

Anonymised version

Translation

C-374/23 – 1

Case C-374/23 [Adoreikė] ¹

Request for a preliminary ruling

Date lodged:

13 June 2023

Referring court:

Vilniaus apygardos administracinis teismas (Lithuania)

Date of the decision to refer:

1 June 2023

Applicants:

SR

RB

Defendant:

Lietuvos Respublika

[...] **VILNIAUS APYGARDOS ADMINISTRACINIS TEISMAS**
(REGIONAL ADMINISTRATIVE COURT, VILNIUS, LITHUANIA)

ORDER

[...] 1 June 2023

[...] Judge of the Regional Administrative Court, Vilnius, [...] [composition of the court],

¹ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

in the written procedure of the administrative case concerning the action brought by the applicants SR and RB against the defendant [...] for compensation for damage caused by acts of the State,

has established the following:

The applicants SR and RB, Judges of the Regional Administrative Court, Vilnius, [...] seek compensation for damage from the Lietuvos Respublika (Republic of Lithuania) in the amount of EUR 74 286.09 and EUR 95 620.17, respectively.

The applicants seek compensation for damage from the Lithuanian State, inter alia, on the ground that the rate of their remuneration depends on the political will of the other powers – the executive and the legislative – which is not only incompatible with the principle of the independence of judges, enshrined in Article 109(2) of the Lietuvos Respublikos Konstitucija (Constitution of the Republic of Lithuania), but also with the Republic of Lithuania's international obligations.

The representatives [...] of the defendant [...], in their joint defence, state that they object to the applicants' action. In essence, they refer to the following arguments: (1) the conditions for the State's liability under Article 6.271 of the Lietuvos Respublikos civilinis kodeksas (Civil Code of the Republic of Lithuania) have not been satisfied; (2) there is no basis for finding that the State has failed to act, in such a way as to give rise to its liability in tort; (3) it is the constitutional right and duty of the Government to plan the State budget and the rate of remuneration of public officials and public sector employees; ([4]) the base rate [of remuneration] for public sector employees is set each year in the light of the State's financial resources and commitments, and the State could not increase the base rate [of remuneration] any faster than it has done; ([5]) from 2018 to 2023, the base rate has consistently increased in the light of the current economic and social situation, the State's commitments and the financial resources expected to be available; ([6]) the base rate also has a direct economic impact on the private sector and the national average salary; ([7]) the increase in the base rate has also had a significant impact on the growth of the judicial salary fund; ([8]) the establishment of the system for the remuneration of judges falls within the exclusive constitutional discretion of the State and its institutions.

Pursuant to Article 3 of the Lietuvos Respublikos teisėjų darbo apmokėjimo įstatymas (Law of the Republic of Lithuania on remuneration of judges; 'the LRJ'), the base rate ('the base rate') for the salary (remuneration) of State politicians, judges, State officials, civil servants, and employees of institutions funded by the State and municipalities of the Republic of Lithuania for a given year, adopted by the Lietuvos Respublikos Seimas (Parliament of the Republic of Lithuania; 'the Parliament') on a proposal from the Lietuvos Respublikos Vyriausybė (Government of the Republic of Lithuania; 'the Government') is to be used for the purpose of calculating the remuneration of judges. The base rate is to be set taking into account the average annual inflation rate for the previous year

(as calculated by the national consumer price index), the level of the minimum monthly salary and the impact of other factors affecting the level and evolution of the average salary in the public sector. Pursuant to Article 4[(2)] of the LRJ, the remuneration of judges of courts of general jurisdiction and specialised courts is to consist of: (1) a salary; (2) an increment for length of service to the Lithuanian State; (3) a payment for working and being on standby duty on rest days and on public holidays, and for substitution; and (4) a bonus for an increase in the workload.

In accordance with Chapter II of the Annex to the LRJ, the coefficient for the salary of a regional court judge is 17.2. The coefficient was established by Lietuvos Respublikos teisėjų atlyginimų įstatymo priedėlio pakeitimo įstatymas Nr. XI-235 (Law No XI-235 amending the annex to the Law of the Republic of Lithuania on remuneration of judges) of 28 April 2009 (which entered into force on 1 October 2013), and has not been amended since 1 October 2013, except for judges of district courts. The salary of judges of courts of general jurisdiction and specialised regional courts is calculated by multiplying the coefficient for the salary set out in the Annex to the LRJ (17.2) by the base rate, which was EUR 181 in 2022 and is EUR 186 in 2023.

The remuneration of regional court judges (excluding the length-of-service increment) was EUR 2 440.85 (gross) in 2008 and EUR 2 362 (gross) in 2021, excluding the length-of-service increment, taking into account the 2019 tax reform (coefficient of 17.2 x base rate of [EUR] 177/1.289 tax change). Thus, while the remuneration of judges appears to have increased by around 8% over the 13-year period, in reality, the remuneration of judges has decreased by 3.2% in nominal terms due to the tax changes alone, and from the end of 2021, it is approaching the level of the national average salary: in Q1 2022, the national average monthly salary in the country [...] was EUR 1 729.90 (gross), and the average monthly remuneration of a judge was EUR 3 113.20 (gross). It should be noted that judges, who receive remuneration at the aforementioned rate, are subject to particularly stringent requirements: (1) the requirement to be of impeccable reputation, (2) the requirement to work for equal pay regardless of workload (working hours of judges are not regulated to that effect), (3) specific health requirements, (4) the requirement not to engage in any other work, with the exception of teaching and creative work (non-competition requirement, Article 113 of the Constitution), (5) the requirement to be entitled to work with information which constitutes State secrets, (6) restrictions on the right to express opinions, and so on.

It should be noted that the maximum amounts recommended in point 7 of the Rekomendacijos dėl civilinėse bylose priteistino užmokesčio už advokato ar advokato padėjėjo teikiamą pagalbą maksimalaus dydžio (Recommendations concerning the maximum amount of the fee for assistance provided by a lawyer (advokatas) or trainee lawyer to be awarded in civil cases), approved by order No 1R-85 of the Lietuvos Respublikos teisingumo ministras (Minister for Justice of the Republic of Lithuania) of 2 April 2004 and by resolution of the Lietuvos advokatų taryba (Lithuanian Bar Association) of 26 March 2004 ('the

Recommendations’) for the fees for legal services provided by a lawyer in civil cases are calculated by applying the established coefficients, based on the average gross monthly salary [...] in the national economy in the quarter preceding the previous quarter, as published by the Lietuvos statistikos departamentas (Lithuanian Department of Statistics). Pursuant to point 8.19 of the Recommendations, the recommended rate in respect of costs per hour of legal advice, representation in court, preparation for a court hearing or preliminary hearing, participation in negotiations for the conclusion of a settlement agreement, or representation of a person before a pre-litigation dispute resolution body, in the event that the same dispute is subsequently brought before a court, is 0.1. The recommended amount per hour of work of a lawyer is therefore EUR 179.9 (1 799 x 0.1), whereas the gross hourly remuneration of a regional court judge, excluding the length-of-service increment, is approximately EUR 20, and the daily remuneration is therefore EUR 159.66 (3 199.20 / 20 working days). Through those provisions, the position of the State, which is also a party to the proceedings, is that the minimum hourly fee for a lawyer is at an appropriate and reasonable rate. Thus, the remuneration paid to judges discriminates against judges in relation to lawyers in similar professions, which constitutes an infringement of Articles 29 and 48 of the Constitution, which impose an obligation to ensure non-discrimination and equal treatment in respect of human rights (the obligation of the State to establish a comparable system for the remuneration of judges for similar work), and of Article 2 of the Treaty on the European Union (TEU).

The applicants in the present case raise the issue of the liability of the State and seek compensation for damage caused by its failure to act, since there is no legal mechanism that can be initiated by a court or a judge to require the executive and legislative powers to introduce remuneration that is commensurate with the dignity, responsibility and strict limitations, inter alia on engaging in other work, attaching to judicial office.

The fact that the base rate should depend not on the political will of the Parliament or the Government, but on national economic indicators has been implicitly acknowledged by the Government itself, when it began to implement the Government’s programme, which was approved by Resolution No XIV-72 of the Parliament of the Republic of Lithuania of 11 December 2020 – the reform of the civil service was launched in order to ensure that the remuneration of State officials would be based on economic indicators.

According to Article 2 TEU, the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 6 TEU states that 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 ('the Charter'); The Charter is to have the same legal value as the Treaties. The provisions of the Charter are not to extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter are to be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions (paragraph 1). The Union is to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession is not to affect the Union's competences as defined in the Treaties (paragraph 2). 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, are to constitute general principles of the Union's law.

Article 47 of the Charter enshrines the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. The same right is enshrined in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Republic of Lithuania, upon becoming a member of the European Union in 2004, undertook to respect and promote the values set out in Article 2 TEU, in accordance with the provisions of Articles 49 and 52 TEU.

According to [the first] subparagraph of Article 19(1) TEU, the Court of Justice of the European Union ('the Court of Justice') is to ensure that in the interpretation and application of the Treaties the law is observed. Under Article 267 of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice is to have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties.

Under the second subparagraph of Article 19(1) TEU, every Member State must thus in particular ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law, meet the requirements of effective judicial protection (judgment of 2 March 2021, *A.B. and Others*, C-824/18, EU:C:2021:153, paragraph 112 and the case-law cited). The Court of Justice has stated that the content of Article 19 TEU imposes an obligation on national courts and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law (Opinion 1/09, 2011, paragraph 68; Opinion 2/13, 2014, paragraph 175; [judgment of 27 February 2018,] *Associação Sindical dos Juizes Portugueses*, [C-64/16, EU:C:2018:117], paragraphs 32 to 33; [judgment of 6 March 2018,] *Achmea*, [C-284/16, EU:C:2018:158], paragraph 36). In the judgment in *Associação Sindical dos Juizes Portugueses* (C-64/16), the Court of Justice linked the

obligation of the Member States contained in the second subparagraph of Article 19(1) TEU to the right to a fair trial, noting that every Member State must ensure that courts or tribunals meet the requirements of effective judicial protection, since it is essential for such protection that national courts remain independent in the light of the second paragraph of Article 47 of the Charter, which establishes, inter alia, the requirement to ensure the right of access to an independent tribunal. It was also pointed out that the receipt by judges of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.

The independence of the judiciary is one of the fundamental principles of the democratic rule of law, an important principle of EU law and constitutional principle, an integral part of the principles of the separation of powers and the rule of law, and a prerequisite for the protection of human rights and freedoms. The Court of Justice, in its judgment of 9 July 2020, *Land Hessen*, C-272/19, EU:C:C:2020:535, stated that ‘the independence of the judges of the Member States is of fundamental importance for the EU legal order in various respects. It is informed, first, by the principle of the rule of law, which is one of the values on which, under Article 2 TEU, the Union is founded and which are common to the Member States, and by Article 19 TEU, which gives concrete expression to that value and entrusts shared responsibility for ensuring judicial review within the EU legal order to national courts or tribunals (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 32). Second, that independence is a necessary condition if individuals are to be guaranteed, within the scope of EU law, the fundamental right to an independent and impartial tribunal laid down in Article 47 of the Charter, which is of cardinal importance as a guarantee of the protection of all the rights that individuals derive from EU law (see, to that effect, inter alia, judgment of 26 March 2020, *Review Simpson v Council and HG v Commission*, C-542/18 RX-II and C-543/18 RX II, EU:C:2020:232, paragraphs 70 and 71 and the case-law cited). Last, that independence is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that that mechanism may be activated only by a body responsible for applying EU law, which satisfies, inter alia, that criterion of independence (see, in particular, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 56 and the case-law cited)’.

The principle of the independence of the judiciary includes the independence of the judiciary’s funding from the executive and legislative powers. The Court of Justice, in the judgment [of 5 February 1963,] *Van Gend en Loos*, [26/62, EU:C:1963:1], established the direct effect of EU law. Accordingly, in the present case, the national court must assess whether the rules governing the remuneration of judges, whereby the rate of remuneration of judges depends directly on the political will of the Parliament and the Government, are compatible with EU law and observe the values protected by the European Union in Article 2 TEU, as well as the principle of the independence of the judiciary, as enshrined in Article 47 of the Charter. It should be noted that the existing case-law does not shed the

necessary light on that issue, which therefore constitutes a new question of interpretation of EU law, which, in the view of the Regional Administrative Court, Vilnius, is of importance for the uniform application of EU law by all the Member States. Moreover, EU law must be interpreted autonomously and uniformly throughout the European Union in accordance with the principles of interpretation of EU law.

In the present case, the Regional Administrative Court, Vilnius, in order to examine the case on its merits, must rule on the principle of the independence of the judiciary and is bound not only by national law but also by EU law. Without any clarification as to the content of that principle, it is not possible to rule on whether the provisions of national law governing the remuneration of judges are compatible with the principle of the independence of the judiciary enshrined in Article 19(1) TEU. A preliminary ruling from the Court of Justice on that issue is therefore not only of general interest for the uniform application of EU law, but is also necessary in order for judgment to be given in this case.

The answers given by the Court of Justice to the questions set out in the operative part of this order will therefore be of fundamental importance in the present case, since the content of the concept of the independence of the judiciary and, consequently, the question of the State's liability and compensation for damage caused by its failure to act, depend on the interpretation of EU law.

[...] [grounds for referral to the Court of Justice]

In the light of the foregoing considerations, [...] [reference to provisions of procedural law], the Regional Administrative Court, Vilnius,

orders as follows:

The following questions of significance for the present case regarding the interpretation of EU law are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Are the values of democracy, the rule of law, respect for human rights and justice, enshrined in Article 2 TEU, and the provisions of the second subparagraph of Article 19(1) TEU, to be interpreted as conferring on the legislative and executive powers of the Member States the unrestricted and exclusive discretion to set, by means of national legislation, the remuneration of judges at a rate that depends solely on the will of the legislative and executive powers?

2. Are the provisions of the second subparagraph of Article 19(1) TEU, as well as those of Article 47 of the Charter, which covers, inter alia, the independence of the judiciary, to be interpreted as permitting the Member States to introduce, by means of national legislation, rules which set the remuneration of judges below the remuneration or fees set by the State in respect of members of other legal professions?

[...] [standard procedural wording and composition of the court] [...]

WORKING DOCUMENT