

**2021 THEMIS COMPETITION**

**GRAND FINAL**

**TEAM FRANCE**

**Mister Franz K's Case**

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We will first address the competency of the Court regarding Mister Franz K's case (I). In order to assess the respect of Mister K's right to a fair trial, we will first examine the preservation of his substantial rights within the criminal procedure (II). Before addressing Mister Franz K's access to an impartial, independent and competent tribunal (III).

#### **I) The jurisdiction of the ECJ to give a preliminary ruling**

The request for a preliminary ruling concerns the interpretation of Article 47 and Article 48 of the Charter of Fundamental Rights of the European Union (the 'EU Charter'), the Directive on the right to information in criminal proceedings (2012/13/EU), the Directive on the right to interpretation and translation (2010/64/EU) and the Directive on the right of access to a lawyer (2013/48/EU). The request has been made in proceedings relating to the criminal investigation and trial conducted by the authorities of the Kingdom of H. against Mr Franz K. The referring court questions the legality, having regard to EU law, of the domestic criminal law and practice of the Kingdom of H. with regard to fair trial rights.

The request for the preliminary ruling has been submitted by Judge Arno V., to whom the case of Mr. K. was assigned as a single judge panel, at the Regional Court in Themisburg on 10 May 2020. On 25 May 2020, the Prosecutor General filed an extraordinary appeal to the High Court of H. against the decision ordering referral for a preliminary ruling. On 27 June 2020, the High Court ruled that the referral was unlawful. On the same day, Judge Jana G., acting in her capacity of President of the Regional Court, asked the ECJ for immediate withdrawal of the referral.

It must be recalled that a national court does not lose the right to refer questions to the ECJ if a preliminary referral is to be made before a higher court. The effectiveness of EU law would be in jeopardy if the existence of an obligation to refer a matter to a higher court could prevent a national court hearing a case governed by EU law from exercising the right conferred on it by Article 267 TFEU.<sup>1</sup> **Therefore, even if the issues listed in the request of the preliminary ruling could also be reviewed by the High Court of H., Judge Arno V. was well-founded to refer questions to the ECJ.**

As to the validity of the ruling of the High Court on the illegality of the referral, the ECJ has ruled that a decision of a supreme court, by which a request for a preliminary ruling is

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<sup>1</sup> Cases C-188/10 and C-189/10, *Melki and Abdelli* (ECLI:EU:C:2010:363), at para 45.

declared unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings is incompatible with Article 267 TFUE, since the assessment of those factors falls within the exclusive jurisdiction of the Court. The effectiveness of EU law would be in jeopardy if the outcome of an appeal to the highest national court could deter a national court hearing a case governed by EU law from exercising the discretion to refer to the ECJ questions concerning the interpretation or validity of EU law.<sup>2</sup> **In light of the above, the ruling of the High Court has to be considered as incompatible with EU law. As to the withdrawal of the question, the ECJ should thus consider that it remains seized of the referral from the Regional Court of Themisburg, since the ruling of the High Court does not constitute a regular basis for withdrawal.**

It should also be noted that the request for withdrawal emanates from the President of the Regional Court, who does not constitute ‘a court’ as interpreted by the ECJ.<sup>3</sup> First, she is not the court before which the case has been brought, but acts as an administrative authority. Secondly, she is not a body established by law, independent and permanent (see *infra*).

Finally, the nature of the rights concerned by the questions asked in the referral should be taken into account by the ECJ to assess the necessity to remain seized. It must be recalled that according to the European Court of Human Rights (ECtHR), the refusal of a national court to submit a question for a preliminary ruling may, in certain circumstances, affect the fairness of proceedings and infringe upon the right to a fair trial as enshrined in Article 6(1) of the ECtHR.<sup>4</sup>

## **II) Assessment of Mister Franz K’s substantial rights within the criminal procedure**

The Court must assess whether Mister Franz K’s substantial rights in the criminal procedure are preserved, specifically his right to the presumption of innocence<sup>5</sup> and his defence rights.<sup>6</sup>

### **A) Mister Franz K’s presumption of innocence**

Under both ECtHR and ECJ standards, the culpability of a person accused of criminal offences must be sufficiently demonstrated by admissible and legally administrated evidence.

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<sup>2</sup> Case C-564/19, IS (Illegality of the order for referral) (ECLI:EU:C:2021:949), at para 72-73

<sup>3</sup> For the criteria, see Case C-54/96, Dorsch Consult, at para 23

<sup>4</sup> ECtHR, *Dhahbi v. Italy*, Application no 17120/09, Judgement of 8 April 2014.

<sup>5</sup> Article 6§2 of the ECHR and article 48§1 of the EU Charter

<sup>6</sup> Article 6§3 of the ECHR and article 48§2 of the EU Charter

While domestic legislation frames the conditions applicable to the burden of proof,<sup>7</sup> the Court examines whether the collection of evidence respects minimum safeguards necessary to preserve the right to a fair trial, as stated in the 9th March 2006 directive on the strengthening of certain aspects of the presumption of innocence.<sup>8</sup> Therefore, Mister Franz K's case raises two questions regarding the fairness of the police investigation conducted by the Authorities of Themisburg. On the one hand, the compatibility of the hiring of informants with European law and, on the other, the extent to which Mister Franz K was provoked into committing a criminal offence.

Regarding the use of informants by the Themisburg police, the principle of such practices is found to be admissible according to European law. In particular, the fight against organized crime (such as drug trafficking in Mister Franz K's case) is considered a legitimate and proportionate goal in a democratic society, which allows state members to seek the help of under-cover agents.<sup>9</sup> Thus, the sole principle that the investigations against Mister Franz K were carried out with the support of informants is not contrary to European law.

Nonetheless, the use of such methods should be limited to strict necessity, without threatening the preservation of the presumption of innocence. In that sense, according to long-standing and established case-law of the ECtHR, the use of under-cover agents must not represent enticement to commit a criminal offence, as stated recently in *Grba v. Croatia*.<sup>10</sup> Here, both the informant and the dockworker were paid by the police to actively incite Mister Franz K to become involved in drug trafficking, by spontaneously proposing criminal opportunities and material means to carry them out and by putting pressure on him. Therefore, the presumption of innocence of Mister Franz K, which is a major component of his right to a fair trial, has not been respected according to European law standards.

## **B) Mister Franz K's defence rights**

Mister Franz K's case also raises questions regarding the preservation of his defence rights, especially his right to seek legal aid and his right to fully comprehend the extent of the criminal charges raised against him.

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<sup>7</sup> ECtHR, 1st March 2007 *Heglas v. Czech Republic*, n°5935/02 § 84 ; Article 6 Directive (EU) 2016/343 ; ECtHR, 1st March 2007 *Heglas v. Czech Republic*, n°5935/02 § 84 ; Article 6 Directive (EU) 2016/343.

<sup>8</sup> Directive (EU) 2016/343

<sup>9</sup> ECtHR, 5th February 2008, *Ramanauskas v. Lithuania*, n° 74420/01 § 53

<sup>10</sup> ECHR, 23 February 2018, *Grba v. Croatia* n°47074/12, §§99-100

Both the ECHR<sup>11</sup> and European law guarantee the right to the assistance of a lawyer in criminal proceedings, as implemented by the 2013/48/EU Directive on the right of access to a lawyer in criminal proceedings. This right is applicable from the very beginning of the proceedings, when a person is suspected of any criminal offence.<sup>12</sup> Concretely here, Mister Franz K was denied the right to access legal advice during custody, representing a breach of his defence rights. The denied assistance of a lawyer had concrete consequences for the rest of the proceedings, as he was not able to be present or be represented in court, when such presence is also a component of his right to access a fair trial (*Jussila c. Finlande* [GC], §40).

The right to interpretation is also a fundamental right, guaranteed by Article 6 of the Convention in its criminal limb as a component of a fair trial and protected by several European directives.<sup>13</sup> Requesting an interpreter must therefore be accessible and free.<sup>14</sup> Furthermore, the European Court of Human Rights assesses whether access to interpretation is effective<sup>15</sup> and permits a satisfactory translation of the proceedings. By failing to assess the professional competency of the required interpreter, the Kingdom of H. has not guaranteed the effective assistance of Mister Franz K, as no information enables verification that he was provided with a full understanding of the charges against him.

### **III) On the respect of fair trial guarantees in Frank K's case regarding the right to a tribunal established by law that is competent, independent and impartial**

Article 6 of the ECHR and article 47 of the EU Charter both refer to the right to a tribunal established by law that is competent, independent and impartial.

As a preliminary remark, the ECHR asserts that citizens must be judged according to the rule of law, that is, by a tribunal made out of judges that fulfil requirements of competence and that were regularly appointed to sit on the bench (see *Gudmundur v. Iceland - n°26374/18*). These judges must be independent and impartial.

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<sup>11</sup> ECtHR, 27 November 2008 *Salduz v. Turkey* n°36391/02 ; ECtHR, *Brusco v. France*, n°1466/07

<sup>12</sup> ECtHR, *Truten v. Ukraine*, no. 18041/08, § 66

<sup>13</sup> Directive 2012/13/EU on the right to information in criminal proceedings ; Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.

<sup>14</sup> ECtHR, 28 November 1978, *Luedicke, Belkacem et Koç c/ Allemagne*, § 40.

<sup>15</sup> ECtHR, 14 October 2014, *Baytar c/ Turquie*, n° 45440/04 § 50.

Independence is defined by the ECJ as the faculty for judges to adjudicate on cases without suffering from external pressure of any kind (hierarchical, political, etc ; *Associação Sindical dos Juizes Portugueses C-64/16*).

In ECJ's case-law, questions of independence often refer to the appointment or dismissal of judges. The Court considers that the principle of independence is violated if the procedure of appointment does not respect the principle of separation of power (*AK v. Krajowa Rada Sadownictwa C-585/18, C-624/18 & C-625/18*).

Furthermore, the Court considers that judges are not independent when their tenure in office is disrupted without legitimate reasons by the legislative or executive power, when disciplinary proceedings do not respect fair trial guarantees and touch upon the content of judicial decisions (*Minister of Justice and Equality C-216/18 ; Commission v. Poland C-791/19*).

The ECtHR has developed a similar case-law, mostly concerned with appointments and dismissal of judges (*Gudmundur v. Iceland ; Broda and Bodara v. Poland - n°26691/18*). In *Findlay v. United Kingdom (n°22107/93)*, it has established criteria to appreciate the independence of a tribunal: the manner of appointment of its members and the duration of their term of office; the existence of guarantees against outside pressures; whether the body presents an appearance of independence.

The current case raises issues of independence at different levels of the judicial system of H. The Court shall appreciate the independence of the judges adjudicating on Mr. Franz K's case (Arno V. and Gregory B.), that of the Presidents of the Themisburg Regional Court (including Jana G.) and that of the High Court.

#### **A) On the role of the Prosecutor General**

In the Kingdom of H., the Prosecutor General is the Minister of Justice. He has numerous powers in relation to the appointment and dismissal of judges as well as procedural capacity, such as the power to appeal a judge's decision to request a preliminary ruling to the ECJ.

Regarding the Prosecutor General's appeal to Judge Arno V.'s reference to the ECJ, it must be stressed that such a power, given to a political authority, endangers the effectiveness of the consultative advice given by Luxembourg Court. Indeed, the whole purpose of the preliminary ruling of the ECJ is to instaurate a dialogue between judges as regard to the increasing

connexion between judicial systems. Therefore, the illegitimate interference of political power weakens the ability of national judges to correctively implement European law, as requested by the principle of primary application (*Costa v. Enel*, C6/64).

Such a concentration of powers in the hands of the Minister of Justice is contrary to the principle of the separation of powers. It endangers the independence of the judiciary. In the particular case of Mr K., it threatens his right to a fair trial.

## **B) On the independence of the first instance judges**

### 1) Regarding Judge Arno V.

Judge Arno V. decided to refer a preliminary question to the ECJ in Franz K's case. He notably questioned the independence of the High Court. Later on, he refused to withdraw the reference at the request of the President of his Court. The Minister of Justice informed the High Justice Inspector of this preliminary question and disciplinary proceedings were engaged against Arno V. The President of his Court, Jana G., also suspended him for one month based on a legal provision used "*in extraordinary circumstances when the image of the judiciary might be irreversibly damaged*".

Disciplinary proceedings must prevent the intervention of external powers into judicial decisions (*Minister of Justice and Equality C-216/18*). The transmission of a preliminary question to the ECJ has been appreciated as a judicial decision (see *Advocate General Bot, para 83, Case C614-14*). Thus, the disciplinary proceedings against Arno V. due to his transmission of a question to the ECJ could be ruled as a violation of Article 6 of the ECHR and Article 47 of the EU Charter.

In *Commission against Poland*, the ECJ dealt with a similar issue. After the Regional Court of Warsaw, in Joined Cases C-748/19 to C-754/19, submitted requests for a preliminary ruling to ECJ concerning the requirements to be met regarding the independence of the panel on which a judge seconded to that court on a decision of the Minister for Justice was sitting, inquiries were carried out to determine whether the conduct of the judge chairing that panel, who had made those requests, could constitute a disciplinary offence.

The Court concluded that, by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the ECJ to be restricted by the possibility of triggering disciplinary proceedings, Poland had failed to fulfil its obligations under Article 267 TFEU.

Indeed, it must be highlighted that the triggering of disciplinary proceedings jeopardizes the principle of primacy of EU law and the effectiveness of the preliminary question mechanism.

By questioning the independence of the High Court, Arno V. applied European law to Franz K's case. Indeed, the ECJ has ruled that the right to an effective remedy, enshrined in Article 47 of the EU Charter and reaffirmed, in a specific field, by Directive 2000/78/1 precludes cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal (*AK v. Krajowa Rada Sądownictwa C-585/18, C-624/18 & C-625/18*) As a national judge, Arno V. was entitled to call into question the independence of the High Court in a case whereby European law was applicable.

## 2) Regarding Judge Gregory B.

The President of the Court transferred Gregory B from his chamber to the case of Franz K. without his consent. Here, we must question whether Gregory B fulfils the criteria of independence in light of his appointment and permeability to political pressure.

In *Gudmundur v. Iceland*, the ECtHR developed a three-step test in order to evaluate the existence of a violation of Article 6 of the ECHR when a judge is appointed in breach of domestic law.

In Franz K's case, the regularity of the appointment of Gregory B. may be called into question. Indeed, he did appeal the decision of Jana G. to transfer him from a civil chamber to the criminal chamber. Furthermore, Jana G. herself was appointed irregularly according to domestic law (see development hereafter). It follows that if Jana G. herself was not independent, then Gregory B. could not give the appearance of independence. Indeed, in the case *Reczkowicz against Poland (n°43447/19)*, the tribunal adjudicating on the claimant's case was ruled to be dependent because it was appointed by the judicial council which itself was not independent.



Gregory B.'s appointment is at the very least contested through appeal and the irregularity of Jana G.'s appointment trickles down to his own regularity. It therefore follows that we can deem his appointment as irregular.

Thus, we must assess whether the breach of domestic law pertained to a fundamental rule of the procedure for appointing judges, that is to say if the breach undermines the very essence of the right to a tribunal established by law.

In Franz K's case, Gregory B. was appointed even though he had been a judge adjudicating civil cases for eighteen years. Legitimate concerns may arise as to his competence, which is a requirement of a tribunal established by law. Indeed, technical competency of a judicial body is vital to deliver justice as a "tribunal".

Furthermore, his independence is greatly threatened due to the interference of the Minister of Justice in the case. The latter expressed his opinion publicly on the judicial decision of Arno V. and disciplinary proceedings were engaged against Arno V.

As such, the attitude and decisions of Gregory B. could be influenced by fear of disciplinary sanctions if he departs from the opinion of the Minister of Justice. Frank K would not be guaranteed an independent and impartial tribunal.

### **C) On the independence of the presidents of the Court**

#### **1) Removal of the President of the Court**

The President of the Court in Themisburg was removed by the Minister of Justice, according to a law that allows this to be done in cases of gross negligence of duties, thus prematurely terminating his four-year mandate. The decision was not appealable and no reasoning was given. The Minister of Justice stated to the press that the court's lack of action to prevent the decision of referral to the ECJ was disappointing.

Both the ECtHR and the ECJ have ruled that the removal of a judge by a member of the executive branch without proper motivation breaches Article 6 of the Convention and Article 47 of the Charter of the EU (*Broda and Bodara v. Poland* ; *Commission v. Poland C619/18*). Very similarly to *Broda and Bodara v. Poland*, the Themisburg judge did not have any remedy to challenge the decision of the Minister of Justice. The conditions in which he could be removed, "gross negligence of duties", were not specific enough and the Judicial Council was

excluded from the process. The dismissal procedure was not examined by a court and there were no fair trial guarantees in the disciplinary proceedings (*Olújić v. Croatia*, n°22330/05). It thus violates Article 6 of the Convention.

## 2) Secondment of Jana G. as President of the Court

Judge Jana G. ordered Judge Arno V. to withdraw the request for a preliminary ruling in Frank K's case. He refused, as he considered that she was unlawfully seconded and had no power to order him to revoke his judicial decision.

According to domestic law, she could be seconded for a period of two years or for an unspecified period of time. However, the Minister of Justice seconded her for four years, hence appointing her in breach of domestic law. This irregularity in itself does not threaten the essence of fair trial guarantees. However, taken with the fact that the term of office may be terminated by the Minister of Justice without any motive and that there is no right to appeal this decision, it follows that the seconded judge is de facto under the influence of the executive power.

Thus, the president of the court was manifestly not independent, which had a negative effect on the reasoning of the first instance judge due to the former's injunctions.

## D) On the independence of the High Court

The High Court is meant to appreciate the case of Franz K through the appeal formed by the Prosecutor General. Judge Arno V. did also raise the issue of its independence in his preliminary question, stressing that the 9 members of the new extraordinary chambers were directly appointed by the legislative.

The Court will therefore assess the respect of these nomination dispositions of judicial independence and of the principle of separation of powers.

In the precedent case *AK v. Krajowa Rada Sądownictwa*, the Court of Justice stated that a tribunal is not independent when “*the objective circumstances in which such a court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it*”

In Mister Franz K's case, the composition of the judicial council solely depends on the legislative power, regardless of the imperative of professional capacity and independence which is inherent to the very definition of a tribunal according to ECtHR law (*Gudmundur v. Iceland*). The court has indeed no means to verify the professional qualification and integrity of the personality composing the exceptional chamber, despite the requirement of international standards such as the UN basic principles on the Independence of the judiciary, giving rise to reasonable doubts on their actual independence.

Moreover, the appointment method of the members of the extraordinary chamber is creating a precedent to the influence of the legislative, as the judicial council cannot be considered independent from political power. Indeed, the composition of this judicial council does not follow international recommendations on independence. As an example, Article 2 and 3 of the Universal Charter of the Judge sets that the judicial councils must provide room for both representatives of the judiciary and of the civil society but exclude members of the other powers. Therefore, the Court can conclude that there is a legitimate doubt as to the ability of the members of the exceptional chamber, directly nominated by the Judicial council, to be independent from the legislative power.

### **Conclusive statement**

The Court's reasoning shall scrutinize both the individual and systemic aspects of Mister K's case.

Indeed, the assessment of Mister K's specific substantial rights within the criminal procedure is determinant to evaluate the compatibility of the Kingdom of H.'s criminal law practices with European standards. Nevertheless, these rights can only be fully comprehended through an examination of the global structure of the judiciary which frame Mister K's concrete access to Justice.

Through its examination, the Court must find that the Kingdom of H's has failed to preserve Mister K's right to fair trial. In that sense, it must be reaffirmed that independence, impartiality and competency of judges represent democratic imperatives, which are crucial to preserve. As it stands now, the judicial system of the kingdom of H does not appear solid enough to provide guarantees against a Police State threatening democracy.