

Case C-408/23

Request for a preliminary ruling

Date lodged:

4 July 2023

Referring court:

Oberlandesgericht Köln (Germany)

Date of the decision to refer:

27 June 2023

Applicant:

Rechtsanwältin and Notarin

Defendant:

President of the Oberlandesgerichts Hamm

Oberlandesgericht Köln (Cologne Higher Regional Court)

Decision

In the administrative matter concerning a notary
of a Rechtsanwältin (lawyer) and Notarin (notary) from North Rhine-Westphalia,
applicant,

[...]

v

the President of the Oberlandesgericht Hamm (Hamm Higher Regional Court)
[...] 59065 Hamm,

defendant,

the Senat für Notarsachen (Division for Matters Concerning Notaries) of the
Oberlandesgericht Köln (Cologne Higher Regional Court) [...],

on 27 June 2023,

decided as follows:

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

1. Are Article 21 of the Charter of Fundamental Rights of the European Union and Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation to be interpreted as precluding national legislation which provides in mandatory terms that a person who has reached the age of 60 on expiry of the deadline for applications to the notary post in question cannot be appointed for the first time to the role of *Anwaltsnotar* (lawyer commissioned as notary), even if more than one post must remain vacant because there are no suitable younger candidates in the local court district in which the application procedure took place and candidates from other local court districts are not permitted to apply?

2. Is question 1 to be answered in the affirmative if it is to be expected that more than one advertised post of lawyer commissioned as notary will be impossible to fill with suitable candidates younger than 60 in the same local court district in the following year?

3. Is question 1 to be answered in the affirmative in any event because it is also to be expected that, also in other local court districts outside large urban centres, it will repeatedly prove impossible to fill all advertised posts of lawyer commissioned as notary with suitable candidates younger than 60?

4. Is no infringement of Article 21 of the Charter of Fundamental Rights of the European Union and Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 present if the supply of notarial services is assured in a local court district even though an applicant over 60 years of age has not been appointed to the post of lawyer commissioned as notary solely on account of his or her age and more than one post has remained vacant?

II. The proceedings are stayed.

Grounds

A. Subject matter and facts of the main proceedings

- 1 The applicant applied for a post of *Anwaltsnotarin* (lawyer commissioned as notary) in the local court district in which she has been practising as a *Rechtsanwältin* (lawyer) for more than three years. Her application was rejected because she was over 60 years of age on expiry of the deadline for applications. She satisfies all the other requirements for admission to the post of lawyer commissioned as notary in the local court district. In particular, she has passed the lawyers' professional examination required for the office of notary. She had

previously applied for an advertised notary post in the same district in 2017. The application was also rejected in that instance on the grounds that the applicant had already reached the age of 60. The action brought against that rejection was unsuccessful, both before the Division (2 VA (Not) 8/17) and before the Bundesgerichtshof (Federal Court of Justice) (NotZ(Brfg) 7/18).

- 2 The number of notary posts in a given local court district is based on the demand for notarial services and maintenance of an orderly age structure (Paragraph 4 of the Bundesnotarordnung (Federal Code for Notaries)). A total of four posts were advertised in the local court district in question in 2022. Only one post was filled. The other posts remained vacant for lack of candidates.
- 3 It is expected that it will remain impossible in future to fill all the posts in the local court district in question, because of a lack of sufficient numbers of candidates who satisfy the requirements for appointment to the post of lawyer commissioned as notary. In 2023, five notary posts were advertised for the local court district in question. In view of the information held about passes in the lawyers' professional examination which is a requirement for appointment to the post of lawyer commissioned as notary (Paragraph 5b(1)(3) of the Federal Code for Notaries), it is probable that three of those posts will remain vacant for lack of candidates. Regarding all the local court districts within the jurisdiction of the defendant for which lawyers commissioned as notaries are to be appointed, there are likely to be only 39 candidates for the 69 posts advertised in 2023. Regarding the federal territory as a whole, it can likewise be assumed that notary posts outside large urban centres will, on a similar scale, remain impossible to fill. In any event, the failure to fill advertised notary posts has not yet resulted in an inability to provide notarial recording at all or without considerable delay.
- 4 The office of lawyer commissioned as notary is exercised by lawyers concurrently with their legal practice (Paragraph 3(2) of the Federal Code for Notaries). In principle, they can only apply for posts of lawyer commissioned as notary in the local court district in which they have been working as lawyers for at least three years (Paragraph 5b(1)(2) of the Federal Code for Notaries). Notaries charge their clients fees for their notarial work. Remunerative and pensions provision is not made by the State. The office of an appointed lawyer commissioned as notary ends when he or she reaches the age of 70 (Paragraph 48a of the Federal Code for Notaries); the effectiveness of that provision is currently the subject of appeal proceedings pending before the Federal Court of Justice (NotZ(Brfg) 4/22).
- 5 The applicant brought an action before the Cologne Higher Regional Court against the defendant's rejection of the applicant's appointment to the post of lawyer commissioned as notary and contended that the court should

order the defendant to make a fresh decision on the applicant's application for the post of lawyer commissioned as notary, taking into account the legal opinion of the Cologne Higher Regional Court, by amending the defendant's decision rejecting that application.

6 The defendant contends that the court should
dismiss the action.

B. The national legal context

7 Paragraph 5b(1) of the Federal Code for Notaries provides as follows:

‘Only those persons are, as a rule, to be appointed as lawyers commissioned as notary who, upon expiry of the deadline for applications, have

1. worked as a lawyer on a not insignificant scale for various clients for at least five years,
2. pursued the activity referred to in no. 1 for at least three years without interruption in the intended notarial jurisdiction,
3. passed the professional examination for notaries [...] and
4. [...]’

8 Paragraph 5(4) of the Federal Code of Notaries provides as follows:

‘Whoever has reached the age of 60 years on the expiry of the deadline for applications for a notarial position cannot be appointed as notary for the first time.’

9 The explanatory memorandum (Bundestag printed paper 11/6007) to that provision states as follows:

‘The introduction of the upper age limit of 60 years is intended – not least in view of the age-related increase in difficulty associated with learning the profession of notary – to combat a frequent turnover of office holders in the interests of continuity. At the same time, it serves to counteract the risk of population ageing within the profession of notary.

Since learning the profession is not a factor when a former notary seeks reappointment or a notary seeks appointment in a different location, the upper age limit is intended only to apply in respect of first-time appointments.’

10 Paragraph 48a of the Federal Code for Notaries provides as follows:

‘Notaries reach retirement age at the end of that month in which they reach the age of 70.’

11 The judgment of the Federal Court of Justice of 27 May 2019 – NotZ(Brfg) – in the dispute already involving the applicant contains, inter alia, the following two guidelines on the second sentence of Paragraph 6(1) of the Federal Code for

Notaries, which is identical in wording to the current Paragraph 5(4) of the Federal Code for Notaries:

‘2. The second sentence of Paragraph 6(1) of the Federal Code for Notaries leaves the judiciary no margin of discretion; it is in principle not authorised to refrain on the basis of special features inherent in the person of the applicant from applying the age limit.

3. The age limit laid down in the second sentence of Paragraph 6(1) of the Federal Code for Notaries does not constitute prohibited discrimination within the meaning of Article 1 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16). Nor does it infringe the principle of non-discrimination laid down in Article 21(1) of the EU Charter of Fundamental Rights (continuation of panel judgment of 26 November 2007 – NotZ 23/07, BGHZ 174, 273, paragraph 29 et seq.).’

C. Reason for reference and relevance of the questions submitted

- 12 In view of the age limit of 60 years laid down in Paragraph 5(4) of the Federal Code for Notaries for first-time appointments to the post of lawyer commissioned as notary, the Cologne Higher Regional Court cannot grant the form of order sought by the applicant and order the defendant to make a fresh decision on the applicant’s application and not to reject her application on the grounds of her age. The provision leaves the court no margin of discretion and permits no exceptions. Unless it is unequivocally established on the basis of a decision of the Court of Justice of the European Union that Paragraph 5(4) of the Federal Code for Notaries is contrary to EU law, the applicant’s action must necessarily be dismissed.
- 13 With regard to the judgment of the Court of Justice of the European Union of 3 June 2021 in Case C-914/19, *Ministero della Giustizia (Notaries)*, there are doubts as to whether the age limit laid down in Paragraph 5(4) of the Federal Code for Notaries in respect of first-time appointments to the post of lawyer commissioned as notary is consistent with Article 21 of the Charter of Fundamental Rights of the European Union. and Article 6(1) of Council Directive 2000/78/EC of 27 November 2000, because it does not even allow exceptions in the event of more than one post being impossible to fill with candidates younger than the age limit. As a result, the German age limit for first-time appointments to the post of lawyer commissioned as notary may also exceed the level permissible for achieving the legitimate purpose of promoting generational change and rejuvenation.
- 14 However, because the age limit laid down in Paragraph 5(4) of the Federal Code for Notaries in respect of first-time appointments to the post of lawyer commissioned as notary is set comparatively high, at 60 years of age, and only 10 years of service remain until the age of 70, at which the office must be

resigned, there is also a possibility, in the view of the referring court, that an interpretation of Article 21 of the Charter of Fundamental Rights of the European Union and Article 6(1) of Directive 2000/78/EC will show that Paragraph 5(4) of the Federal Code for Notaries is consistent with protection against discrimination under EU law.

[...]

WORKING DOCUMENT