

Case C-661/23 (Jeszek) ⁱ

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

9 November 2023

Referring court:

Wojskowy Sąd Okręgowy w Warszawie (Poland)

Date of the decision to refer:

9 November 2023

Criminal proceedings against:

R. S.

Subject matter of the main proceedings

Criminal proceedings before the court of second instance against Major R. S., who was convicted by a non-final judgment at first instance of committing a criminal offence under Article 343(1) of the Kodeks Karny (Criminal Code) concurrently with Article 338(1) of that code, read in conjunction with Article 12(1) and Article 11(2) thereof.

Subject matter and legal basis of the request

Compatibility with EU law – in light of Article 2 and Article 4(2) and (3) TEU, as well as the second subparagraph of Article 19(1) thereof, read in conjunction with Article 47 of the Charter of Fundamental Rights – of provisions of national law that provide for the retirement by operation of law of a military court judge declared unfit for professional military service, but capable of serving as a judge.

ⁱ This case has been given a fictitious name which does not correspond to the real name of any of the parties to the proceedings.

Questions referred for a preliminary ruling

1. Must EU law, including Article 2 of the Treaty on European Union (TEU) and the value of the rule of law enshrined therein, as well as the second subparagraph of Article 19(1) thereof, read in conjunction with Article 47 of the Charter of Fundamental Rights, be interpreted as precluding provisions of national law such as:

(a) Article 233 of the *ustawa z dnia 11 marca 2022 r. o obronie Ojczyzny* (Law of 11 March 2022 on the Defence of the Homeland), as amended by the *ustawa z dnia 28 lipca 2023 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw* (Law of 28 July 2023 amending the Civil Code and certain other laws) (*Dziennik Ustaw* (Journal of Laws) of 2023, item 1615), pursuant to which a national military court judge is to be deprived of his or her right to remain in the position of judge at a given court after being discharged from professional military service (including as a result of being declared permanently unfit for professional military service), which includes the right to sit on the adjudicating panels of that court in cases assigned to him or her prior to the entry into force of those provisions;

(b) Article 13 of the Law of 28 July 2023 amending the Civil Code and certain other laws (*Dziennik Ustaw* of 2023, item 1615), pursuant to which, upon the entry into force of the provisions referred to in point (a) above, a national military court judge who is discharged from professional military service in the circumstances described above is to be retired by operation of law?

Is the fact that the provision referred to in point (b) concerns, and will continue to concern, only a single judge sitting on the panel of the referring court (*ad hominem* law), and that at the same time prosecutors have retained their similar right to remain in the position of prosecutor for military affairs despite being discharged from professional military service, relevant to the answer to be given to this question?

2. Must EU law, including the provisions indicated in Question 1, be interpreted as meaning that the retirement by operation of law of a national military court judge, in the circumstances referred to in that question, is ineffective, as a result of which that judge may continue to sit on the panel of the referring court, and all state bodies, including judicial bodies, are obliged to enable him or her to continue to sit on that panel in accordance with the previously existing rules?

3. Must EU law – including (i) Article 2 TEU and the value of the rule of law enshrined therein, Article 4(3) TEU and the principle of sincere cooperation enshrined therein, the second subparagraph of Article 19(1) TEU, Article 267 TFEU, and the principles of effectiveness and primacy, and (ii) Article 2 TEU and the value of democracy enshrined therein, Article 4(2)

TEU, and the principle of the separation of powers – be interpreted as meaning that the power, or obligation, of a national court to suspend the application of provisions of national law, including statutory provisions, which are the subject of the reference for a preliminary ruling derives directly from EU law?

Is the fact that national law does not provide for the possibility of suspension of the application of provisions of national law by the court which has made a reference for a preliminary ruling, and that a ruling ordering such suspension, until the referring court has taken into account the points of interpretation of EU law contained in the Court's response to that reference, is necessary in the circumstances of the case in the main proceedings, relevant to the answer to be given to this question?

Provisions of European Union law relied on

Article 2 [and] Article 4(2) and (3) of the Treaty on European Union, as well as the second subparagraph of Article 19(1) thereof;

Article 47 of the Charter of Fundamental Rights of the European Union.

Provisions of national law relied on

Articles 10 [and] 13 of the ustawa z dnia 28 lipca 2023 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw (Law of 28 July 2023 amending the Civil Code and certain other laws) (Dziennik Ustaw of 2023, item 1615);

- Pursuant to Article 10: ‘In the ustawa z dnia 11 marca 2022 r. o obronie Ojczyzny (Law of 11 March 2022 on the Defence of the Homeland) (Dziennik Ustaw of 2022, item 2305, and of 2023, items 347 and 641), Article 233 shall read: “In the event that a prosecutor for military affairs who is a professional soldier is discharged from professional military service, he or she shall remain in his or her position as a prosecutor in the respective organisational unit of the prosecutor’s office irrespective of the number of prosecutorial positions in that unit”’.
- Pursuant to Article 13: ‘A military court judge discharged from professional military service who remains in the position of judge on the date of the entry into force of this Law shall retire on that date ...’. Pursuant to Article 14, the date of the entry into force of both of the above provisions is 15 November 2023.

Article 175(1) [and] Article 180 of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland);

Article 233 of the Law of 11 March 2022 on the Defence of the Homeland, in the version in force until 14 November 2023, pursuant to which: ‘In the event that a military court judge or a prosecutor for military affairs who is a professional soldier is discharged from professional military service, he or she shall remain in his or her position as a judge or prosecutor in the respective organisational unit of the court or of the prosecutor’s office irrespective of the number of positions in those units’.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The facts and procedure in the present case are similar to those in Case C-646/23.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 2 In essence, the reasoning is largely identical to the reasoning in the request for a preliminary ruling in Case C-646/23.
- 3 With regard to Question 2, the referring court additionally states that the question concerns the consequences of a finding that the cited provisions of national law are incompatible with EU law. The referring court has doubts regarding the effects of the Court’s future ruling on the effectiveness of provisions of national law which provide for the retirement, by operation of law, of the judge sitting on the panel of the referring court. In order to ascertain the practical consequences of a finding that the provisions cited are incompatible with EU law, the referring court is seeking an answer to the question whether, in such a situation, all state bodies, including judicial bodies, should enable that judge to continue to sit on the adjudicating panel under the previously existing rules.
- 4 With regard to Question 3, the referring court additionally states that the question concerns the effectiveness of the suspension of provisions of national law during the period following the Court’s response to the reference for a preliminary ruling, pending a ruling [by the referring court] on the basis of that response. Under Polish law, including the Kodeks Postępowania Karnego (Code of Criminal Procedure), there is no mechanism for suspending the application of provisions of any rank, which prevents an interpretation consistent with EU law. At the same time, the referring court has doubts as to whether the possibility of such suspension, where it concerns statutory provisions, is compatible with, inter alia, the principle of the separation of powers and the value of democracy as enshrined in Article 2 TEU, or with Article 4(2) TEU. Therefore, an answer to Question 3 is objectively necessary, since otherwise, from the moment the Court’s response is received – and before any ruling is given [by the referring court] that takes into account the points of interpretation of EU law contained in that response – the effectiveness of the reference for a preliminary ruling will be illusory, since the judge sitting on the panel of the referring court will have been retired by operation of law.

- 5 The reasoning underlying the request for an expedited procedure is identical to that set out in the reference for a preliminary ruling in Case C-646/23.

WORKING DOCUMENT