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 RESPONDENT

Counsel for Respondent:

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

Sebastian Buhai
Maja Nenadovic
Tomas Zbihlej

AUTHORITIES

I. TREATY ARTICLES

Article 228 - TEU (as amended) 10
Articles 6 TEU (as amended) 4,5,8,9,10
Article 8 TEU 7
Article 46 TEU (as amended) 5,6,10
Preamble to the TEU 9

II. EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Article 12 7,9

III. DIRECTIVES AND LEGISLATION

Article 2 of Directive 104/99 4,5,6,7,8,9
Directive 76/207 4

IV. CASES

Opinion 2/94 on Accession by the Community to the ECHR [1996] ECR I-1759 10
F v Switzerland (ECHR A series 128) 7,9
Pubblico Ministero v Ratti (Case 148/78) 4
Van Gend en Loos v Nederlandse Administratie der Belastingen (Case 26/62) 5
Van Duyn v Home Office (Case 41/74) 4
Uecker and Jacquet (Case C – 64 & 65/96) 7
Francovich and Others v Italian State (Cases C – 6/90 & C – 9/90) 8,
Marshall 4
Cinétheque 7,10
Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/84) 9
Internationale Handelsgesellschaft 10
Hoechst (Case 46/87) 10
Kaur v Lord Advocate 10
J. Nold KG v Commission (Case 4/73) 10

NOTE: In the Argument, all references to authorities will be in an abbreviated form, with page references to the Competition Materials.

SUMMARY OF ARGUMENT

The Applicants cannot rely on the Directive 104/99 and Treaty Article 6 in order to sustain their claims, since these articles are not directly effective, since they do not meet the conditions laid down in the case law of this Court.

It is within the powers of Urepose to regulate the work permits of the immigrants and the right to marry. The Applicants cannot seek damages on grounds of the non-implementation of the Directive since the Directive does not entail them the right to bring a claim and the alleged damages are purely speculative. They may be able to look for remedy in the European Court of Human Rights, but not in front of this court, since their situation is not related to EC Law.

Even if the articles would be directly effective, the applicants could not rely upon these provisions, because they are not discriminated on the grounds of ethnic or religious belief. Applicant Delilah cannot rely on the Community legislation, since she is unemployed and she resides in the state of Urepose, of which she is a national.

The European Court of Justice should only take the jurisprudence of the European Court of Human Rights as a subsidiary mean of interpretation, in matters related to Community Law, since the EU Treaties do not specify otherwise. In order for this Court to be bounded by the jurisprudence of the Court of Human rights, Treaty amendment would still be necessary.

Question 1

We hold that Directive 104/99 is not capable to confer direct effect and thus individuals cannot rely on its provisions in front of national courts.

1. According to Article 189 of the EC Treaty, Directives are generally not designated to be capable of direct effect. However, the Court has decided in a number of cases Van Duyn(13), Pubblico Ministero(18), that a directive might be relied on by an individual before a national Court. The Court led down a number of criteria which must be fulfilled in order do a Directive to have direct effect. The provisions of the Directive must be unconditional and they must also be sufficiently clear and precise, as far as their subject matter is concerned Marshall (21). Article 2 of Directive 104/99 does not comply with these criteria.

2. The provisions of Article 6 TEU are unclear and imprecise. Article 2 of the Directive states "Member States shall introduce […] such measures as are necessary to prohibit all discrimination arising out of employment and linked matters". It is not possible from the content of the Directive or from the jurisprudence of this Court to identify the extent of the term "linked matters" and consequently it is not possible to deduce the measures to be taken by the State of Urepose. The lack of clarity would determine that a literal reading of the Directive 104/99 would make it impossible for Member States to limit the scope of work permits for non European Union citizens, as such permits necessarily comprise some element of ethnic and racial considerations. At the same time, the uniformity of the Community Law would be seriously affected, each State can interpret the provision of the directive differently.

3. In contrast to the wording in the Directive 104/99, Article 1, paragraph of the Directive 76/207, which was found to have direct effect, clearly identifies the areas to which the principle of equal treatment between men and women is applied: "access to employment, including promotion, and to vocational training and as regards working conditions and on the conditions referred to in paragraph 2, social security". The contrast in the wording of two Directives, regulating a similar issue, discrimination, also shows that Directive 104/99 does not have direct effect.

4. The reference to the Member States' "obligations under Article 6 TEU", which does not have direct effect, as stated in the answer to Question 2, and to the "fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms" does not in any way, clarify the provisions of the Directive. It merely reaffirms a general obligation of the States to follow the above mentioned Treaties, and in no way does it confer direct effect rights to individuals, enforceable in front of a national court.

5. To sum up, the direct effect of Directive 104/99 is conditional on the further clarification from the Community institutions as to the areas covered by the term "employment and linked matters" and on further measures taken to implement Article 6 TEU and to include the

European Convention for the Protection of Human Rights and Fundamental Freedoms in EU legislation.

Question 2

We hold that Article 6 TEU cannot be regarded as being directly effective and it cannot be relied upon by private parties.

1. The general scheme and the wording of Article 6 TEU do not indicate the conclusion that it has direct effect and do not pose clear obligation on the Member States or a clear right upon the individuals.

2. Article 6, paragraph 1 contains a declarative statement that cannot be relied upon as such by individuals in national courts. The paragraph simply states that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law". These are already acknowledged by the Member States as common principles in their legislation; their inclusion in this article has the aim of restating their commitment to respect such general fundamental rights.

3. The conditions for direct effect (Van Gend en Loos (12)) are not fulfilled. In this respect we have the following about the provisions in Article 6:
   i) They are not sufficiently clear and precise. The wording in 6 (2) is inexact and vague as it does not specify the rights to which it refers. The general obligation is that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms […] and as result from the constitutional traditions common to the Member States, as general principles of Community law". As stated in the paragraph, these shall be taken as general principles that can by nature be used for interpretation, but do not clearly and precisely state the rights and obligations. The Court's powers can only apply the provisions of art. 6(2) "with regard to actions of the institutions, insofar as the Court has jurisdiction" (art. 46 (d) TEU). Therefore, it is not a matter for this Court to control the national law for human rights compliance.
   ii) The provisions are conditional. From 6 (4) it is clear that the enforceability of the rights cited paragraph 2 is conditional upon further measures taken by the Union itself in order to "attain its objectives and carry through its policies". The Union has developed certain means to implement and clarify fundamental rights, such as the case of sex discrimination, nevertheless as stated in our answer of question 1, the reference to the European Convention of Human Rights is not sufficient to confer direct effect rights upon individuals.
   iii) The provisions can leave room for the exercise of discretion in its implementation by the EU or Member States. The inclusion of paragraph 3 in the article clearly gives discretion to the Member States concerning the implementation of the provisions of the article: "The Union shall respect the national identities of its members". With reference to paragraph 2, every Member State should respect the fundamental rights and freedoms as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and in view of their constitutional traditions common to the Member States. Nonetheless, as

stipulated in paragraph 3, national identities will prevail. Discretion is clearly awarded to the Member States concerning the implementation of the Article.

4. Given that conditions i), ii), and iii), required in order that a Treaty provision should be directly effective are not met, it is obvious that Article 6 TEU cannot be regarded as directly effective and implicitly it cannot be invoked by individuals in front of national courts.

Question 3a

Albeit the passage of the Directive 104/99, a non-EC national, lawfully resident in, and in possession of a valid work permit issued by, a Member State, is by no means entitled to rely upon the provisions of either document mentioned above when seeking a renewal of his/hers work permit.

1. Applicant Oleg, non-EC national, lawfully resident in, and in possession of a valid work permit issued by Urepose is relying on the provisions of Directive 104/99 in the proceeding against the Ureposian Immigration Authorities on grounds of his being denied the renewal of the working permit as discriminatory and contrary to the provisions of the Directive. Facts (3)

2. The Applicant has no motive in starting proceedings against the Ureposian Immigration Authorities on grounds of violations of human rights freedoms. There is no actual ban of applicant Oleg's marriage, therefore no violation of human rights, the conditions imposed on the working permit merely entailing a loss of his employment privileges. It has to be stressed that Oleg's employment status is a privilege and not a right; it would have been within the national power of the Member State Urepose to issue a work permit for a five-year term without renewal procedures attached. The Applicant's position then would have been the same, merely a denial of extension of his permit.

3. Immigration and the allowance of migrant workers are completely and clearly within the national competence of Urepose. Moreover, Oleg is neither a citizen of the European Union, nor is there an Association Agreement in effect between Outupia and Urepose, thus there are no additional regulations that should specifically apply in the case of Oleg. Urepose is therefore completely entitled to allow or to prohibit and to set the conditions for third country nationals to be admitted in and to be allowed to remain in the respective Member State. Hence, the Directive 104/99 cannot add anything (and nor does it intersect with) to the procedures concerning the immigration policy of Urepose.

4. There is no discrimination within the conditions imposed on the working permits that falls among the specified categories in the Directive 104/99; thus the applicant merely seeks to add another category, marital status. The wording of the Directive 104/99 is clear: " [...] to prohibit all discrimination arising out of employment […] based on **racial or ethnic origin, religion or belief or disability**" (emphasis added) Facts (2). First of all the Council and the Commission only could have decided upon such a matter and second, there is already legislation which specifically address the rights of family members of migrant workers in

European Union. Obviously statutory interpretation by a court cannot be to rewrite legislation in order to broaden its scope, but merely to clarify uncertain meaning.

5. Finally, the conditional work permit is not at all a ban, being at most a limitation. Article 12 of the EU convention states that the right of marriage shall be " according to national law". The right to marry may be limited so long as their limitation does not extend so far as to reach its very essence. F. vs. Switzerland (156). In the present case, the limitation on marriage serves as a legitimate aim of the state. There is an existing and perpetuating problem with a "recent influx of refugees into Urepose" Facts (2). A change in a migrant's marital status would obviously lead to an increase of refugees, children and dependants, without de facto adding to the Ureposian labour force. In the event that the Applicant prevailed in his suit, the future outcome would be that labour permits would be made for a fixed time, without any conditional right of renewal. The present situation of allowing the Immigration Department to consider and allow extensions of work permits is obviously already very favourable to migrant workers. Therefore, the limitation in this case is lawful and does not broadly interfere or produce a violation of the fundamental right of free marriage. The Applicant is thus in no position of using the provisions of the Directive 104/99 in proving that the conditions on the working permit are a ban to his marriage.

6. In conclusion, we hold that even if the Directive 104/99 has direct effect, the Applicant cannot rely on its provisions against the refusal of the Ureposian Immigration Authorities to renew his working permit.

Question 3b

We firmly claim that the Directive 104/99 has no direct connection to the case of the applicant and can not be used as a base of any claim in front of the Court.

1. Applicant Delilah is in no position to rely on the Directive 104/99. Its application, given that it would fulfil the conditions to have a direct effect, which it in the opinion of the respondent does not, would be solely limited to the Applicant Oleg. There is no connection between her right to marry, which is not being infringed, and the community law. It is an internal matter of the State of Urepose and it is to a national court to decide on the matter. The precedent for this case could be seen in the case of Ms. Jacquete and Ms. Uecker vs. Nordrhein-Westfalen (122) where the Court has upheld the decision that no national can claim independent employment rights for his/her spouse who is not a national under the EU treaty from a member state. This Court has also observed that Treaty Article 8 was not intended to extend the scope of the Treaty to internal situations. The precedent should be observed also in this case in the account of the Directive 104/99 and thus this directive should not be applied in this case. As stated in the above case: "Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State" (124)

2. As can be further seen the Applicant is relying on the European Convention of Human Rights. This document is not a part of the EU treaty and this claim should be thus laid in front of the responsible authority, which would be in this case the national Ureposian courts.

In the case that the Applicant wants to persuade her claim further and apply to an international authority she has to, in this case, apply to the European Court of Human Rights, which has the jurisdiction in this matter. As stated in the judgement on Cinetheque (52): "[…] the Court has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law"

3. In conclusion, the respondent firmly stands behind the opinion that the directive can not be applied in this case and that Applicant Delilah has no firm ground for her claim.

Question 4a

We hold that the Applicant, a non-EC national lawfully resident in and in possession of a valid work permit issued by a Member State is not entitled to seek damages against Urepose for its non-implementation of the Directive 104/99.

1. The Applicant did not marry yet and he did lose neither his work permit nor his job. Therefore any damages claimed by the Applicant are purely speculative until such time as his work permit is actually revoked. Then only, a claim for damages could be at mostly only to lost wages, although even in that case the Court faces the difficulty of determining the period of time for which lost wages should be paid.

2. The right to any compensation to individual by the State must depend upon three conditions as argued in the case of Francovich (31).
   i) The first condition is that the result prescribed by the Directive should entail the grant of rights to individuals bringing the claim. As argued under Question 1 of these observations, it is urged that the damages claimed are at the moment only speculative since he did not lose his job or his permit yet. Therefore, no direct rights were conferred on the Applicant.
   ii) The second condition is that it should be possible to identify the specific nature and extent of such rights. Again, as under question 1, that precision is lacking in both the Treaty Article 6 and the Directive 104/99. In neither of these is there any special or precise definition of workplace discrimination and everything it might entail. The lack of precision would leave the Court with the extremely difficult task of interpretation.
   iii) Finally, the third condition is the existence of a causal link between the breach of the nation state's obligation and the loss or damage alleged to have been suffered by the injured parties. As argued earlier on, the Applicant has at this point suffered no damages. Due to that, the Applicant does not fulfil the third condition laid down in the case of Francovich. Even in case certain damages existed, that would be a factual question determined by the Ureposian courts.

3. The Applicant's situation does not fulfil any of the conditions laid down in Francovich (30) which would entitle him to seek compensation for damages and he in fact did not at this point in time suffer any damages.

4. In conclusion the Applicant Oleg, non-EC citizen, is by no means entitled to seek damages against Urepose for its non-implementation of the Directive 104/99.

Question 4b

We hold that the Applicant, an unemployed EC citizen, is not 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. First, the argument made under question 4a, referring to the Applicant's right to claim damages from Urepose is equally applicable to the claim of the Applicant Delilah. Thus, the three conditions mentioned in case Francovich are clearly not satisfied in this Applicant's case either;

   i) there is no direct right for the Applicant to bring forth this claim as no direct rights were conferred - she is only a third party in this case.
   ii) the precision is lacking in both the Treaty Article 6 and the Directive 104/99, thus the nature and the extent of the possible rights of the Applicant cannot be identified.
   iii) the causal link between the state's obligation and the alleged damage has not been established but that is a factual question that remains to be determined by the Ureposian courts.

2. One significant difference between the two Applicants should be taken into careful consideration: Applicant Delilah has no limitation whatsoever on her right to marry. Applicant Delilah is involved as a third party in this case. Therefore, she can have no standing to claim, not even a factual basis for a statement of alleged injuries to the third party.

3. Moreover, even if she could maintain the claim, the interference with a right to marry is impossible to be reduced to a material compensation. The Court of Human Rights does allow, in some cases, 'non-pecuniary' damages for which the Court gives a monetary amount to a successful claimant.
   Nevertheless, in the case of F.v. Switzerland (153 through 155), the Court held that although the Article 12 right to marry had been violated, the applicant acknowledged that he could not prove pecuniary damages. Finally, the court also declined to award the non-pecuniary damages. This
   decision followed an earlier judgement in Johnston (155,156).

4. Summing up, Applicant Delilah, national of the Member State Urepose, is not entitled to seek damages for the failure of non-implementation of Directive 104/99.

Question 5

In the light of the wording of Article 6 TEU and the Preamble to the TEU, there is no support to justify a requirement for the European Court of Justice and therefore member state national

courts to be bound by the jurisprudence of the European Court Of Human Rights in their interpretation of the said European Convention. We hold that the ECJ and therefore Member State courts are following the jurisprudence of the European Court of Human Rights only as a subsidiary means of interpretation.

1. This Court recognised the obligation of the Communities to respect human rights, but nevertheless applied these rights within specified limits. In the judgement of Internationale Handelsgesellschaft (57) it is implied that the general principles of human right observed by the Court include only those that are common to all the Member States, thus imposing a specific legal boundary.

2. As certain legal matters are greatly varying among the Member States, the European Court of Justice cannot apply the same treatment, thus being impossible for it to be bound by the jurisprudence of the European Court of Human Rights, since this Court "has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator " Cineteque (125). In Hoechst (58) this Court has made a difference between the private dwelling of a natural person and commercial establishments, on the basis that the latter were subject to significantly different treatment among the Member States.

3. The issue must be one that is within the scope of Community law, as the Treaty defines it. In Kaur (58) the Court held that Article 8 of the European Convention could not be relied upon in a "matter wholly unrelated to EC law". The Treaty is obviously a grant of limited authority to the European Union, while the European Convention is unlimited in its application to human rights. In Nold (58), the Court of Justice held that human rights guidelines should be followed "within the framework of Community law".

4. In this Court's Opinion (87-98) pursuant to Article 228(6) of the Treaty, rendered prior to the Amsterdam Treaty, the issue was whether the Union could accede to the European Convention. The result was determined in the negative. This decision, however, did not address the applicability of human rights law except in general terms as "part of general principles of law whose observance the Court ensures" and as "constitutional provisions common to the Member States" (97). The "accession to the European Convention would not be within the powers of the Community: Treaty amendments would be required before the Community could take this step" (58). It is unlikely however to find favour with all Member States, as these must agree unanimously to any change in the Treaty rules. Article 6 TEU does not change this situation. This is further confirmed by Article 46 (2), which limits the Court's jurisdiction on Article 6(2).

5. In conclusion, the European Court of Justice should only look for subsidiary guidance in the jurisprudence of the European Court of Human Rights only in matters falling under Community law. As the scope of European Convention is much broader, the jurisprudence of the European Court of Human Rights has little relevance to Community law.

SUBMISSIONS

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

1. Answering in the negative Question No.1.
2. Answering in the negative Question No. 2.

3a. Answering in the negative Question No. 3a.
3b. Answering in the negative Question No. 3b.
4a. Answering in the negative Question No.4a.
4b. Answering in the negative Question No.4b.

5. Answering in the negative Question No. 5.

Respectfully submitted,

Sebastian Buhai
Maja Nenadovic
Tomas Zbihlej

COUNSEL FOR THE GOVERNMENT OF UREPOSE, RESPONDENT

Dated: 1 April 2000