

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 10 July 2008¹

I — Introduction

respect to framework decisions are laid down in Article 35(2) and (3) EU:

1. The present proceedings once again² concern the interpretation of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.³ Clarification is required as to whether the Framework Decision requires that victims of crime must be able to be heard as witnesses in criminal proceedings in which they fulfil the role of prosecutor.

‘2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.

II — Legal framework

3. A Member State making a declaration pursuant to paragraph 2 shall specify that either:

A — *European Union law*

2. The rules concerning the jurisdiction of the Court to give preliminary rulings with

(a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment; or

¹ — Original language: German.

² — See Case C-105/03 *Pupino* [2005] ECR I-5285 and Case C-467/05 *Dell’Orto* [2007] ECR I-5557.

³ — OJ 2001 L 82, p. 1.

(b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.’

3. The aims of Framework Decision 2001/220 are set out above all in recital 8 of its preamble:

‘The rules and practices as regards the standing and main rights of victims need to be approximated, with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be understood, the right to be protected at the various stages of procedure and the right to have allowance made for the disadvantage of living in a different Member State from the one in which the crime was committed.’

4. Article 2(1) describes in general terms how the interests of victims are to be taken into consideration in criminal proceedings:

legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.’

5. The hearing of victims of crime and the provision of evidence by them are covered, in particular, by Article 3:

‘Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.

Each Member State shall take appropriate measures to ensure that its authorities question victims only in so far as necessary for the purpose of criminal proceedings.’

B — *Hungarian law*

‘Each Member State shall ensure that victims have a real and appropriate role in its criminal

6. Under Hungarian law on criminal procedure, victims of crime may, in certain

situations, bring a substitute private prosecution in lieu of the public prosecutor. The party bringing the substitute private prosecution is to exercise in the judicial proceedings the rights of the public prosecutor, save where otherwise provided. In comparison with the powers of the public prosecutor, the powers of the party bringing a substitute private prosecution are limited in so far as he may not propose that the accused be deprived of parental authority, he cannot have access to confidential documents which are separated from the file, and he cannot extend the charge.

7. Further, it is expressly provided that anyone taking part or having taken part in a criminal case as a witness cannot act as public prosecutor.

III — Main proceedings and reference for a preliminary ruling

8. In the main proceedings, György Katz brought a substitute private prosecution against István Roland Sós. Mr Katz accused Mr Sós of defrauding him, thereby causing him particularly serious harm.

9. Mr Katz applied to be heard as a witness. The referring court refused this application. It decided that, as a public prosecutor may not appear as a witness, the same must apply to a party bringing a substitute private prosecution.

10. The referring court doubts, however, whether that is compatible with Framework Decision 2001/220. It has, therefore, by decision of 6 July 2007, referred the following question to the Court for a preliminary ruling:

‘Must Articles 2 and 3 of Council Framework Decision 2001/220 of 15 March 2001 on the standing of victims in criminal proceedings be interpreted as meaning that the national court must be guaranteed the possibility of hearing the victim as a witness also in criminal proceedings which have been instituted by him as a substitute private prosecution?’

11. Written observations were submitted by Mr Katz, the Republic of Austria, the Republic of Hungary and the Commission. The Republic of Hungary and the Commission took part in the hearing of 19 June 2008.

IV — Legal assessment

A — Admissibility of the reference for a preliminary ruling

12. The reference for a preliminary ruling expressly relates exclusively to the question whether a national court must be guaranteed the possibility of hearing the victim as a witness also in criminal proceedings instituted by him as a substitute private prosecution.

14. As the present case concerns the interpretation of a framework decision under Article 34(2)(b) EU, the system under Article 234 EC applies to the jurisdiction of the Court to give preliminary rulings by virtue of Article 35 EU, subject to the conditions laid down by the latter provision.⁴

13. Framework Decision 2001/220 only deals indirectly with this question, as it concerns the rights of victims of crime, and not the powers of the court. If, however, victims have the right to be heard as witnesses under the Framework Decision, then the national court must logically, in accordance with the question referred, be guaranteed the possibility of hearing the victim as a witness. Taking the Framework Decision into consideration, and in order to provide the national court with an answer, the question referred is therefore to be reformulated as follows:

15. As a consequence, the Court can answer the question only if Hungary has, in accordance with Article 35(2) EU, accepted by way of a declaration its jurisdiction to give preliminary rulings. Such a declaration exists.

‘Must Articles 2 and 3 of Framework Decision 2001/220 on the standing of victims in criminal proceedings be interpreted as meaning that a victim must have the possibility of contributing evidence as a witness in proceedings which have been instituted by him as a substitute private prosecution?’

16. It is, nevertheless, open to question whether the referring court is entitled to make the reference. Conflicting notices have in fact been published in the *Official Journal of the European Union* concerning the right of national courts to make references: it was at first communicated that Hungary had accepted the jurisdiction of the Court

⁴ — See *Pupino* (cited in footnote 2), paragraph 19, and *Dell’Orto* (cited in footnote 2), paragraph 33. See also Case C-354/04 P *Gestoras Pro Amnistia and Others v Council* [2007] ECR I-1579, paragraph 54, and Case C-355/04 P *Segi and Others v Council* [2007] ECR I-1657, paragraph 54.

in accordance with Article 35(3)(a) EU.⁵ Accordingly, only courts ruling at last instance would have been entitled to make references. After the present reference for a preliminary ruling was lodged with the Court, it was communicated that Hungary had ‘withdrawn’ this first declaration and instead declared its acceptance of the Court’s jurisdiction in accordance with Article 35(3)(b) EU. Accordingly, all national courts may make references for preliminary rulings concerning European Union law.⁶

respect to the references of certain courts. On the contrary, the Member States specify⁷ which courts may make references. The ‘specification’ need not be connected with the declaration accepting the jurisdiction of the Court of Justice. The actual regulation of entitlement to make references may instead be by way of a separate internal legislative act.

17. There is no information as to whether the Fővárosi Bíróság is a court of last instance in the present case. It therefore seems possible, according to the communications in the Official Journal, that, at the time of the reference, the court lacked jurisdiction to refer questions concerning European Union law to the Court of Justice.

19. At least in the present case, the entitlement to make references was specified correctly only by the Hungarian Decision (Kormányhatározat) 2088/2003. This expressly accepts the jurisdiction of the Court under Article 35(3)(b) EU. This Hungarian decision already existed at the time of the reference for a preliminary ruling, and the referring court and the Hungarian Government correctly found the jurisdiction of the Court upon it.

18. Under Article 35(3) EU, the details provided by the Member States concerning courts entitled to make references do not, however, necessarily confer jurisdiction, but may also be simply declaratory. Contrary to what may be assumed from the wording of the communications in the Official Journal concerning acceptance of jurisdiction, the Member States do not recognise the jurisdiction of the Court of Justice under Article 35(3)(a) or (b) EU, that is to say, with

20. The original communication in the Official Journal was, consequently, incorrect, and was corrected by the later communication concerning Hungarian acceptance of the Court’s jurisdiction. It should, moreover, be noted that, at the time of the Court’s judgment at any rate, its jurisdiction will not be in doubt.

5 — OJ 2005 L 327, p. 19.

6 — OJ 2008 L 70, p. 23.

7 — French: ‘indiquer’; German: ‘bestimmen’.

21. The Court, therefore, has jurisdiction to answer the question referred for a preliminary ruling.

22. Hungary is, nevertheless, of the opinion that the reference for a preliminary ruling is inadmissible, due to its hypothetical nature. It states that the referring court's doubts concerning the possibility for the party bringing a substitute private prosecution to be heard as a witness in criminal proceedings are based on an incorrect interpretation of Hungarian law and that, according to a commentary on criminal procedural law and an opinion of the Supreme Court,⁸ a party bringing a substitute private prosecution may, under Hungarian criminal procedural law, appear as a witness.

23. It is, however, in principle to be presumed that questions referred by national courts for a preliminary ruling are relevant to the decision.⁹ It is only in exceptional circumstances that the Court examines the conditions in which a case was referred to it by a national court, in order to assess whether it has jurisdiction.¹⁰ According to established case-law, the Court may refuse to rule on a question referred 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.¹¹ Save for such cases, the Court is in principle bound to give a preliminary ruling on questions concerning the interpretation of Community law.¹²

24. The Hungarian Government presents strong circumstantial evidence to the effect that the question referred for a preliminary ruling requires no further clarification under Hungarian law. However, the reference for a preliminary ruling and the refusal to date to hear Mr Katz as a witness demonstrate that at least the referring court interprets Hungarian law differently, presumably even despite being aware of the opinion of the Supreme Court.

25. It is not the Court's role, when assessing the admissibility of a reference for a preliminary ruling, to correct a national court's interpretation of national law.¹³ The Court

8 — Opinion 4/2007 of 4 May 2007.

9 — Case C-355/97 *Beck and Bergdorf* [1999] ECR 4977, paragraph 22; *Pupino* (cited in footnote 2), paragraph 30; Joined Cases C-202/04 and C-94/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25; Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 29; and Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraph 30.

10 — Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 27.

11 — See, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 24; and *Commune de Mesquer* (cited in footnote 9), paragraph 30.

12 — See *Bosman* (cited in footnote 11), paragraph 59, and *IATA and ELFAA* (cited in footnote 11), paragraph 24.

13 — See Case 16/83 *Prantl* [1984] ECR 1299, paragraph 10; Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* [1984] ECR 3435, paragraph 10; Case C-347/89 *Eurim-Pharm* [1991] ECR I-1747, paragraph 16; Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 20; and Case C-244/06 *Dynamic Medien* [2008] ECR I-505, paragraph 19.

should rather assist the referring court to overcome doubts concerning the interpretation of Community and Union law.

Court of Justice. Since the right to determine the questions to be brought before the Court devolves upon the national court alone, the parties may not change the tenor of the questions.¹⁵

26. Consequently, the question referred for a preliminary ruling is not clearly hypothetical.

29. Consequently, the referring court's question is to be answered.

27. Finally, Mr Katz suggests that the reference for a preliminary ruling should be widely construed and it should be examined whether Framework Decision 2001/220 requires certain investigative powers of the prosecuting authority to be vested in the party bringing a substitute private prosecution.

B — *Question referred*

30. The reference for a preliminary ruling concerns Hungarian procedures with respect to substitute private prosecutions, that is to say, the status of victims of a crime where they themselves, in the course of criminal proceedings relating to the crime, exercise the function of prosecutor in lieu of a public prosecutor.

28. However, Article 234 EC establishes direct cooperation between the Court of Justice and the national courts by way of a non-contentious procedure excluding any initiative of the parties, who are merely invited to be heard in the course of that procedure.¹⁴ Under Article 234 EC it is for the national court, and not the parties to the main action, to bring a matter before the

31. Criminal proceedings in the Member States are, in general, brought by

¹⁴ — This is illustrated by Case C-2/06 *Kempter* [2008] ECR I-411, paragraphs 41 and 42.

¹⁵ — Case 44/65 *Singer* [1965] ECR 965, 970; Case C-381/89 *Sindesmos Melon tis Eleftheras Evangelikis Ekklesias and Others* [1992] ECR I-2111, paragraph 19; Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraph 23; Case C-402/98 *ATB and Others* [2000] ECR I-5501, paragraph 29; and Joined Cases C-376/05 and C-377/05 *Brünsteiner und Autohaus Hilgert* [2006] ECR I-11383, paragraph 28.

public prosecutors. In exceptional cases, however, private parties, generally the victims of crimes, may bring a criminal prosecution before a court in lieu of the public prosecutor and exercise the function of the public prosecutor during the criminal proceedings. This procedure raises the question to what extent rules governing public prosecutors are also applicable to parties bringing a private prosecution. This relates both to the powers of the prosecutor and to any limitations on them.

32. The present case concerns the possibility of being heard as a witness. In principle, the hearing of a person as a witness in his own case is problematic due to potential conflicts of interest. On the other hand, the victim's evidence can significantly contribute to proving the guilt of the perpetrator, and thus to reaching a fair and correct judgment.

33. Framework Decision 2001/220 does not contain any special rules concerning the rights of victims where they bring a prosecution themselves. Nevertheless, the general rules on the rights of victims show that victims must always have the opportunity to provide evidence by means of testimony in criminal proceedings.

34. This follows, in particular, from the first paragraph of Article 3 of Framework Decision 2001/220, under which the Member States are to safeguard the possibility for victims to be heard during proceedings and to supply evidence.

35. The Austrian Government admittedly emphasises that testimony of the victim is not expressly mentioned. However, the element of testimony is implicitly contained in the formulation 'to be heard'. Furthermore, victims' testimony is in many cases the most important evidence they can supply. As the Commission emphasises, to exclude the victim's testimony as evidence would render the right to be safeguarded under the first paragraph of Article 3 of Framework Decision 2001/220 largely meaningless.

36. To undermine the rights of victims in such a way would be incompatible with the aims of Framework Decision 2001/220. According to recital 8, victims should, *inter alia*, obtain the right to provide information. In general, under Article 2(1), the Member States are to ensure that victims have a real and appropriate role in their criminal legal systems. They are to recognise,

under the same provision, the rights and legitimate interests of victims with particular reference to criminal proceedings.

deprived of important evidence. The referring court and the Commission are, therefore, justified in their concerns that it would be difficult, if not impossible, to succeed with a private prosecution if the prosecuting victim were not able to give testimony.

37. At least where victims wish to give testimony, it is fundamentally consistent with their legitimate interests to allow them to do so. With respect to the Austrian Government's reference to the fact that testimony could also represent a burden for the victim, this is not relevant to the present case. As indeed the Commission also makes clear, the issue to be decided here is not whether victims can be forced to give testimony against their will.

40. The Commission is, therefore, of the opinion that the victim must be able to give testimony as a witness also when bringing the prosecution. This cannot, however, be inferred from Framework Decision 2001/220. The term 'witness' is not used in paragraph 1 of Article 3. Rather, the victim has the right to be heard and to supply evidence.

38. There also seems to be nothing to indicate that the rights of victims should not be applicable to criminal proceedings in which they bring the prosecution. Framework Decision 2001/220 does not contain any limitations in this respect.

41. Framework Decision 2001/220 shows that the legislator was aware of the distinction between the role of the victim as witness and as a party. It is expressly stated in Articles 5 and 7 that victims can participate in criminal proceedings as witnesses or as parties.

39. On the contrary, it is specifically victims bringing prosecutions who deserve special protection. They generally exercise this function precisely because the public prosecutors refuse to bring a prosecution. In such a situation, a prohibition of testimony would amount to an additional disadvantage: victims would have to conduct the proceedings alone, without the support of a public prosecutor, and would, at the same time, be

42. Consequently, it is not necessary that victims bringing a prosecution receive the status of witnesses if the applicable national law governing criminal procedure nevertheless grants them the possibility of being heard before the court, and this testimony constitutes admissible evidence. This seems, according to a study carried out by the

Court's research department, to correspond with the procedures in many Member States regarding this situation: victims who bring prosecutions may contribute evidence by way of testimony without being entirely equated with witnesses. In particular, testimony under oath is often precluded.

43. Such individualised consideration of the testimony of victims bringing prosecutions takes the difficulty of their role into account. Even irrespective of the role as prosecutor, the victim's interest in the outcome of the proceedings is clear. Where the victim also assumes the role of prosecutor, it becomes all the more difficult to ensure the objectivity which is essential for a good witness. Therefore, the value of a victim's testimony cannot be regarded as solid and irrefutable. On the contrary, courts must assess the testimony of victims particularly carefully in every case, thereby taking the individual situation of the victim fully into consideration.

44. It should, in addition, be emphasised that giving effect to the position of victims bringing prosecutions should not entail any kind of diminution of the rights of the defence. These rights derive from the right to a fair trial, which is enshrined in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR') and recognised by Articles 47 and 48

of the Charter of Fundamental Rights of the European Union,¹⁶ proclaimed in Nice on 7 December 2000. The rights of the defence, therefore, constitute a fundamental right forming part of the general principles of law whose observance the Court ensures.¹⁷ The Framework Decision is, consequently, to be interpreted in such a way as to respect Article 6 of the ECHR, as interpreted by the European Court of Human Rights.¹⁸

45. Under Article 6(3)(d) of the ECHR, the defendant has, in particular, the right to examine or have examined witnesses against him. This applies also to the testimony of the victim of the crime, even where the victim brings the prosecution. The principle of equality of arms between the prosecution and the defendant may not be prejudiced.

46. The Member States have the obligation to give effect to these requirements in their law governing criminal procedure. Inasmuch as this has not been carried out with the necessary clarity, the national courts are obliged to strive to interpret the procedural law in conformity with the Framework Decision.¹⁹

16 — OJ 2000 C 364, p. 1, as amended by the proclamation of 12 December 2007, OJ 2007 C 303, p. 1.

17 — Case C-283/05 *ASML* [2006] ECR I-12041, paragraph 27, and Case C-14/07 *Weiss und Partner* [2008] ECR I-3367, paragraph 47.

18 — *Pupino* (cited in footnote 2), paragraph 59.

19 — *Pupino* (cited in footnote 2), paragraph 34.

V — Conclusion

47. I therefore propose that the reply to the question referred for a preliminary ruling should be as follows:

Under the first paragraph of Article 3 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, victims of crimes who act as prosecutor in lieu of a public prosecutor in the resulting criminal proceedings must have the possibility of contributing evidence in the proceedings by giving testimony. Such victims need not, however, be afforded the status of witnesses if the applicable national law governing criminal procedure nevertheless grants them the possibility of being heard before the court and that testimony constitutes admissible evidence.