JUDGMENT OF THE COURT (Fifth Chamber)

5 February 2004 *

In Case C-380/01,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Gustav Schneider

and

Bundesminister für Justiz,

on the interpretation 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 (OJ 1976 L 39, p. 40),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: P. Jann, acting for the President of the Fifth Chamber, C.W.A. Timmermans (Rapporteur) and A. Rosas, Judges,

Advocate General: S. Alber,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Bundesminister für Justiz, by C. Kren, acting as Agent,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Commission of the European Communities, by J. Sack and N. Yerrel, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Schneider, represented by P. Ringhofer, Rechtsanwalt, the Austrian Government, represented by H. Dossi, and the Commission, represented by J. Sack and N. Yerrel at the hearing on 23 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 10 December 2002,

gives the following

Judgment

1 By order of 13 September 2001, received at the Court on 4 October following, the Verwaltungsgerichtshof referred to the Court for a preliminary ruling under Article 234 EC a question 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 (OJ 1976 L 39, p. 40).

2 The question was raised in proceedings between Mr Schneider and the Bundesminister für Justiz concerning the latter's rejection of his claim for compensation for harm allegedly suffered by him because he was not appointed judge of the Oberlandesgericht Wien (Austria).

Legal background

Community law

3 Article 1(1) of Directive 76/207 provides:

'The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards 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. This principle is hereinafter referred to as "the principle of equal treatment".'

4 Article 6 of Directive 76/207 reads as follows:

'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.'

National law

5 In Austria a general claim for compensation may be brought against the State on the basis of Paragraph 1(1) of the Amtshaftungsgesetz ('Government Liability Act', hereinafter 'the AHG'). Such a claim for compensation against the State must be brought before the civil courts.

6 Paragraph 15 of the Bundes-Gleichbehandlungsgesetz (Federal law on equal treatment, BGBl. I, 1993/100, hereinafter 'the B-GBG') provides that when a male or female civil servant is refused an appointment as a result of the State's violating the principle of equal treatment as required by Paragraph 3(5) of the B-GBG, the State shall be liable to compensate for the harm suffered. The latter

provision prohibits all discrimination in career advancement, in particular in cases of promotion and appointment to better-paying positions.

7 Under Paragraph 19(2) of the B-GBG, the civil servants concerned must exercise their rights under Paragraph 15 of that law within six months by bringing a claim against the State before the relevant authority. The decision given may be challenged before the Verwaltungsgerichtshof, which is an administrative court, under the procedure provided for by Paragraph 130 of the BundesVerfassungsgesetz (Federal constitutional law).

Main proceedings and questions referred for a preliminary ruling

8 Mr Schneider, born in 1953, is a judge of the Arbeits- und Sozialgericht Wien (Austria). In 1997 and 1998 he twice applied for a specialised post corresponding to his qualifications with the Oberlandesgericht Wien. Both times preference was given to a younger female candidate with less seniority on the grounds that the quota earmarked for women's career advancement had not been filled.

9 Following those decisions, Mr Schneider brought a claim for compensation against the State on the basis of the AHG before the Landesgericht für Zivilrechtsachen Wien in order to obtain compensation for the harm he claims to have suffered. He argued that, in the promotion decisions, account was not taken of reasons specific to him. After his claim was dismissed, he appealed to the Oberlandesgericht Wien, which in turn dismissed his appeal. Mr Schneider then appealed to the Oberster Gerichtshof for 'Revision' (judicial review). By decision of 30 January 2001, that court dismissed the appeal. Referring to the Court's case-law on the principle of equal treatment under Directive 76/207 (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), it held that, for want of a saving clause, the Austrian measure for women's career advancement was not compatible with Community law. It also held, however, 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, should have been taken into account.

10 In addition, by letter of 11 January 1999, Mr Schneider submitted a claim to the Bundesminister für Justiz for compensation for harm allegedly suffered by him due to his not being appointed judge of the Oberlandesgericht Wien following his application of 14 April 1998. That claim, submitted on the basis of the B-GBG, was dismissed by that minister.

11 Mr Schneider challenged that decision before the Verwaltungsgerichtshof. He argued inter alia that it was unlawful because the law in question obliged the injured party to claim compensation for harm from the authority which had caused it. He also argued that the judicial review of such a decision carried out by the Verwaltungsgerichtshof, acting as a court of appeal, did not adequately satisfy the requirements of effective judicial protection. He argued that that court had no right to 'review the assessment of the evidence', so that questions of fact fell definitively within the competence of the administrative authority.

12 In the order for reference, the Verwaltungsgerichtshof states that the action brought before it is, by its very nature, an appeal. As an appeal court, it can carry out only a limited review of the facts. In that context, and in light of the Court's case-law, it considers that it is at the very least doubtful whether the judicial protection provided in this case by the Verwaltungsgerichtshof alone satisfies the legal requirements of Community law as laid down in Article 6 of Directive 76/207.

13 That being so, taking the view that a decision on that point was necessary for resolving the dispute pending before it, the Verwaltungsgerichtshof decided to stay proceedings and to refer the following question to the Court:

'Is Article 6 of Council Directive 76/207... 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 (Administrative Court) 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 Subsequent to the Advocate General's Opinion, the Verwaltungsgerichtshof sent the Court an order issued by it on 26 March 2003 and in which it comments on the relationship between the procedure for a claim for compensation pursuant to Paragraph 15(1) of the B-GBG and the one for a civil claim for compensation under Paragraph 1(1) of the AHG.

Admissibility of the question referred for a preliminary ruling

15 In response to a written question from the Court on the relationship between the two sets of proceedings brought by Mr Schneider, one before the Landesgericht für Zivilrechtsachen Wien and the other before the Verwaltungsgerichtshof, the Austrian Government states that a claim for compensation against the State before the civil courts cannot exclude or limit an administrative action for compensation against the State based on the provisions of the B-GBG. It states that, conversely, if an applicant relies before an administrative court on the rights

it derives from a violation of the provisions of the B-GBG, the civil courts, by virtue of their general powers, retain jurisdiction to rule on disputes involving State liability. Accordingly, actions such as those in the main proceedings here can, in Austria, be brought before both the civil and the administrative courts.

16 The Austrian Government adds that *res judicata* in civil proceedings does not in principle bind the administrative courts and vice versa. Since decisions of civil and administrative courts have different subject-matters, a decision that a right relied on before a civil court is held to be unfounded cannot bind the administrative court in its assessment as to whether the allegations made before it are well founded.

17 Moreover, that response from the Austrian Government shows that Mr Schneider brought a claim for compensation against the State under the AHG alleging inadequate transposition of Article 2(4) of Directive 76/207 and that the civil courts which successively heard the case dismissed Mr Schneider's action on the grounds that there was no direct link between the alleged violation of Community law, namely the lack of a saving clause, and the alleged harm.

18 The Commission of the European Communities observes, as a preliminary point, that in so far as the claims for compensation brought against the State by Mr Schneider before the Landesgericht für Zivilrechtsachen Wien and the Oberlandesgericht Wien provided the opportunity for a comprehensive factual and legal review of the Bundesminister für Justiz's decision at issue in the main proceedings, the restrictions involved in the parallel administrative proceedings seem to be of no import. Provided the proceedings before the civil courts comply with the requirements of Article 6 of Directive 76/207, the main proceedings satisfy the requirements of Community law governing the matter and the

question referred for a preliminary ruling thereby becomes inadmissible. Although the proceedings before the civil and administrative courts in question here are different and based on different pieces of legislation, proceedings commenced with a view to obtaining compensation do in fact pursue the same objective as proceedings brought before an administrative court.

19 Having regard to the order of 26 March 2003 of the Verwaltungsgerichtshof, which arrived at the Court after the Opinion of the Advocate General, the Court observes, as a first point, that the oral procedure before it was closed after that opinion. Under its Rules of Procedure, however, the Court could have decided to re-open the oral procedure and to forward that order to the parties to the main proceedings and other parties concerned to the preliminary ruling proceedings in order to allow them to submit their observations. In this case, the Court found that there was no need to re-open the oral procedure and so informed the national court, the parties to the main proceedings, the Member States and the institutions which had submitted observations.

20 As regards the question referred for a preliminary ruling, it must be observed that the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them (see Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22; Case C-378/93 *La Pyramide* [1994] ECR I-3999, paragraph 10; and Case C-361/97 *Nour* [1998] ECR I-3101, paragraph 10).

21 In the context of that cooperation, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to

deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18).

22 However, the Court has also held that in exceptional circumstances it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *PreussenElektra*, cited above, paragraph 39, and *Canal Satélite Digital*, cited above, paragraph 19).

23 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 (*Meilicke*, cited above, paragraph 25, and the case-law cited therein).

24 It should be observed that Article 6 of Directive 76/207, which enables all persons who consider themselves wronged by failure to apply to them the principle of equal treatment to pursue their claims by judicial process, does not specify the nature of the court to which the Member States must entrust that task. So long as persons who consider themselves wronged by failure to apply the principle of

equal treatment to them are able to pursue their claims effectively before a competent court, the requirements of Article 6 are satisfied.

25 Directive 76/207 was transposed into Austrian law by the B-GBG, the application of which may be challenged before an administrative authority and then before an administrative court.

26 However, as evidenced by the case-file submitted to the Court, in Austria there is also the possibility of bringing a general claim before the civil courts for compensation against the State based on Paragraph 1(1) of the AHG with a view to obtaining compensation for harm suffered as a result of a decision found to be unlawful having regard to the principle of equal treatment for men and women in the promotion of civil servants and magistrates.

27 Thus, as pointed out by the Advocate General in paragraph 35 of his Opinion, through the general State liability provisions, the application of which is subject to three levels of judicial review of the facts and the law, the Austrian legal order offers individuals a means by which they may pursue a claim concerning failure to apply the principle of equal treatment to them.

28 Such a judicial process undeniably satisfies the requirement of adequate and effective judicial protection as contemplated in Article 6 of Directive 76/207.

29 In the main proceedings, moreover, Mr Schneider brought proceedings before the Landesgericht Wien and the Oberlandesgericht Wien, as well as before the Oberster Gerichtshof, in order to obtain compensation for the harm he allegedly suffered as a result of the violation of the principle of equal treatment for men and women occasioned by the decision dismissing his claim.

30 Accordingly, in a judicial system such as that at issue in the main proceedings, the requirements of Article 6 of Directive 76/207 are fully satisfied by the judicial processes for State liability available before the civil courts under the general provisions such as those of the AHG, on which Mr Schneider has relied.

31 That being so, the question whether the proceedings before the administrative court satisfy the requirements of Article 6 of Directive 76/207 is not relevant for resolving the main dispute, so that the question referred for a preliminary ruling is hypothetical. Accordingly, as evidenced by paragraphs 22 and 23 of this judgment, the Court does not have jurisdiction to answer such a question.

32 In light of all of the foregoing considerations, the Court finds that the question referred for a preliminary ruling is inadmissible.

Costs

33 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these

proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Verwaltungsgerichtshof (Austria) by decision received at the Court on 4 October 2001, hereby rules:

The reference for a preliminary ruling submitted by the Verwaltungsgerichtshof by order of 13 September 2001 is inadmissible.

Jann Timmermans Rosas

Delivered in open court in Luxembourg on 5 February 2004.

R. Grass V. Skouris

Registrar President