
**IN THE
COURT OF JUSTICE
OF THE
EUROPEAN COMMUNITIES**

CASE C – 00/00.

**OLEG & DELILAH,
APPLICANTS**

V

**GOVERNMENT OF UREPOSE,
RESPONDENT**

(On Request for a Preliminary Ruling from the Ureposian
Regional Court)

WRITTEN OBSERVATIONS FOR APPLICANT

Counsel for Applicant:

University College
Utrecht University
Postbus 80 -145,
3508 TC Utrecht
The Netherlands

Sebastian Buhai
Maja Nenadovic
Tomas Zbihlej

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SUMMARY OF THE ARGUMENT

Oleg, an Outopian national, is a migrant worker in the European Union Member State Urepose. He wants to marry an Ureposian national Delilah. His religious belief is prohibiting him from co-habitation. However he is prevented from marriage by a national law which effectively cancels his working permit upon a change in his marital status and thus forces him to leave the country.

This law is against the directly effective Directive 104/99, which states that no one is to be discriminated on any grounds arising from employment and linked matters. Even though the state failed to implement the directive by the set time, this does not prevent Oleg from relying on it, as the directive becomes valid after the set time for its implementation by the member states expires.

The directive is clear and precise enough and does not leave any space for misinterpretation. It further creates rights, which require that the subject is able to rely on the directive in order to uphold them. Thus it fulfils the required conditions to have direct effect.

Delilah an unemployed citizen of Urepose also has the right to rely on the directive as her inability to marry stems directly from the failure of the State of Urepose to implement the Directive.

Due to the non-implementation of the directive the Applicants suffered moral and material damages, which the state is liable to compensate them for.

Because the European Union did proclaim its commitment to uphold the rights granted by the European Convention of Human Rights, it ought to follow the jurisprudence of the European Court of Human Rights, in order to prevent misinterpretation, and protect the Fundamental Rights granted in the Document.

ARGUMENT

Question 1:

We hold that Directive 104/99, which implements Treaty Article 6, has direct effect and confers clear and precise rights to individuals to rely on its provisions.

1. A Directive is a secondary legislation of the EU and is defined in Article 249 of the Treaty. Establishing the European Community as amended by the Treaty of Amsterdam as “binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.
2. This Court has held that directives have direct effect, enabling individuals to rely on them, at least in actions against the State, before their national courts: “[...] the national Court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State, must uphold that request, if the obligation in question is unconditional and sufficiently precise” Pubblico Ministero (18). The criteria for direct effect were first referred to in Van Gend en Loos (12). In order for a provision, in general, to be capable of direct effect, it has to be sufficiently clear and precise, unconditional and leave no room for exercise of discretion in implementation by Member States or Community institutions.
3. It is rationally clear that it was the evident intention of the Commission to give Directive 104/99 direct effect. Directive 104/99 represents a subsequent measure to Article 6 TEU and Article 13 of the EC Treaty, issued to implement on national levels of the Member States measures to combat discrimination, one of the common and general principles of the EU. The very fact that the Directive poses upon the Member States a clear obligation to introduce in their national legal systems measures that directly influence fundamental rights and freedoms on the individual level means that it was intended to enable individuals to rely on it before their national courts in cases they feel these rights have been denied to them. As the Court stated in Van Gend en Loos (12) and reaffirmed in Van Duyn (13), Defrenne (14), Marshall and others, “it would be incompatible with the binding effect attributed to a directive by Article 189 (now 249) to exclude [...] the possibility that the obligation which it imposes may be invoked by those concerned.”
4. The Directive is not conditional upon any other measures, apart from the passing of the deadline for implementation. In Ratti and other cases, this Court stated that it is the expiry of the prescribed deadline which converts an unimplemented Directive into a provision on which an individual may rely before a national court: “A Member State which has not adopted the implementing measures required by the directive in the prescribed period may not rely, as against individuals, on its own failure to perform the obligation which the directive entails.” Therefore, since the deadline has passed, the state is unable to rely upon conflicting provisions of its national law (the standard policy of the Urepose immigration department to impose conditions on work permits that conflicts with Article 2 of Directive 104/99).
5. Article 2 of Directive 104/99 is clear sufficiently as such to state that Member States shall introduce in their national systems “such measures as are necessary” to achieve the mentioned goal. The obligation is sufficiently precise as well– wording of the goal to prohibit all discrimination based upon “racial or ethnic origin, religion or belief or disability” Facts (2) copies the words of Article 13 of the EC Treaty.

Thus, since it explicitly mentions the grounds on which “all” discrimination shall be removed, moreover with reference to Article 6 of the TEU, Article 2 of the Directive possesses a sufficiently clear and precise obligation on behalf of the State.

6. Furthermore, there is no room for the exercise of discretion in implementation by the Member States. The Directive states clearly the right of the individuals not to be discriminated against, on grounds of race, ethnicity, religious belief, in the field of “employment and linked matters”. This gives the State clear indication as to the persons to which the Directive applies and the field in which it applies (employment has been defined in the jurisprudence of this Court in cases such as Sala (137).) This Court also specifies how these measures should be taken: “in accordance with their obligations under Article 6 TEU [...] that such measures shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms”. Therefore the State is bound in the implementation and application of the Directive by the European Convention, even if Urepose did not implement the Convention. Facts (3).
7. In conclusion, the purpose of the Directive 104/99 and its wording fulfil all conditions required and thus the Directive is capable of direct effect and can be relied upon by individuals in front of the national Courts.

Question 2:

The provisions guaranteeing the respect for human rights, contained in Article 6 of the TEU have direct effect, conferring Oleg the right not to be discriminated on the basis of his ethnicity and religious belief and ensuring for both Oleg and Delilah the respect for their right to marriage.

1. It is established in the case law of this Court, that Treaty provisions can be capable of direct effect. Van Gend (13) In order to see whether the provisions of Article 6 have direct effect, “it is necessary to consider the spirit, the general scheme and the wording of those provisions” Van Gend (12) and to find that these provisions impose “in a clearly defined way “ Van Gend (12) “a precise obligation which does not require the adoption of any further measure on the part of either the Community institutions, or of the Member States and which leaves them, in relation to implementation, no discretionary power”. Van Duyn (13). Article 6 of the Treaty fulfils these conditions as one can read in its paragraphs:
Article 6 (ex Article F)
 - (1) The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to all the Member States.
 - (2) The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
 - (3) The Union shall respect the national identities of its Member States.
 - (4) The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.
2. As the duty of this Court is to ensure observance of fundamental rights in the field of Community Law, Cinetheque (125), we must firstly remind that the issue of non-discrimination on grounds of ethnicity or religious belief, was brought under the umbrella of Community Law by Directive 104/99, in the field of “employment and linked matters”

3. The issue of human rights has become of fundamental importance in Community Law especially during the last decade. Therefore it is in the spirit and the purpose of Article 6 (2) to have direct effect. The numerous acts of the Community institutions show the following:
 - A. “ Human rights as guaranteed by the international instruments, agreed upon by the Member States and in particular by the European Convention [...] are basic principles which **must be fully respected** within the European Union” (emphasis added)
 - B. Whereas the European Convention has been ratified by all the Member States and whereas it is laid down in Articles F(2) and K(2) of the Treaty on the European Union that the Union will respect basic rights as guaranteed by the Convention”. Resolution (74)

“ Whereas as the Court of Justice has recognised that law comprises over and above the rules embodied in the Treaties and secondary Community Legislation, the general principles of law and, in particular fundamental rights [...]

 - (1) The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from [...] the European Convention for the Protection of Human Rights and Fundamental Freedoms.
 - (2) In the exercise of their powers and in pursuance of the aims of the European Communities, they respect and will continue to respect these rights.” Declaration (71)

In order for all these purposes to be fulfilled, it is necessary for Treaty Article 6 to have Direct Effect.
4. The general scheme and the wording of Article 6 also show that it has direct effect. The Article states in the first paragraph the foundations of the European Union: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law”. Then it goes on to further clarify the fundamental rights, not referring to them as human rights in general, but especially to those granted by the European Convention, which is prominent to the other international documents, promoting a uniform application of the rights contained therein. Therefore the Union and its Member States have a clear and precise obligation to respect these rights and consequently confers the right to individuals to rely upon them. The fact that the article uses the terms “principles” in relation to human rights, does not preclude direct effect: “it is impossible to put forward an argument against its direct effect based on the use in this article of the word “principle” since in the language of the Treaty, this term is specifically used in order to indicate the fundamental nature of certain provisions [...] If this concept were to be attenuated to the point of reducing it to the level of a vague declaration, the very foundations of the Community and the coherence of its external relations would be indirectly affected” Defrenne (14).
5. As required by Article 6(4), the Union has provided itself with the necessary means to implement this article by adopting the directly effective Directive 104/99, which refers again to the European Convention, making the application of the directive unconditional on the adoption of subsequent measures of implementation and thus fulfilling another condition for direct effect.
6. The provisions of Article 6(3) do not influence the direct effect of Article 6 related to the respect of human rights. The respect for national identities is a political declaration, which states that in the field of international relations, the Member States will keep their identity, their international personality.
7. Nor do the provisions of Article 46(d) TEU preclude the direct effect of Art. 6(2). Even if the “provisions of the Treaty [...] concerning the powers of the Court of Justice [...] shall apply only to [...] Article 6(2) with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European communities and under this Treaty”, the individuals are conferred clear fundamental rights by article 6, and can rely upon them in front of national Courts.
8. Therefore Article 6 TEU meets all conditions led down by the Court for direct effect, which is required in order to secure the fundamental rights and to effectively fulfil its function.

Question 3a

Given the passage of the Treaty Article 6 and of the Directive 104/99, applicant Oleg, third country national, legally long-term resident in, and in the possession of a valid work permit issued by, a Member State, is clearly entitled to rely upon the provisions of the above mentioned treaty article, respectively directive in seeking a renewal of his permit.

1. Applicant Oleg was granted a five year work permit on the 1st of January 1995; the permit was “conditional upon there being no change in the marital status of the permit holder. In the event of any change of status the permit is cancelled and the permit holder must re-apply”. Facts (2)
2. Such a work permit could not, after the passage of Article 6 TEU and of Directive 104/99 have a provision that clearly violates one of the fundamental principles of human right. In essence, Oleg could not by any means be denied marriage. Article 8 of the European Convention openly protects family life from any “interference by a public authority”, while Article 12 specifically guarantees “the right to marry”. Hence, a provision like the one mentioned above imposed on the work permit is clearly violating the free right to marriage and implicitly, in the light of the existing Community law, it is unlawful.
3. “Oleg’s religious convictions prevent him from co-habiting (with any person of the opposite sex)” Facts(2). By imposing condition 4 on the all the work-permits of non-EC nationals, Urepose not only violates the right to marriage of Oleg, but even more, it violates the fundamental right of the freedom of religion. Article 2 of Directive 104/99 states that Member States should introduce such measures that “[...] prohibit all discrimination arising out of employment or linked matters based upon racial or ethnic origin, **religion** or belief or disability “ (emphasis added). Facts (2). Such a clear violations of the provisions of the Directive cannot be just ignored. Consequently, Oleg is fully entitled to rely on the provisions of Directive 104/99 and of the Article 6 TEU when seeking a renewal of the work permit.
4. Being lawfully resident in Urepose, Oleg is legally under the jurisdiction of this Member State, therefore he can clearly rely on the legislation valid at that time in the country, in particular on the Directive 104/99. This Court found that a Member State worker in another Member State was entitled not to have his name bizarrely mistranslated by that state, Konstantinidis (125), a relatively minor right violation compared to the ones in the present case initiated by Oleg. The Court gave then its judgement on the base of the violation of Article 8 of the European Convention of Human Rights, which was applicable within the scope of Community law, as involving a worker. There is no indication at all that the direct effect of either Directive 104/99 or Article 6 of the Treaty should be restricted to EC citizens only. In the hereby case Article 6 TEU and Directive 104/99 have the effect to bring Oleg, not a European Union citizen, but a lawful resident in Urepose and in possession of a 5-year work permit, under the same ambit of law which prohibits discriminatory denial of human rights.
5. In conclusion, after the enactment of the direct effect of Directive 104/99 and/or Treaty Article 6 no discriminatory provisions conditioning the working permit or the renewal of the working permit on grounds of change in marital status or any other fundamental right can remain active or be added. Oleg’s application against the decision of the Ureposian Immigration Authorities of refusing the renewal of his work permit is entitled as in the light of the wording of the Directive 104/99 and Article 6 TEU the decision of the Ureposian authorities was discriminatory and clearly in contrast to the provisions of the above mentioned documents.

Question 3b

We hold that Delilah is entitled to rely on Directive 104/99 and Article 6 of the TEU in order to secure her right to marriage.

1. Ms. Delilah is an unemployed citizen of and currently residing in Urepose. She wants to marry Mr. Oleg, who in case of marriage will lose his residence permit and will be forced to leave the country in 28 days. Facts (2).
2. In case of Ms Delilah her right to marriage is being violated by the proceeding of the immigration authorities. The applicant is therefore trying to protect her rights by relying on the EU Directive 104/99. This Directive states that all discrimination “arising out of employment or **linked matters**” (emphasis added) shall be abolished by the member states. Though the Applicant Delilah is not employed, she still has the right to rely in the directive as the violation of her right to marry stems from the fact that in the case she marries, Oleg will be forced to leave the country, thus effectively making the marriage impossible, which stems from a matter linked to employment as discussed above. In this case the Directive 104/99 can be used by the Applicant in front of the Court to secure her right to marry and lead a family life as guaranteed under the European Convention on Human Rights.
3. As already clarified, the Directive 104/99 and the Article 6 are capable of direct effect and can be used to uphold Ms Delilah’s rights. The Treaty Article 6 in its expressive terms also incorporates the human rights as guaranteed in the European Convention, which are being implemented by issuing the Directive 104/99. The citizens of the European Community can rely on them in front of the European Court and the Court can find a member state guilty of violating a treaty as was established by the case of Francovich (123). In this case the Member State has to provide the injured party with an effective remedy for the violation of its rights established by the directive and/or treaty as decided in the case of Ms Coote vs Grenada . Coote(150).
4. The violation in this case is of Ms Delilah’s right to marry and have a family, which is expressively guaranteed in the European Convention on Human Rights as a fundamental right under Article 12. It was established that even a partial or temporary restraint and denial of this right can be a violation (the case of F. vs. Switzerland (153)) of this right. The Court in this case decided on the reasoning that a limitation on marriage “must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.”
5. On these grounds it is clear that her situation is directly applicable to the rights conferred on every citizen by the Directive 104/99 and thus she has the right to rely on it to secure these rights.

Question 4a:

We hold that Oleg, a non-EC national lawfully resident in, and in possession of a valid work permit issued by, a Member State, even in the light of the non-passage of Directive 104/99 and/or Article 6 TEU, is clearly entitled to seek damages against Urepose.

1. The State had an obligation it did not fulfil. Urepose failed to transpose Directive 104/99 into domestic law within the stated time limit and thus prevented Oleg from directly relying on its protection. “A

Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which directive entails.” Pubblico Ministero (18) Thus, the failure of implementation cannot prevent Oleg from claiming the benefit of its protection: “...after the expiration of the period fixed for the implementation of a directive a Member State may not apply its internal law - even if it is provided with penal sanctions - which has not yet been adapted in compliance with the directive, to a person who complied with the requirements of the directive.” Pubblico Ministero (18)

2. Urepose had an obligation arising from this Directive to achieve the results envisaged by that legislation. As this obligation was not fulfilled, Urepose is liable in damages for its failure to implement the Directive. We have that, “where a Member State fails to fulfil its obligation under the third paragraph of Article 249 of the Treaty to take all measures necessary to achieve the result prescribed by the Directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.” Francovich (30)
 - i) The first condition consists of the fact that there must be a direct right to the individual to bring the claim. The direct right is given to Oleg, due to the fact that the non-implementation of the directive affected him personally, causing him damage through discrimination on the grounds of religion (as elaborated in the answer to Question 3a) and through the imposition of an unlawful requirement for the work permit (this will be elaborated on below). Therefore, the first condition is clearly fulfilled as seen from the above mentioned arguments.
 - ii) The second condition lies in the possibility of identifying the specific nature and extent of such rights. This precision is identified – Oleg being entitled to protection of his right to non-discrimination on grounds of racial or ethnic origin, or religious belief. The right to marry, as well as previously mentioned rights Oleg has, is all specified in the European Convention of Human Rights.
 - iii) Finally, the third condition is the existence of a causal link between the nation state’s obligation and the loss or damage suffered. As mentioned, Urepose had the obligation to implement the Directive in a given period of time- it failed to do so. Due to its failure, Oleg suffered damages; namely his right to work was given an unlawful requirement. Hence, Oleg is entitled to seek damages due to non-implementation of the Directive 104/99.
3. Urepose bars Oleg’s right to marry as a condition of his permit. Facts (2). This clearly constitutes unlawful work place discrimination in the light of Directive 104/99. Urepose cannot give a work permit conditioned by an unlawful requirement, therefore Oleg is entitled to seek damages against the member State for discrimination under Directive 104/99 and Article 6 TEU.
4. Finally, “under Article 5 of the Treaty the Member States are required to take all appropriate measures, whether general or particular, to ensure the fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law.” Francovich (30). As Urepose did not make an effort to at least adjust its legislation to the conditions of the Directive 104/99, it should be held liable for paying damages: “it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.” Francovich (30)

Question 4b:

We hold that Delilah, an unemployed EC citizen, is clearly entitled as a matter of Community law to seek damages against the Member State of which she is a national for its failure to implement the said Directive 104/99.

1. Applicant Delilah has been injured by Urepose's failure to implement the Directive 104/99 by preventing her, in fact, to marry Oleg. As observed above in Question 4a, while discussing the first condition for State liability, laid down in Francovich (30), any party injured by a Member State's failure of implementing the conditions of a Directive has the right to be provided with remedies, including damages, by that Member State: "it is for the Member States to ensure effective judicial control of compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the Directive provides." Coote (150)
2. The fact that Delilah is unemployed and a resident citizen of Urepose cannot divest her of the fundamental right of marriage. This is both her fundamental human right under Article 6 TEU and a social advantage through the Directive 104/99. Moreover, the right to marriage is inherent right in the European Union citizenship, which Delilah possesses, as it is one of the fundamental human rights. Therefore specific nature and extent of Delilah's rights are identified, and the second condition, laid down in Francovich, is fulfilled.
3. Furthermore, the causal link between the State's obligation and the damage suffered, exists, thus fulfilling the third condition laid down in Francovich(30). Had the State of Urepose implemented the Directive 104/99, there would have been no obstacles for Delilah's pursuit of happiness through marriage. Delilah is entitled to seek damages to Urepose's infringement of her right to marry: "The State must be liable for loss and damages caused to individuals as a result of breaches of Community law." Francovich (30) In this case, the sanction must "be such as to guarantee real and effective judicial protection." Van Colson (25).
4. To sum up, the measure of damages that Delilah is entitled to, is of course a question to be determined by the Ureposian courts bearing in mind the causal link between the State's breach and the damages suffered by the individual whose rights were infringed. Delilah's rights were clearly infringed by Urepose's failure to implement the Directive 104/99 and therefore she is clearly entitled to seek damages that are to be determined by Urepose.

Question 5:

The European Court of Justice and national Courts will find guidance in the jurisprudence of the European Court of Human Rights when interpreting the European Convention, in the field of Community law .

1. Prior to the enactment of Treaty Article 6 and Directive 104/99, this Court recognised the obligation of the Communities to respect human rights, but applied these rights in the field of Community Law. The commitment of the Court to human rights as contained in the Convention is expressed in Stauder v Ulm (57), Internationale Handelsgesellschaft (57), R v Kirk (58). This was reinforced by the Declaration (71), by multiple other declarations made on this issue from 1973-1993 by various Community institutions (Opinion (89)) and in the Resolution on respect of the Human Rights in the European Union from 1994: " stresses that protection of human rights and fundamental freedoms has been recognised as

a principle of the European Union [...] which must be guaranteed by the Court of Justice”. Resolution (75).

2. Specific references to the European Convention were made in cases such as R v Kirk (Article 7 of the Convention), Johnston (Article 6), National Panasonic (Article 8 – relating to “right to respect for private and family life”) (58).
3. The importance of the European Convention of Human Rights was further reaffirmed by the Court’s Opinion on the formal accession of the Communities to the Convention. This was before the Amsterdam Treaty, which enacted Article 6, accomplishing what this Court had ruled “could only be done by Treaty amendment” in making the Convention a part of Community Law, by imposing a duty to “respect fundamental rights” as “guaranteed by the European Convention...”
4. The Council and the Commission embodied specific elements of the Convention in its legislation, such as the principle of non-discrimination in Directives 1612/98_(137)_and 104/99 Facts (1).
5. Given the subsidiary jurisdiction of the European Court of Human Rights (“it is primarily for the national courts and authorities to apply the Convention”), if the European Court of Justice would be guided by its jurisprudence, it would simply “lead to an increase in the likelihood of finding a remedy under domestic law, without the need for an application to the organs established by the Convention”. Konstantinidis (105-106). If in a case referred to the European Court of Justice for a preliminary ruling, the Court would interpret the European Convention differently from the interpretation given by the European Court of Human Rights, the national Court, which referred the question would have to follow the interpretation of the European Court of Justice. After the interpretation being put in practice the person in question can go to the European Court of Human Rights, which could overrule the decision of the National Court because a different interpretation to the European Convention was given. In order for this not to happen the Court of Justice ought to follow the jurisprudence of the European Court of Human Rights.
6. This Court has in the past used and will use in the future various authorities for guidance on how to interpret the European Convention for the Protection of Human Rights and Fundamental Freedoms. The strongest will be the jurisprudence of the European Court of Human Rights. Further include the international and national constitutional human rights law; in general principles recognised by Member States: and in judicial decisions and relevant scholarly treaties. Opinion (97)

SUBMISSIONS

WHEREFORE, Applicant respectfully submits to this Honourable Court that it returns this case to the Ureposian Supreme Court with a Preliminary Ruling:

1. Answering in the affirmative Question No.1.
2. Answering in the affirmative Question No. 2.
- 3a. Answering in the affirmative Question No. 3a.
- 3b. Answering in the affirmative Question No.3b.
- 4a. Answering in the affirmative Question No.4a.
- 4b. Answering in the affirmative Question No.4b.
5. Answering in the affirmative Question No. 5.

Respectfully submitted,

Sebastian Buhai
Maja Nenadovic
Tomas Zbihlej

**COUNSEL FOR OLEG & DELILAH,
APPLICANTS**

Dated: 1 April 2000