive medical-psychological expert report. If the person concerned has undergone a corresponding expert examination of his or her fitness to drive when renewing his or her driving licence in the Member State of his or her normal residence, it must immediately come to his or her mind that he or she must assert and prove this to the driver licensing authority even without an explicit notification contained in the request to provide a medical-psychological expert report by such driver licensing authority. The request to produce a medical-psychological expert report does not need to contain such a notification.

27 bb) Even such an interpretation of the relevant provisions in conformity with EU law cannot, however, help the claimant to succeed with his request for a declaratory judgment. He did not even assert that the health examination he underwent in the Kingdom of Spain before renewing his driving licence also included the question, as in a medical-psychological examination, whether there had been a consolidated change in his drinking behaviour and whether he could again be deemed able to separate driving a motor vehicle and alcohol consumption impairing driving safety with sufficient certainty. This applies not only to his assertions in the courts responsible for finding the facts, but also to his opinion on the CJEU's judgment in the appeal proceedings on points of law. On the contrary, the claimant's counsel also proceeds from the assumption that the subject matter and standard of the health examination provided for in Spain is different; in his written statement of 23 August 2019, he concedes "that there is no selection procedure in the form of the medical-psychological examination in Spain anyway". Moreover, the Higher Administrative Court (*Verwaltungsgerichtshof*) has already found that the claimant has not produced any medical-psychological evidence whatsoever that would be suitable for plausibly documenting recovery of fitness to drive in any other way, i.e. other than by submitting a medical-psychological expert report from an officially recognised driver fitness test centre (printed judgment p. 31).