Opinion of Advocate General Alber delivered on 10 December 2002

Gustav Schneider v Bundesminister für Justiz

Reference for a preliminary ruling: Verwaltungsgerichtshof - Austria

Directive 76/207/EEC - Equal treatment for men and women - Promotion - Principle of effective control by the courts - Inadmissibility

Case C-380/01

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I – Introduction

1. In its reference for a preliminary ruling in this case the Austrian Verwaltungsgerichtshof (Administrative Court) has referred a question to the Court on the interpretation of Article 6 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (2) (hereinafter Directive 76/207). The question asks whether the requirement of a possibility of a person pursuing claims by judicial process in relation to the principle of equal treatment is adequately satisfied where the Verwaltungsgerichtshof alone, as a court which only hears appeals on points of law, has competence.

2. In the national proceedings the applicant in the main proceedings (hereinafter the applicant) – over whom a woman was preferred for promotion – in addition to taking action before the administrative authorities and the Verwaltungsgerichtshof under the Austrian Bundes-Gleichbehandlungsgesetz (Federal law on equal treatment, hereinafter the B-GBG) claiming compensation for loss sustained by him as a result of alleged discrimination against him, also brought a general claim for compensation against the State in the civil courts claiming damages for alleged inadequate transposition of provisions of Community law in Article 2(4) of Directive 76/207. The civil courts held at three instances that they had jurisdiction and ruled, in principle, that, whilst a claim for compensation against the State for failure to apply the principle of equal treatment can be valid, in this particular case the necessary conditions were not fulfilled.

3. Because of the availability of this additional judicial process through the civil courts at several levels, as a result of which the requirements of Article 6 of the aforementioned directive could immediately be satisfied, it is doubtful whether the reference for a preliminary ruling made by the Verwaltungsgerichtshof based on its exclusive jurisdiction is admissible at all.

II – Legal background

A –Community law

4. Article 3(1) of Directive 76/207 reads as follows:Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

5. Article 6 of Directive 76/207 provides:Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.

B –National law

6. Paragraph 3 of the B-GBG (in the version applicable at the relevant date) provides: Nobody shall be directly or indirectly discriminated against on grounds of sex in connection with an employment or training relationship pursuant to Paragraph 1(1), particularly 1.4. ...5. in relation to professional advancement, particularly promotion and the allocation of more highly paid appointments (duties), ...

7. Paragraph 15(1) of the B-GBG reads as follows:When a male or female civil servant is refused an appointment as a result of the State violating the principle of equal treatment as required by Paragraph 3(5), the State shall be liable to compensate for the harm suffered.

8. Paragraph 19(2) of the B-GBG provides:Male or female civil servants must exercise their rights under Paragraph 15 ... by bringing a claim against the State before the relevant authority. ...

III – Facts and main proceedings

9. The applicant is a judge of the Arbeits- und Sozialgericht Wien (Austria). He twice applied for an established post with the Oberlandesgericht Wien. Both times preference was given to a younger female candidate with less seniority on account of the rule on quotas earmarked for women's career advancement.

10. Following those decisions the applicant brought a general claim for compensation against the State before the Landesgericht für Zivilrechtssachen Wien in order to obtain compensation for the harm allegedly suffered as a result of no account having been taken, in the promotion decisions, of a number of reasons specific to him. The Landesgericht and, on appeal, the Oberlandesgericht Wien both ruled that judicial process in the civil courts was admissible but that the claim was unsubstantiated. In the final instance the Oberster Gerichtshof (Supreme Court, hereinafter the OGH), as the court of judicial review, dismissed the appeal but stated that in its judgment it was always the civil courts that were responsible for deciding compensation claims under Paragraph 23 of the Bundes-Verfassungsgesetz (Federal constitutional law) and brought under the Amtshaftungsgesetz (Government Liability Act, hereinafter the AHG) or under the principles governing State liability. Paragraphs 15 and 19 of the B-GBG could not preclude those — wider — claims in whole or in part.

11. In examining the claim for compensation against the State the OGH also came to the conclusion that, having regard to the case-law of the Court of Justice of the European Communities on the Community law principle of equal treatment under Directive 76/207, (3) for want of a saving clause, the Austrian measure for women's career advancement was not compatible with Community law. It nevertheless dismissed the applicant's claim for compensation on the grounds that there was no causal link between the infringement of the law and the alleged harm. It found that Mr Schneider had not put forward any reasons specific to him which, had there been a saving clause and a clear and verifiable selection procedure, should have been taken into account.

12. In addition to the civil claim the applicant also submitted a claim to the competent authority, the Bundesminister für Justiz (Federal Minister for Justice), by letter of 11 January 1999, for compensation for harm suffered due to his not being appointed judge of the Oberlandesgericht Wien as a result of discrimination. He appealed to the Verwaltungsgerichtshof against the minister's decision dismissing his claim. He argued inter alia that the decision was unlawful because Paragraph 19 of the B-GBG obliged him to bring a claim for compensation before the very authority that had caused the harm. He also argued that a judicial review of such decisions carried out by the Verwaltungsgerichtshof did not adequately satisfy the requirements of effective judicial protection because that court, as a court which only hears appeals on points of law, had no right to review the assessment of evidence so that the examination of questions of fact fell solely within the competence of the administrative authority itself.

IV — Reference for a preliminary ruling and proceedings before the Court

13. The Verwaltungsgerichtshof has doubts about the compatibility of its own limited power of review with Community law, so that it has submitted the following question to the Court for a preliminary ruling:Is Article 6 of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions to be interpreted as meaning that the possibility required by that article of pursuing claims (in the present case, a claim for compensation) by judicial process is not adequately satisfied by the Austrian Verwaltungsgerichtshof alone, in view of that court's legally limited powers (a court which hears appeals on points of law only with no fact-finding powers)?

14. The Austrian Government and the Commission have submitted observations in the proceedings before the Court.

15. The Court has asked the participants in these proceedings for their written answers to certain questions.The Austrian Government was asked to submit its answer to the following question:What is the relationship between the claim for compensation against the State brought by Mr Schneider in this case in the Landesgericht and the appeal proceedings filed by him in the Verwaltungsgerichtshof against the order pronounced by the Bundesminister für Justiz?The Commission was asked to submit answers to the following questions:

(1) Can the requirements regarding the duty to adduce evidence laid down in Directive 97/80 be satisfied in judicial proceedings in which issues of law alone are examined?

(2) Do appeal proceedings before an administrative authority such as those in the main proceedings in this case come within the scope of application of Directive 97/80? If so, would the directive apply to the proceedings in question in view of the fact that the contested order of the Bundesminister für Justiz was pronounced before the expiry of the deadline for transposition of the directive?

V — Arguments of the parties

1. The Austrian Government

16. The Austrian Government observes that, according to the Court's case-law, (4) in the absence of Community rules governing the matter it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes; however, it is the Member States' responsibility to ensure that individual rights derived from Community law are effectively protected in each case and to observe the principles of equivalence and effectiveness. The observance of those principles and assurance of legal protection involve not just a process of judicial review that empowers the competent national courts to substitute their assessments of the facts for the assessment made by the administrative authority concerned. Since — as can be seen from the *Upjohn* judgment — the Community judicature must also restrict itself to examining the findings of fact and law made by the Community authorities and to verifying, in particular, whether the action taken by those authorities is vitiated by a manifest error or a misuse of powers, Community law does not require a more extensive review to be carried out by the national courts in similar cases.

17. As even Directive 76/207 itself provides for the possibility of prior proceedings before other competent authorities, the system of a posteriori judicial control of administrative procedure by the Verwaltungsgerichtshof alone, as chosen by the Austrian legislature, does therefore satisfy Community law criteria.

18. Furthermore, the civil courts competent to hear claims for compensation against the State always have unlimited jurisdiction. They are not bound by the administrative authorities' decisions any more than those authorities are bound by the civil courts' decisions. A compensation claim under Paragraph 15 of the B-GBG allowed by the administrative courts merely has a restrictive effect on the claim in damages brought before the civil courts as regards the loss sustained.

19. To summarise, therefore, the Austrian Government considers that Article 6 of Directive 76/207 should be interpreted as meaning that the possibility required by that article of pursuing claims by judicial process is adequately satisfied by the Verwaltungsgerichtshof's review of the administrative authority's decision.2. The Commission

20. In its written observations the Commission casts doubt on the necessity for a reference in two respects. Firstly, the limitations of the proceedings in the administrative courts might possibly not matter if the parallel proceedings claiming compensation against the State brought by Mr Schneider in the Landesgericht für Zivilrechtssachen Wien were to provide an opportunity for carrying out a full review of the decision pronounced by the Bundesminister für Justiz as regards both facts and law. Secondly, this case would essentially appear to be concerned with an issue of law, that is to say the question of whether the saving clause required under the case-law of the Court (5) in the case of quotas for women demands that reasons specific to a male candidate other than greater suitability be taken into account.

21. On the basis of the answer given by the Austrian Government to the question raised by the Court and the judgment of the OGH in the parallel proceedings in the civil courts attached thereto, the Commission took the view during the oral procedure that the proceedings in which compensation was claimed against the State satisfied all of the procedural requirements under Community law for judicial proceedings based on sexual discrimination. In the opinion of the Commission, therefore, reservations as to the admissibility of the reference for a preliminary ruling have now become a certainty.

22. The Commission's Agent referred to the more extensive observations contained in the Commission's written submissions only so as to cover the eventuality of the Court not agreeing with that conclusion. Those submissions can be summarised as follows. The principle of the effectiveness of Community law requires an assurance of effective judicial protection for the enforcement of rights afforded under Community law even in the absence of a specific provision such as that contained in Article 6 of Directive 76/207. The Austrian legal position with regard to proceedings in the administrative courts does not satisfy those requirements as the Verwaltungsgerichtshof is barred from ascertaining and appraising all of the facts and from correcting corresponding errors on the part of the administration. This shortcoming in judicial protection is particularly patent because the department within the administration responsible for pronouncing decisions is also the body that has jurisdiction over appeals against its own decisions.

23. It is apparent from Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, (6) in particular, that effective judicial protection is only guaranteed if the court is able to appraise in full all of the facts relevant to the decision. In requiring Member States to take such measures as are necessary, in accordance with their national judicial systems, to ensure that, in complaints of breach of the principle of equal treatment, it is for the respondent to prove that there has been no breach of that principle, Article 4(1) of Directive 97/80 assumes that it is for the respondent in the judicial proceedings not only to state the correct application of the law but also to mention in the judicial proceedings all of the facts relevant to the decision. It also assumes that the court must be in a position to appraise those facts in full. This is particularly apparent from Article 4(3) because it is provided there that Member States can fail to apply paragraph 1 only if it is for the court to investigate the facts of the case in any event. The reference to the facts of the case in this provision makes it clear that it is for the court not only to determine the law but also to examine whether the facts have been correctly ascertained and appraised.

24. In answering the questions raised by the Court, the Commission states that the Bundesminister für Justiz cannot be considered an other competent authority within the meaning of Article 4(1) of Directive 97/80 as he is responsible for the very promotion practice complained of. The Commission takes the view, with regard to the applicability of the directive, that the fact that the applicant's case had not been finally decided by the date on which the period for transposition came to an end is decisive.

25. Consequently, the Commission is of the opinion that Article 6 of Directive 76/207 and Article 4 of Directive 97/80 should be interpreted as meaning that the precept embodied therein, namely the guarantee of effective judicial protection in the event of alleged discrimination based on sex, must not just permit the court before which a case has been brought to examine whether the relevant law has been correctly interpreted and applied by the authority concerned but also whether all of the relevant facts have been correctly ascertained and properly taken into account.

VI — Legal appraisal

The admissibility of the reference for a preliminary ruling

26. In the present case the principal question is whether the reference for a preliminary ruling is admissible. The Commission has already expressed certain doubts in this respect in its written observations. The extent of the problem and the circumstances enabling that problem to be assessed were not brought to the attention of the Court during the course of the present proceedings until the Austrian Government gave its answers to the question raised by the Court.

27. In answer to the question put by the Court the Austrian Government firstly observed that the decisions of the authorities concerned do not, in principle, have any binding effect on each other; secondly, it attached and explained the judgment of the OGH, which was the final court of appeal in the claim for compensation against the State.

28. It is apparent from that judgment that the competent civil courts, when considering the claim for compensation against the State, did examine in detail the issue of infringement of the principle of equal treatment under Directive 76/207. This applies both factually in relation to the personal reasons submitted by the applicant and also legally in relation to the wealth of case-law of the Court on the principle of equal treatment. In the present case the substantive objective of both claims (for compensation against the State and under Paragraph 15 of the B-GBG) is indemnification for harm sustained in relation to professional advancement as a result of infringement of the principle of equal treatment, albeit that the infringement alleged in the proceedings for compensation against the State is based on the argument that the national legislative stance is in breach of Community law, whilst the proceedings before the Verwaltungsgerichtshof are based on the alleged illegality of the decision by the Bundesminister für Justiz. The B-GBG would not appear expressly to preclude other rights to compensation. Consequently, the OGH, as the highest national civil court, has ruled in a final judgment that Paragraph 15 of the B-GBG does not preclude other rights to compensation under the Amtshaftungsgesetz or principles governing State liability that are guaranteed by constitutional law. Even though, formally speaking, these are two different rights to compensation, the ultimate objective of both of them is to obtain financial indemnity for loss of higher pay.

29. To that extent it is to be assumed, at least during the period in question and in the circumstances of this particular case, that the civil judicial process and the administrative judicial process were both available to the applicant in parallel in his quest for compensation.

30. On the question of the admissibility of a reference for a preliminary ruling the Court has consistently held that the procedure provided for by Article 234 EC is an instrument for cooperation between the Court and the national courts. (7)

31. In the division of functions in the administration of justice between national courts and the Court provided for by Article 234 EC the Court gives preliminary rulings without, in principle, having to examine the circumstances in which the national courts have been led to refer questions and propose to apply the provision of Community law which they have asked the Court to interpret. (8) It is, in principle, solely for the national courts before which proceedings are pending, and which must assume responsibility for the judgment to be given, to determine in the light of the particular circumstances of individual cases both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they submit to the Court. (9) Consequently, where these questions relate to the interpretation of a Community law provision, the Court is, in principle, obliged to make a ruling. (10)

32. However, the Court cannot give a preliminary ruling where it is quite obvious that the interpretation of Community law sought by a national court bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical. (11) The Court ruled in this connection in *Meilicke* (12) that:in order to determine whether it has jurisdiction, it is a matter for the Court of Justice to examine the conditions in which the case has been referred to it by the national court. The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions.

33. The Austrian legislation — notwithstanding the wording of the question referred for a preliminary ruling — guarantees that anybody who considers himself to have been harmed by failure to apply the principle of equal treatment under Directive 76/207 to him is entitled to bring judicial proceedings to uphold his rights, as required by Article 6 of Directive 76/207. However, this provision does not mean that the courts concerned must be administrative courts. There cannot be any doubt that the civil courts in Austria, from the Landesgericht to the OGH, are courts or tribunals that fulfil the criteria developed under Article 234 EC. (13)

34. The possibility of judicial pursuit of rights required by Article 6 of Directive 76/207 is therefore provided in Austria by the claim for compensation against the State that is to be pursued in the civil courts. In a Community law context it does not matter whether there is also another channel through which to pursue an infringement of the principle of equal treatment or whether that channel does in itself meet the requirements of effective judicial protection. A *single* possibility of effective judicial protection will suffice.

35. The question referred for a preliminary ruling in this case is hypothetical in so far as it asks whether the possibility of pursuing a claim for compensation by judicial process on the grounds of failure to apply the principle of equal treatment is assured by the Austrian Verwaltungsgerichtshof *alone*. As stated above, the Austrian legal system, by its Amtshaftungsgesetz and principles governing State liability, the application of which is subject to three levels of judicial review of the facts and the law by the civil courts, offers individuals a means by which they may pursue a claim concerning failure to apply the principle of equal treatment to them, as required under Article 6 of Directive 76/207. The question of what would be the case if the Verwaltungsgerichtshof alone were to have jurisdiction to examine application of the principle of equal treatment is hypothetical in these circumstances.

36. Hence, the Court does not have jurisdiction to rule on the question referred to it. The question referred for a preliminary ruling must therefore be deemed inadmissible. Consequently, there is no need to go into any other substantive issues, such as the applicability of Directive 97/80.

VII — Conclusion

37. In the light of the foregoing considerations, it is recommended that the question referred by the national court should be answered as follows:The reference for a preliminary ruling is inadmissible.

1 –Original language: German.

2 –OJ 1976 L 39, p. 40.

3 –Case C-450/93 *Kalanke* [1995] ECR I-3051; Case C-409/95 *Marschall* [1997] ECR I-6363; Case C-158/97 *Badeck and Others* [2000] ECR I-1875; and Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539.

4 –Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 40, and Case C-120/97 *Upjohn* [1999] ECR I-223, paragraphs 32 to 35.

5 –.*Marschall* (cited in footnote 3), *Badeck and Others* (cited in footnote 3), and *Abrahamsson and Anderson* (cited in footnote 3).

6 –OJ 1998 L 14, p. 6.

7 –Case 16/65 *Schwarze* [1965] ECR 877; Case C-147/91 *Ferrer Laderer* [1992] ECR I-4097, paragraph 6; and Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22.

8 –Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 22.

9 –Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 17; Case C-143/94 *Furlanis* [1995] ECR I-3633, paragraph 12; and Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 15.

10 –Case C-369/89 *Piageme and Others* [1991] ECR I-2971, paragraph 10.

11 –Order of the Court of 25 May 1998 in Case C-361/97 *Rouhollah Nour* [1998] ECR I-3101.

12 –Cited in footnote 7, paragraph 25, referring to Case 244/80 *Foglia* [1981] ECR 3045, paragraphs 18 to 21.

13 –.*Dorsch Consult*, cited in footnote 4, paragraph 23.