

Case C-196/24 [Aucrinde] ⁱ

Request for a preliminary ruling

Date lodged:

20 February 2024

Referring court:

Tribunal judiciaire de Chambéry (France)

Date of the decision to refer:

16 January 2024

Applicant:

xx

Defendants:

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**TRIBUNAL JUDICIAIRE
DE CHAMBÉRY**

(COURT OF CHAMBÉRY)
Civil Chamber

INTERNATIONAL LETTER ROGATORY

...

ORDER ...

...

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

Having regard to the proceedings pending before the tribunale civile di Genova (Civil District Court, Genoa, Italy),

BETWEEN:

APPLICANT:

xx

....:

AND:

DEFENDANTS:

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PUBLIC PROSECUTOR'S OFFICE
in the person of the procuratore generale della Repubblica presso il tribunale di Genova (State Prosecutor to the Civil District Court, Genoa) ...

SUMMARY OF THE DISPUTE

- 1 XX, born in ..., residing in ..., brought proceedings before the Civil District Court, Genoa seeking (i) a declaration that he is the illegitimate son of aa, who died on ..., (ii) the authorisation to use his father's surname, (iii) an order that the competent registrar [enter the future judgment into the record] when it becomes final ... [and] (iv) an [order] commissioning an expert's report [establishing] xx's status as an illegitimate child, following exhumation of the body of the presumed father.
- 2 Under an ordinanza istruttoria (directions order) of 5 March 2022, the giudice istruttore del tribunale civile di Genova (investigating judge of the Civil District Court, Genoa) ordered that an expert's report be produced by a haematologist to determine whether the applicant has genetic characteristics matching those of the defendants to the proceedings, who are recognised children of aa.

- 3 The defendants, legitimate children of aa, objected to undergoing the tests required for the haematologist's report and requested that samples be taken from aa's body where his remains are buried.
- 4 Under a directions order of 1[4] April 2022, the investigating judge of the Civil District Court, Genoa ordered that an expert's report be produced by a haematologist and appointed an expert to carry out a genetic comparison between the applicant (xx) and the body of the presumed father (aa), after exhuming the latter, and suspended the expert's activities pending the execution of the international [letter] rogatory which may [be sent] to the French judicial authority requesting that the body be exhumed, in accordance with French law.
- 5 On 18 November 2022, the Civil District Court, Genoa sent the tribunal judiciaire de Chambéry (Court of Chambéry, France) a request for international mutual assistance in civil matters consisting in a request for exhumation of the body of aa, who was born in ... on ..., died in ... on ..., and is buried in France.
- 6 The request was made pursuant to Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.
- 7 ...

GROUNDS FOR THE DECISION

Preliminary observations on the [right] to make a reference

- 8 Article 267 TFEU provides: 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
...'
- 9 'A national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature [...]

Although it is true that cooperation between the courts of the Member States in the taking of evidence does not necessarily lead to the elaboration of a judicial decision, the fact remains that examination of a witness by a court [...] is an act undertaken in the context of judicial proceedings that are intended to lead to a decision of a judicial nature. The issue of responsibility for the costs of examining a witness falls within the framework of those proceedings. Therefore, there is a direct connection between the question referred for a preliminary ruling and the performance by the referring court of a judicial function' (judgment of 17 February 2011, *Weryński*, C-283/09, EU:C:2011:85, paragraphs 44 and 45).

- 10 In the present case, although the referring court can refuse to execute the request for international mutual assistance in civil matters only in limited circumstances (Article 12 and Article 16 of Regulation [2020/1783]), it is not a mere executing authority of a decision already taken by the requesting authority and it must issue a judicial decision in order to determine whether the conditions laid down in the abovementioned regulation are met.
- 11 The determination demanded of the referring court cannot be viewed as a purely formal determination in the light of the wording of Article 12 of Regulation [2020/1783], which requires that the requested court ‘*execute the request in accordance with its national law*’.
- 12 In addition, while a dispute is not directly pending before the referring court, there is, nevertheless, a dispute between several parties in Italy, which is pending before the requesting Italian court, and, by extension, one – admittedly partial – aspect of that dispute has been brought before the requested French court.
- 13 Accordingly, the French court must be regarded as a court within the meaning of Article 267 TFEU.

1 The applicable rules to execute the request

- 14 The request from the Civil District Court, Genoa is made in accordance with Regulation [2020/1783].
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26 Regulation [2020/1783] ... therefore applies to requests for measures of
investigation made by a court of one Member State in respect of evidence
[located] in the territory of another Member State, with the exception of Denmark.

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32 In the light of the foregoing, ... Regulation [2020/1783] must be applied.

2 The request made by the Civil District Court, Genoa

(a) Admissibility of the request

33 Article 5 of Regulation [2020/1783] sets out the [form and content of requests].

...

34 ... the request is therefore admissible.

(b) Express refusals to execute requests

35 The Regulation provides an exhaustive list of the cases in which the requested
court may refuse to execute the request. Since Regulation [2020/1783] is intended
to facilitate, in so far as possible, the taking of evidence abroad, the cases in which
requested courts may refuse to execute requests are strictly limited.

36 ... Article 16 of Regulation [2020/1783] [concerns]

‘Refusals to execute requests:

...

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44 There is therefore no reason to oppose the request from the Civil District Court, Genoa on the basis of Article 16 of Regulation [2020/1783].

(c) *The relevant provisions of national and EU law at issue*

1) The first provision of EU law at issue

45 Article 12(3) of Regulation [2020/1783] provides:

‘The requesting court may call for the request to be executed in accordance with a special procedure provided for in its national law, using form A in Annex I. The requested court shall execute the request in accordance with the special procedure unless doing so would be incompatible with its national law or if it is unable to do so because of major practical difficulties. If the requested court does not comply with the call for the request to be executed in accordance with a special procedure for one of those reasons, it shall inform the requesting court using form H in Annex I.’

46 In order for a request to be executed in accordance with a special procedure, the requesting court must complete point 12 of form A. In the present case, the Civil District Court, Genoa did not complete point 12 of form A and there is therefore no need to consider the question of the compatibility of a special request with national law, or to argue practical difficulties.

47 However, Article 12 of that same Regulation, [entitled] ‘General provisions on the execution of a request’, provides [in paragraph 2 thereof], that ‘the requested court shall execute the request in accordance with its national law’.

48 That article is virtually identical to Article 10 of repealed Council Regulation (EC) No 1206/2001 of 28 May 2001, which provided: ‘2. *The requested court shall execute the request in accordance with the law of its Member State.*’

49 In addition, in relation to that article, the Practice Guide for the Application of the Regulation on the Taking of Evidence, relating to Regulation (EC) No 1206/2001 of 28 May 2001, states that the requested court may, if the procedure laid down by the Member State of the requesting court is incompatible with the law of the Member State of that requested court, refuse to comply with that request. **A procedure can be considered as incompatible with the law of the Member State of the requested court if it is in conflict with fundamental principles of that law.**

50 The court raises a first question concerning the interpretation of that article. Whilst the cases in which a Member State may refuse to execute a request from another Member State are listed exhaustively in Article 16 of the Regulation, Article 12 appears to introduce new cases in which compliance with such a request may be refused.

- 51 The Court will be asked to interpret that article so as to clarify its scope for the national court: **does that article allow a national court to refuse to apply the Regulation and [to refuse] to comply with a request, on the ground that the procedure specified in the request is contrary to fundamental principles of the national law of the requested State?**
- 52 In addition, if that question is answered in the affirmative, the question arises, in the present case, of the contradiction between the procedure specified in the request, on the one hand, and fundamental principles of French national law and certain articles of the Charter of Fundamental Rights of the European Union ('the Charter'), on the other hand.

2) The national provision at issue

- 53 Article 16-11 of the Code civil (Civil Code) in force on 21 May 2023 provides:

'The identification of an individual by DNA fingerprinting may be sought only:

1° In the context of investigative measures conducted in the course of judicial proceedings;

...

*In civil matters, such identification may be sought only by execution of a measure of investigation ordered by a court before which an action is brought seeking either to establish or to contest parentage, or to obtain or remove subsidies. The consent of the person concerned must be obtained expressly and in advance. **An identification cannot be made by DNA fingerprinting after a person's death unless that person gave his or her express consent during their lifetime.**'*

- 54 Under French law, a body may be exhumed for the purposes of establishing parentage only if, during his or her lifetime, the person concerned gave his or her express consent.

3) Relevant national and international case-law

- 55 On 6 July 2011, a case was referred by the Cour de cassation (Court of Cassation, France) to the Conseil constitutionnel (Constitutional Council, France) concerning the rules governing post mortem genetic reports (Decision No 2011-173 QPC of 30 September 2011, <https://www.conseil-constitutionnel.fr/decision/2011/2011173QPC.htm>). More specifically, the Constitutional Council was asked to rule on the compatibility of the second paragraph of Article 16-11 of the Civil Code with the principle of respect for private and family life, as guaranteed by the Constitution française (French Constitution).

- 56 The Constitutional Council took the view that the presumption that deceased persons have not consented to genetic reports is a barrier intentionally erected by

the legislature to guarantee the respect due to the deceased by preventing exhumations requested for abusive purposes:

‘Whereas by providing that deceased persons are presumed not to have consented to identification by DNA fingerprinting, the legislature intended to preclude exhumations in order to ensure due respect for the dead; whereas it is not for the Constitutional Council to substitute its assessment for that of the legislature as regards the account taken, in such matters, of the respect due to the human body; whereas, consequently, the complaints alleging infringement of the respect due for private life and the right to lead a normal family life must be rejected.’

57 That position is at odds with the case-law of the European Court of Human Rights, which in a judgment of 13 July 2006, *Jäggi v. Switzerland* (application No 58757/00) held that the taking of a DNA sample involving an exhumation did not infringe, having regard to the circumstances of the case in question, the private life of the deceased or the inviolability of the deceased’s body, rather that there had been a disproportionate infringement of the right of a 70-year-old person to know his origins and to ascertain whether the deceased was indeed his biological father, as that person’s request to have the body exhumed in order to have DNA testing carried out had been refused.

58 The European Court of Human Rights has reasserted its position on several occasions, including in the judgment of 16 June 2011, *Pascaud v. France* (application No 19535/08):

‘59. ... The Court takes the view that the right to an identity, which falls within the scope of the right to know one’s parentage and to have it recognised, is an integral part of the concept of “private life”. In such cases, an even more detailed analysis must be carried out in order to weigh up the existing interests.

60. The Court is required to determine whether, in the present case, a fair balance was struck between the weighting of the competing interests, that is to say, on the one hand, the applicant’s right to know his parentage and, on the other hand, the right of third parties not to have to undergo DNA testing and the general interest in the protection of legal certainty. ...

64. However, the Court considers that the protection of the interests of the presumed father cannot, on its own, be a sufficient argument to deny the applicant his rights in the light of Article 8 of the Convention.

*65. By precluding genetic testing post mortem and refusing to recognise and establish the applicant’s biological paternity, the court of appeal gave greater weight to the rights and interests of the presumed father than to the applicant’s right to know his parentage and to have it recognised, a right which does not disappear with age, quite the reverse (see *Jäggi*, cited above, § 40).’*

59 It is clear from those different rulings that there is a difference of views between, on the one hand, the Constitutional Council, which considers the second

paragraph of Article 16-11 of the Civil Code, under which the possibility of making an identification by DNA fingerprinting post mortem is subject to the express consent of the deceased given during his or her lifetime, compatible with the French Constitution and, on the other hand, the European Court of Human Rights, which considers that the application of that article and the subsequent refusal to authorise such an identification may constitute an infringement of Article 8 of the European Convention of Human Rights.

- 60 The Court of Cassation has also had to consider this question after the decisions cited above were made:

‘Whereas, according to the judgment under appeal, Mr ..., born on ..., was recognised before his birth by his mother, ..., and, on ... by ..., and became legitimate by their subsequent marriage; whereas having learnt from them that his father is in fact ..., who died in ..., he, on ..., made an application to the tribunal de grande instance (Regional Court) seeking authorisation to have the latter’s body exhumed for the purposes of genetic testing;

Whereas by ruling on the merits of the application, even though it fell to it to raise of its own motion the plea of inadmissibility based on the failure to involve the beneficiaries of ... in the proceedings, the cour d’appel (Court of Appeal) infringed the abovementioned provisions’ (Court of Cassation, 1st Civil Chamber, 13 November 2014, No 13-21-0 18).

- 61 According to some academic writers, that judgment created a remedy *praetor legem*, having regard to Article 8 of the European Convention of Human Rights, in order to circumvent the fact that Article 16-11 of the Civil Code is contrary to the Convention in its practical application. However, the Court of Cassation does not address the substance of the matter since the question raised is of a procedural nature (the action is inadmissible as the heirs were not joined as parties to the proceedings). One author therefore concludes that the obligation that the beneficiaries are joined as parties to the proceedings is a purely procedural requirement in order to observe the *audi alteram partem* rule and not a familial substitute for the deceased’s consent. ...
- 62 In addition, the solution cannot be transposed to the case before the referring court. In its judgment, the Court of Cassation is careful to specify that the case in question concerns an action to determine personal status (action to ascertain one’s origins which has no impact on the applicant’s civil status and has no legal consequences):

‘Whereas the admissibility of an action for recognition of genetic parentage by means of an expert report, where an exhumation is required to produce that report, is subject to the requirement that the deceased’s dependents are joined as parties to the proceedings; the related pleas of inadmissibility concern questions of public policy.’

- 63 The request made to the referring court does not concern an action to determine personal status but rather the taking of evidence in the context of an action to establish the applicant's parentage.
- 64 It follows from the pleadings drafted [on behalf] of xx that, 'pursuant to Article 270 of the Civil Code, XX is entitled to know the truth and his origins, accepting as a corollary all the duties and responsibilities that legal recognition of aa's paternity will entail'.
- 65 Therefore, the analysis by the Court of Cassation, which is concerned simply with joining the heirs as parties to proceedings in order to circumvent Article 16-11 of the Civil Code, does not apply and is not, in any case, satisfactory from the point of view of the courts of first instance, because it allows legal uncertainty to persist.
- 66 Ultimately, having completed this part of the analysis, it must be observed that the request made by the Civil District Court, Genoa is contrary to Article 16-11 of the Civil Code, which may itself, in its application, run counter to Article 8 of the European Convention of Human Rights.

The analysis must go into further details.

- 67 After all, the European Union also protects fundamental rights, by virtue of the Charter ...
- 68 It is therefore necessary to determine whether Article 16-11 of the Civil Code is contrary to the Charter, in which case, in accordance with the settled case-law of the Court of Justice of the European Union, the court will have to disapply Article 16-11 of the Civil Code.

4/ The second relevant provisions of EU law at issue

- 69 Article 6 TEU provides:

'1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*

70 **3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'**

71 Two articles of the Charter are applicable in the present case: first, Article 1 which guarantees respect for human dignity and, thereafter, the respect due to the dead and, second, Article 7 which affords everyone the right to respect for his or her private life and is the counterpart of Article 8 of the European Convention of Human Rights.

72 Articles 51 and 52 of the Charter state:

'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers [...]

[...]

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. *Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.*

3. *In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'*

73 'In order to ensure such consistency with the law under the Convention, Article 52(3) provides for a two-stage mechanism. **The Courts of the European Union must first identify the "corresponding" rights, that is to say those which are guaranteed both by the Charter and by the Convention.**

Once correspondence between the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights is established, the Court of Justice is required, in a second stage, to give the right guaranteed by the Charter the same meaning and the same scope as those conferred by the Convention, save where ‘more extensive protection’ is provided. This means that the interpretation of the Charter must mirror that of the European Court of Human Rights, save where the Charter goes further than the Convention, which remains rare’ (Lexisnexis leaflet 160: Charter of Fundamental Rights of the EU).

- 74 In the light of those provisions, the national court has to include the Charter in its considerations only where the national measure at issue falls within the material scope of EU law.
- 75 ...
- 76 In the present case, substantive EU law is directly concerned since this decision is given pursuant to Regulation 2020/1783.
- 77 There is therefore clearly a link between the situation at issue and the EU legal order, which means that the court must apply the Charter, in particular Articles 1 and 7 thereof.
- 78 Article 1 provides that ‘*human dignity is inviolable. It must be respected and protected.*’ This is a fundamental principle which applies post mortem and which could therefore, depending on the interpretation given to it and the scope conferred on it, in the circumstances of this case, preclude the exhumation of the body.
- 79 Conversely, the right to respect for private life guaranteed by Article 7 of the Charter argues in favour of such an exhumation. Since Article 7 of the Charter is the counterpart of Article 8 of the European Convention of Human Rights, it must be interpreted in the light of the case-law of the European Court of Human Rights. That court infers from the right to respect for private life the right of everyone to know his or her origins, by means – as the case may be – of the exhumation of the presumed deceased parent.
- 80 Ultimately, the referring court is called upon to determine whether it is required to apply Article 16-11 of the Civil Code in order to refuse to execute an international letter of request from another Member State in the context of the Regulation on the taking of evidence or whether it must disapply that provision.
- 81 However, in order to apply or disapply Article 16-11 of the Civil Code, the court must establish whether that provision is contrary to Article 7 of the Charter or whether, on the contrary, the limitation laid down in Article 16-11 of the Civil Code does genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others, inter alia with regard to human dignity as guaranteed by Article 1 of the Charter.

82 In order to rule on the dispute brought before it, the national court needs guidance from the Court to determine whether the right to know one's origins and to have them recognised, a right guaranteed by Article 7 of the Charter, prevails or can prevail over the right of deceased persons not to have to undergo DNA tests, without their consent given during their lifetime, a right which may be guaranteed by the principle of respect for human dignity enshrined in Article 1 of the Charter.

Answering that question means having to interpret Articles 1 and 7 of the Charter; jurisdiction to do so [rests] not with the referring court but with the European Court of Justice:

83 Article 267 TFEU provides:

'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) ...;

(b) *the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*

...

84 *Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*

...'

85 ...

86 ... Regulation [2020/1783] ... does not provide for any remedy where the court of the requested State refuses to execute the request for the taking of evidence from the requesting State. ...

87 Since there is no judicial remedy against its decision, the referring court must therefore, before giving a ruling, refer a question to the Court of Justice of the European Union for a preliminary ruling. The Court's [interpretation] is particularly important in the present case because the question is a new one, as the Court has never had to rule on the interpretation of Regulation 2020/1783 ... or the compatibility of its practical application with the Charter.

In the light of all of the foregoing, the proceedings will be stayed pending the [ruling] of the Court.

3 Questions referred to the Court for a preliminary ruling

88 The referring court refers two questions to the Court:

89 ... [wording of the first question]

90 ... The referring court considers that refusals to apply Regulation 2020/1783 are listed exhaustively in Article 16 and that Article 12 should not be a circuitous way of refusing to apply the Regulation.

However, in that case, there is no safeguard against requests to be executed under procedures which do not comply with standards of EU law.

91 2) ... [wording of the second question]

92 The referring court then asks the Court to interpret and determine the links between Article 1 (right to dignity) and Article 7 (right to respect for private life) of the Charter in order to establish whether or not such an application of the Regulation infringes the Charter.

93 The Court's response will determine whether Article 16-11 of the Civil Code is compatible with EU law and whether the court may respond favourably to a request for the taking of evidence from the Civil District Court, Genoa.

94 ... Having regard to Article 52 of the Charter, where it states that, 'in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention', and to judgments given by the European Court of Human Rights in similar cases, the referring court considers that Article 16-11 of the Civil Code could be declared contrary to EU law and disapplied on the basis of Article 7 of the Charter (right to respect for private life).

95 However, the decisions of the Constitutional Court and the Court of Cassation handed down after the judgments of the European Court of Human Rights undermine that analysis by giving precedence to respect for human dignity and mean that the Court of Justice of the European Union must be asked to interpret Articles 1 and 7 of the Charter.

ON THOSE GROUNDS

96 ...

97 **REFERS** to the Court of Justice of the European Union the following questions:

98 1) Does Article 12 of Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters allow a national court to refuse to apply that regulation and to comply with the request from the requesting State, on the ground that the procedure specified in the request is contrary to fundamental principles of the national law of the requested State, and in particular Article 16-11 of the Civil Code?

99 2) If Article 12 of Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters applies regardless of national law, how should Article 1 (right to dignity) and Article 7 (right to respect for private life) of the Charter of Fundamental Rights be interpreted and the links between them determined in order to establish whether or not such an application of the Regulation infringes the Charter of Fundamental Rights?

100 ...

101 ...

102 **NOTES** that the parties to the dispute wish their anonymity to be protected.

103 ...

WORKING DOCUMENT