Anonymised version

Case C-350/24

Request for a preliminary ruling

Date lodged:

14 May 2024

Referring court:

Cour de cassation (France)

Date of the decision to refer:

3 May 2024

Appellant:

HJ

Respondent:

Crédit Agricole Corporate & Investment Bank

[…]

COUR DE CASSATION (COURT OF CASSATION, FRANCE)

[…]

FULL COURT

Public hearing of **3 May 2024**

– Reference to the Court of Justice of the European Union
– Stay of proceedings

[…]

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

JUDGMENT OF THE COURT OF CASSATION, sitting as a FULL COURT, OF 3 MAY 2024

HJ, domiciled […] [in] Courbevoie [(France)], brought [an][…] appeal […] against the judgment delivered on 27 May 2021 by the cour d'appel de Versailles (Court of Appeal, Versailles, France) […] in the dispute between her and Crédit Agricole Corporate & Investment Bank, a public limited company, the registered office of which is […] [in] Montrouge (France), the respondent in cassation.

By judgment of 18 October 2023, the Social Chamber of the Court of Cassation ordered that the appeal be referred to the Full Court for examination.

[…]

[…] [*procedural details*]

the Court of Cassation, sitting as a Full Court, […] [*procedural details*], after deliberation in accordance with the law, gave the present judgment.

Facts and procedure

1 HJ was employed by Crédit Agricole Corporate & Investment Bank (CACIB) by contract of 17 January 2007. She most recently held the position of customer information systems officer in the United Kingdom before being placed on sick leave from 28 August 2013.

2 That contract is governed by United Kingdom law.

3 On 23 September 2013, believing herself to have suffered discrimination on grounds of her sex and psychological harassment, HJ brought proceedings before the conseil de prud'hommes (Labour Tribunal, France) seeking payment of various sums in respect of performance of the employment contract and by way of compensation.

4 By judgment of 26 June 2019, the Labour Tribunal dismissed her claims.

5 By judgment of 27 May 2021, the Court of Appeal, Versailles, held that HJ had failed to present primary facts that could be taken into account as relevant circumstances from which it would be appropriate to infer discrimination for the purposes of sections 13 to 19 and 136 of the Equality Act 2010. It also ruled that the existence of discriminatory harassment within the meaning of Article 26 and victimisation within the meaning of Article 27 of that Act had not been demonstrated.

6 HJ appealed on a point of law.

Grounds of appeal

7 HJ takes issue with the judgment [under appeal] for dismissing all her claims seeking, inter alia, a ruling that she has suffered discrimination on grounds of her sex, discriminatory harassment and victimisation.

8 She asserts, in essence, that by holding, after examining in turn each of the discriminatory situations she had invoked, that she had failed to present primary facts capable of being taken into account as relevant circumstances for the purpose of establishing discrimination within the meaning of the Equality Act 2010, the Court of Appeal based its ruling on an interpretation of the Equality Act that was not in conformity with Article 19 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, which requires the court to carry out an overall appraisal of the facts in order to determine whether it may be presumed that there has been discrimination.

9 HJ also maintains that, after noting that, although it appeared from the documents submitted that the employees who benefited from expatriation within the company were mainly men, the Court of Appeal held that that information alone provided insufficient grounds for presuming that there was discrimination against women in the absence of any information on applications for expatriation by women. She submits that, by issuing such a ruling, when the fact that most expatriated employees are men gave grounds to presume that there was indirect discrimination and, accordingly, it was for CACIB to prove that [its] international mobility scheme is not discriminatory, the Court of Appeal, which placed the burden of proving discrimination on the employee, relied on an interpretation of the provisions of the Equality Act 2010 that was not in conformity with Article 19 of Directive 2006/54/EC of 5 July 2006.

Applicable principles and legislation

I – European Union law

10 According to the [Court of Justice of the European Union] […], the principle of mutual trust requires each of the Member States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law ([…] Opinion of the Court (Full Court) of 18 December 2014, 2/13, paragraph 191, ECLI:EU:C:2014:2454).

11 The principle of the primacy of EU law, established by the [Court of Justice] […] in its judgment in *Costa* (judgment of 15 July 1964, *Costa* v *E.N.E.L.*, 6/64, ECLI:EU:C:1964:66) and described as ‘fundamental’ (judgment of 10 October 1973, *Variola* v *Amministrazione italiana delle Finanze*, 34/73, [1973] ECR 981,

ECLI:EU:C:1973:101), requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States (judgment of 24 June 2019, *Poplawski*, C-573/17, paragraph 54, ECLI:EU:C:2019:530).

12 The obligation to interpret national law in conformity with EU law, which helps to ensure the primacy of EU legislation over national legislation which has not been brought into conformity with it, arises from the Member States' obligation, in the case of a directive, to achieve the result envisaged by that directive, and their duty under Article 5 of the Treaty, now Article 4(3) [TFEU], to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation. It is incumbent on all the authorities of a Member State, including the courts, and in the context of a dispute between individuals (judgment of 10 April 1984, *Von Colson and Kamann*, 14/83, paragraph 26, ECLI:EU:C:1984:153). That case-law has been consistently reaffirmed since then. It is now based on the third paragraph of Article 288 TFEU (judgment of 7 August 2018, *Smith*, C-122/17, paragraph 39, ECLI:EU:C:2018:631).

13 The Court of Justice notes that the obligation to interpret national law in conformity with EU law has certain limits in so far as it cannot serve as the basis for an interpretation of national law that is *contra legem* (judgment of 4 October 2018, *Link Logistik NN*, C-384/17, paragraphs 59 and 61, ECLI:EU:C:2018:810, judgment of 15 April 2008, *Impact* v *Minister for Agriculture and Food and Others*, C-268/06, paragraph 100, ECLI:EU:C:2008:223).

14 It adds, however, that a national court which, hearing a dispute that calls into question a general principle of EU law, such as the principle of non-discrimination, as given concrete expression in a directive, in fact finds it impossible to arrive at an interpretation of national law that is consistent with the directive is nonetheless under an obligation to provide the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (judgment of 19 January 2010, *Kücükdeveci*, C-555/07, paragraph 51, EU:C:2010:21, judgment (Grand Chamber) of 19 April 2016, *Dansk Industri*, C-441/14, paragraph 35, ECLI:EU:C:2016:278).

II – Directive 2006/54/EC

15 The purpose of Directive 2006/54/EC, which in recitals 2 and 5 refers to Articles 2 and 3(2) of the Treaty and to Articles 21 and 23 of the Charter of Fundamental Rights of the European Union, is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. To that end, it contains provisions to implement the principle of equal treatment in relation to access to employment, working conditions and occupational social security schemes. It also contains provisions to

ensure that such implementation is made more effective by the establishment of appropriate procedures.

16 According to recital 30 of that directive, '*it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs*'. It is also stated in that recital that '*the adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice.*'

17 Article 19(1) and (2) of that directive provides:

'*Burden of proof*

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs. ...'

III – Agreement on the withdrawal of the United Kingdom from the European Union

18 Under the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Euratom), approved by the Council of the European Union by Decision (EU) 2020/135 of 30 January 2020 ('the Agreement'), the United Kingdom left the European Union from the date of entry into force of that Agreement on 1 February 2020.

19 Article 126 of the Agreement nevertheless provided for a transition period, ending on 31 December 2020, during which EU law continued to be applicable in the United Kingdom.

20 Under Article 127(3) of the Agreement, 'during the transition period, the Union law applicable pursuant to paragraph 1 shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the

Union and its Member States, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union.'

IV – Equality Act 2010

21 The Equality Act 2010 provides in section 136:

'*(1) This section applies to any proceedings relating to a contravention of this Act.*

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.'

V – National law concerning the powers and obligations of the court in the application of foreign law

22 Article 3 of the Code civil (French Civil Code), on the basis of which, in the absence of specific legislation, the Court of Cassation has developed principles of French private international law, provides that 'the laws concerning public policy and safety shall be binding on all those living in the territory. Immovable property, even that owned by foreign nationals, shall be governed by French law. The laws concerning personal status and capacity shall apply to French nationals, even those residing in a foreign country.'

23 Pursuant to that provision, the Court of Cassation has stated in particular that 'it is for a French court which recognises foreign law to be applicable to investigate its content, either of its own motion or at the request of the party relying on it, with the assistance of the parties and by itself if necessary, and to provide a solution to the question in dispute which is consistent with the foreign positive law' (Court of Cassation, First Civil Chamber, 28 June 2005 […], Bull. 2005, I, No 289; Court of Cassation, Commercial Chamber, 28 June 2005 […], Bull. 2005, IV, No 138).

24 The Court of Cassation has ruled that courts adjudicating on the merits have absolute discretion in applying and interpreting foreign law (Court of Cassation, First Civil Chamber, 13 January 1993 […], Bull. 1993, I, No 14).

Reasons justifying the reference for a preliminary ruling

25 The appeal raises the question, first, of the impact of the withdrawal of the United Kingdom from the European Union on the powers and obligations of the court of a Member State that is required to apply United Kingdom law transposing a European directive in the course of judicial proceedings brought before the end of

the transition period, where the court hearing the case is called on to give its ruling after the end of that period.

26 At the time of the facts (employment contract signed on 17 January 2007; allegations of discrimination between 2010 and 2013), but also at the time when legal proceedings were brought (2013) and when the Labour Tribunal delivered its judgment (2019), the United Kingdom was a member of the European Union. However, at the time when the Court of Appeal, Versailles, ruled on the appeal, on 27 May 2021, the United Kingdom had left the European Union.

27 HJ argues that at the time of the material facts the United Kingdom was still part of the European Union and was therefore subject to EU law, with the result that the national law of that country in force at that time must be interpreted in conformity with the rules of EU law, irrespective of the fact that on the date when the Court of Appeal gave its ruling the United Kingdom court could no longer refer a question to the Court of Justice for a preliminary ruling. She adds, in essence, that even assuming that this fact could relieve the United Kingdom court of its obligation to interpret national law in conformity with EU law, the French court, for its part, remains subject to that obligation when it is led to apply the national law of a Member State of the European Union in force at the time of the material facts.

28 CACIB asserts, in essence, that it is not for the Court of Cassation itself to rule on the compatibility of the law of another Member State with EU law or on the validity of the interpretation of that law by the courts of the Member State concerned. It considers that the Court of Cassation may not take the place of its foreign counterpart to determine the objective of the positive law of a foreign country or take a view on its legal policy and its conformity with EU law, which comes within the unifying jurisdiction of the Court of Justice of the European Union alone.

29 The Advocate General [of the Court of Cassation] considers that a question should be referred to the Court of Justice for a preliminary ruling. She states that the wording of the Agreement, and in particular the absence of stipulations relating to the law applicable to proceedings which were brought before the courts of the Member States during the transition period but were still ongoing after the end of that period, gives rise to doubt whether EU law was still applicable when the Court of Appeal delivered the judgment under appeal.

30 The Court of Cassation considers that reasonable doubt remains on this point.

31 Although legal proceedings brought before the end of the transition period provided for in Article 126 of the Agreement were, on that date, subject to EU law, including Directive 2006/54/EC, on the date when the Court of Appeal gave its ruling, on 27 May 2021, the treaties, and in particular Article 288 of the Treaty on the Functioning of the European Union (TFEU), had ceased to have effect in the United Kingdom's legal order.

32 Thus, while at the time of the allegations of discrimination Article 19 of Directive 2006/54/EC was applicable to the proceedings, the question arises whether the Agreement can have the effect of calling into question retroactively the application of EU law and, in particular, the court's obligation to interpret the applicable law in conformity with EU law.

33 The view could be taken that at that time, even though a certain body of EU law had been maintained in United Kingdom law under the legislation adopted by the United Kingdom, an obligation to interpret national law in conformity with EU law could not be founded on EU law.

34 Conversely, it could be considered that, because the facts were prior to the end of the transition period and the proceedings had been brought before the end of that period, the United Kingdom law which transposed Article 19 of Directive 2006/54/EC must be interpreted in conformity with EU law by the court of another Member State, even if it gives its ruling after the end of the transition period.

35 Consequently, it is necessary to interpret the Agreement in respect of the question whether United Kingdom legislation transposing Article 19 of Directive 2006/54/EC must be regarded as legislation of a Member State transposing a directive by the court giving its ruling after the end of the transition period, where the facts are prior to that date and/or the proceedings were brought before that date.

36 The appeal raises, second, the question whether the obligation to interpret the national law of the Member State in which the court is located in conformity with EU law also applies where that court is required to apply the law of another Member State.

37 HJ is of the view, in essence, that where it applies provisions of the law of another Member State of the European Union, the French court should be obliged, subject to review by the Court of Cassation, to interpret and apply those provisions in conformity with EU law. She notes in particular that, since the Court of Cassation reviews the conformity of the law with international conventions, where the law of a Member State of the European Union is at issue it should *a fortiori* establish the compatibility of the provisions of that foreign law with EU law, bearing in mind that, in accordance with the fundamental principle of the primacy of EU law, EU law takes precedence over all the national laws of the Member States of the European Union and that, in this context, national courts have been established as the ordinary courts responsible for applying EU law by the Court of Justice. HJ acknowledges that if the Court of Cassation should take the view that reasonable doubt remains regarding the scope of such an obligation, it would be required to refer a question to the Court of Justice for a preliminary ruling on this point.

38 CACIB states, in essence, that establishing the right for any national court to call into question any law of another country would raise very challenging problems and could be perceived by Member States as an attack on their sovereignty.

39 The Advocate General states, in essence, that if the Court of Justice gave the answer that EU law was indeed applicable, its case-law on the principle that national law is to be interpreted in conformity with EU law, which seems to require compliance with that principle where national courts apply the law of another Member State, would have to be applied. She asserts, however, first, that the Court of Justice has not explicitly affirmed the existence of any such obligation and, second, that compliance by all the Member States represents a political shift for the European Union towards increased integration of such significance that it also seems necessary to refer a question to the Court of Justice on this second point.

40 The Court of Cassation considers that in order to ensure respect for the primacy of EU law by the French State, it would be necessary to develop the nature of its review of the application and interpretation of foreign law if the French courts were required to assess the conformity with EU law of a law from another Member State.

41 The Court of Cassation is aware that, since the judgment in *Marshall*, the Court of Justice has considered that a directive '*cannot, of itself, impose obligations on an individual and cannot therefore be relied on as such against an individual*' (judgment of 26 February 1986, *Marshall*, C-152/84, paragraph 48, ECLI:EU:C:1986:84).

42 However, the Court of Justice also states that '*in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty*' (judgment of 13 November 1990, *Marleasing*, C-106/89, paragraph 8, ECLI:EU:C:1990:395).

43 In so far as, according to the judgment in *Von Colson and Kaman* (cited above in paragraph 12 of the present decision), the principle that national law is to be interpreted in conformity with EU law is binding on national courts as the organ of the Member State responsible for the obligation of implementing directives in its own national legal order, it cannot be ruled out that the same holds where those courts are required to apply the national law of another Member State.

44 In this regard, the Court of Justice has had occasion to state that '*it is for the court seised of a dispute […] to apply the legislation of the Member State whose courts are designated [in a jurisdiction clause], interpreting that legislation in accordance with EU law, in particular [the directive] […]*' (judgment of 18 November 2020, C-519/19, *Ryanair*, paragraph 51, and judgment of

8 December 2022, *Luxury Trust Automobil*, C-247/21, paragraph 67, ECLI:EU:C:2022:966).

45 The case-law of the Court of Justice therefore seems to indicate that the Court requires the national courts to give an interpretation in conformity with EU law even where they are called on to apply the law of another Member State.

46 However, when expressly asked about this very question, the Court of Justice did not respond on account of the particular features of the case before it (judgment of 15 December 2022, C-577/21, ECLI:EU:C:2022:992).

47 In addition, it could be helpful to know whether the powers and obligations of the national court applying the law of another Member State which finds it impossible to give an interpretation in conformity with EU law are the same as the powers and obligations which it exercises when it applies its own national law, and whether, as the case may be, the principle of non-discrimination established by Article 21 of the Charter of Fundamental Rights of the European Union, as given concrete expression in Directive 2006/54/EC, may, even in a dispute between private individuals, lead it to disapply that law.

48 Consequently, reasonable doubt remains regarding such a conclusion, with the result that the Court of Cassation considers it necessary to request a preliminary ruling on this point also, having regard, moreover, to the institutional implications of the answer.

ON THOSE GROUNDS, the Court:

HAVING REGARD TO Article 267 TFEU

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

1. Must the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Euratom), approved by the Council of the European Union by Decision (EU) 2020/135 of 30 January 2020, be interpreted as meaning that United Kingdom legislation transposing Article 19 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation must be regarded as legislation of a Member State transposing a directive, by a court giving its ruling after the end of the transition period, where the facts are prior to that date and/or the proceedings were brought before that date?

2. Must Article 288 TFEU be interpreted as meaning that a national court hearing a dispute between individuals, which is obliged to apply the law of another Member State, must interpret the provisions of that law in conformity with a directive, without this being precluded by the principle of mutual trust?

3. If the national court considers that it is impossible to interpret those provisions in conformity with the directive, must it disapply that law, as it would do with its own national law, where a general principle of EU law or a provision of primary law, as given concrete expression in a directive, is at issue?

STAYS the proceedings in the appeal pending the decision of the Court of Justice of the European Union.

[…]

[…] [*procedural details*]

[…]