



**CIVIL COURT FIRST HALL
(CONSTITUTIONAL JURISDICTION)**

**THE HON. MR. JUSTICE
JOSEPH ZAMMIT MCKEON**

Sitting of Thursday 15 December 2016

**Case no. 2
Application No. 19/13 JZM**

- 1. Patricia Graham
British Passport 707260831**
- 2. James Parsons
Irish PT3712106**
- 3. Richard Cooper
British Passport 801299620**
- 4. Johanna Van`T Verlatt
Dutch Passport NS 5CH9JK7**
- 5. Nigel Hall
British Passport 703242974**
- 6. Margaret Alder
British Passport 761077078**
- 7. Julia Partridge
British Passport 800978954**
- 8. David Pike
British Passport 108200710**
- 9. Bryan Douglas
Irish PC1316947**
- 10. John Wilks
British Passport 205468746**

- 11. Brian Bush
British Passport 029729096**
- 12. John Besford
British Passport 093163442**
- 13. Peter Sellers
British Passport 706199934**
- 14. Elana Bianchi
Italian Passport Y406692**
- 15. Nuot Raschar
Swiss Passport F 2851139**
- 16. Kevin Bryant
British Passport 507014072**
- 17. Marie Poule Wagner
French Passport 12 AV215281**
- 18. Michael Murray
British Passport 706452911**
- 19. John Murgatroyd
British Passport 107244391**
- 20. Howard Hodgson
IPS 801292081**
- 21. Dr Robin Smith-Saville
British Passport 707472998**
- 22. Maria Wiborg
Sweedish Passport No. 34292287**
- 23. Anders Wiborg
Sweedish Passport No. 85599606**
- 24. Reginald Joseph Fitzpatrick
Maltese I.D. 0033588A**
- 25. George Thomas Goodall
Maltese I.D. 0028358A**

vs

- 1. The Attorney General**
- 2. The Minister of Finance, the Economy and Investment (as responsible for Enemalta Corporation and the Water Services Corporation)**
- 3. The Minister for Resources and Rural Affairs; and by the note of the 18th November 2014 the Minister for Energy and Health assumed the acts of this case instead of The Minister of Finance, the Economy and Investment and The Minister for Resources and Rural Affairs;**
- 4. The Malta Resources Authority**

5. Enemalta Corporation; and by decree given on the 20th January 2015 the name “Enemalta Corporation” was substituted by the name “Enemalta plc”
6. Water Services Corporation

The Court :

This is a decree regarding a request by claimants for this Court to seek a preliminary ruling from the European Court of Justice (ECJ).

I. Preliminaries

Having seen claimants` application of the 18 March 2015.

Having seen respondents` replies filed on the 30 March 2015 and 29 April 2015.

Having heard verbal submissions during the hearing that was held on the 25 May 2015.

Having seen its decree of the 25 May 2015.

Having taken note of claimants` position during the sitting of the 17 March 2016.

Having noted respondents` objections during the hearing of the 17 March 2016.

Having seen the other acts of the proceedings.

Having heard final verbal submissions during the hearing of the 29 September 2016.

Having seen its decree given during the same hearing where the matter was adjourned for today for this Court to give its ruling.

II. Considerations of this Court

Claimants state that the basis at law for their present application for a reference to the European Court of Justice (ECJ) lies in Art 267 of the Treaty on the Functioning of the European Union (TFEU).

1. General

The national court is responsible for protecting the rights that litigants derive from European Union (EU) law and is bound to apply EU law in its entirety, refusing to apply any provisions of domestic law that are in conflict (vide : **Case 33/76 – Rewe-Zentralfinanz – para 5 ; and Case 106/77 – Simmethal III – para 21)**)

When performing this task, the national court may cooperate with the European Court of Justice by using the preliminary ruling proceeding established in Article 267 of the TFEU.

Indeed the reference for a preliminary ruling is described as a fundamental mechanism of EU law aimed at enabling the courts and tribunals of the Member States to ensure uniform interpretation of that law within the EU.

Under Article 267 of TFEU, the ECJ has jurisdiction to give preliminary rulings on the interpretation of EU, and on the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.

Indeed any national court to which a dispute in which the application of a rule of EU law raises questions (original case) has been submitted can decide to refer to the ECJ to resolve these questions.

There are two types of reference for a preliminary ruling :

A reference for a ruling on the **interpretation** of the European instrument (primary law and secondary law) where the national judge requests the ECJ to clarify a point of interpretation of EU law in order to be able to apply it correctly ;

A reference for a preliminary ruling on the **validity** of a European instrument of secondary law where the national judge requests the ECJ to check the validity of an act of EU law.

2. Particular

In the present case, by means of their application, claimants are requesting this Court to make a reference to the ECJ for a ruling regarding **interpretation** of (i) Directive 2009/72/EC “Concerning Common Rules for the Internal Market in Electricity”; (ii) Directive 2006/123/EC “On Services in the Internal Market” ; and (iii) Articles 43 and 49 of the Treaty of the European Union (TEU).

3. The matter

By virtue of Art 267 of the TFEU, any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, **may** as a rule submit a request for a preliminary ruling to the ECJ on the interpretation of a rule of EU Law if it considers it necessary to do so in order to resolve the dispute brought before it.

Whether or not the parties to the proceedings have expressed themselves in favour or not, it is for the national court or tribunal **alone** to decide whether to refer a question to the ECJ for a preliminary ruling.

Indeed in **Case C-283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health** (1982) ECR 3415, the ECJ held that “*the mere fact that a party contends that the dispute gives rise to a question concerning interpretation of community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article (267) ...*”

However, courts or tribunals against whose decisions there is no judicial

remedy under national law **must** bring such a request before the ECJ, unless the Court has already ruled on the point (and there is no new context that raises any serious doubt as to whether that case-law may be applied in that instance), or unless the correct interpretation of the rule of law in question is obvious.

In this particular case, this Court is not a court of last instance and thus this court is not obliged by law to exercise the reference for a preliminary ruling, even if one of the parties requests it. It is up to this Court in its discretion to decide whether to refer questions to the ECJ for a preliminary ruling.

Moreover it is relevant to note that within the framework of this discretionary reference as stipulated in Art 267(2) of the TFEU, a national "court or tribunal" may ask the ECJ to give a preliminary ruling if it considers that a decision on the question is necessary to enable it to give judgement in a particular case.

In her presentation entitled **Preliminary reference proceedings**, Caroline Naômé lays emphasis on the fact that the national judge must consider that the question is necessary to enable it to give its judgment so as to refer to the ECJ for a preliminary ruling.

As explained by Lord Denning M.R. in the *English Champagne Case*¹ this means that *"the judge must have got to the stage when he says to himself: "This clause of the Treaty is capable of two or more meanings. If it means this, I give judgment for the plaintiff. If it means that, I give judgement for the defendant". In short, the point must be such that, whichever way the point is decided, it is conclusive of the case. Nothing more remains but to give judgement."*²

In the present case, this Court finds that claimants have not sufficiently specified which particular provisions of EU law need to be interpreted by the ECJ.

Moreover, claimants have not brought forward their reasons why such a ruling would be necessary to enable this Court to give judgement.

This Court is not of the opinion that a preliminary reference is required for it to arrive to a decision on the demands made in this case.

This Court is in a position to decide on the merits of claimants` on the basis of the evidence brought forward as well as on the basis of court judgements.

As outlined in **recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings** a national court or tribunal may, in particular when it considers that sufficient guidance is given by the case-law of the ECJ, itself decide on the correct interpretation of EU law and its application to the factual situation before it.

Another point to be highlighted by this Court is that the ECJ only rules on the interpretation or validity of the relevant dispositions of EU law.

In **Guide to preliminary ruling proceedings before the Court of Justice of the European Union**³, it was expressly stated that it up to the national court to assess the legality of the legal rule or legal act for domestic law, in light of the Court`s response to the preliminary question.

This was clearly outlined in **Case 16/65, Schwarze**.

In fact the national courts and the EU courts operate independently from one another.

The ECJ does not evaluate the reasons of a national court for deeming that the interpretation of a provision of EU law is necessary for giving judgment in a pending case. It is for the ECJ to decide on the interpretation of the provision and for the national court to apply it (vide : **Case 5/77 : Tedeschi/Denkavit, para. 17-20**).

Indeed, the ECJ may only interpret EU law and thus it may not decide on questions relating to the interpretation or validity of provisions of national law, nor

is it up to the European Court of Justice to apply EU law to the facts in the main action [**C-380/05 Centro Europa 7**]

Consequently, in principle, as outlined by Morten Broberg and Niels Fenger in **Preliminary References to the European Court of Justice** , the ECJ does not pronounce itself on the concrete application of EU law in the main proceedings before the referring court⁴.

Upon examination of Annex A attached to the claimants` note filed on the 15 June 2016, this Court finds that some of the questions put forth are indeed requesting the ECJ not merely to interpret EU Law but also to apply EU law to the particular facts of this case.

This is certainly unacceptable as highlighted by the principles above referred to.

On a final note, the Court observes that through this case, claimants have asked this Court to declare null and without effect the dual-tariff system for electricity and water for non-commercial use based on the criterion of residency of a E.U. National in Malta created by means of Subsidiary Legislation 423.01 and 423.03 respectively by tenure of Article 65(1) of the Constitution of Malta and Chapter 460 of the Laws of Malta and in violation of Directives 2009/72, and 2006/123 and Articles 43 and 49 of the TEU or any thereof. In summary, the claim is that the law which creates a dual tariff system based on the criterion of residence is null and void.

In the present application, claimants have referred to the fact that an EU citizen applying for the provision of utilities in Malta, instead of being granted a direct one time right to be placed on the lower tariff, may and has been first required to provide Enemalta with documentation other than that strictly necessary for identification of persons or the ascertainment of a non-commercial supply and is by default placed on a higher tariff.

Claimants are submitting that this whole system creates an ongoing opportunity for discrimination, abuse and uncertainty to occur, particularly to the detriment of non-Maltese EU citizens, and this in violation of the principles of

transparency, non-discrimination, ascertainment (verifiable) and equality of access in the provision of electricity.

As respondents have pointed out, while claimants` original constitutional application attacks the legality of legislation which establishes a dual tariff system based on the criterion of residence in Malta, claimants are now seeking to attack an administrative practice by ARMS Limited (which is not a party to this suit) which required applicants to provide documentary evidence to show that they are resident in Malta.

This is in fact a different issue which does not fall within the framework of the claimants` demands.

The issues raised in this cause are focused on a declaration that Maltese legislation is null and void, allegedly in breach of EU law, in so far as it created a dual tariff system.

The issues raised in the request for a reference to the ECJ are directed at administrative practices that adopted by ARMS Limited.

This Court states that a request from a national court may be dismissed by the ECJ if:

- the question is not relevant in the sense that the answer to that question, regardless of what the answer may be, in no way can affect the outcome of the case;
- the requested interpretation of EU law bears no relationship to the actual facts;
- the problem is hypothetical; or
- the Court has not been provided with the factual or legal material necessary to give a useful answer on the questions submitted.

(Case C 318/98, Fornasar et autres, para. 27 and 31
Case 283/81, CILFIT, para. 10
Case C 355/97, Landesgrundverkehrsreferent, para. 18-22 , Case 244/80
Pasquale Foglia v Mariella Novello (No 2) para 17 and 18)

Thus, the question as to whether the administrative practices applied by ARMS Limited is in violation of EU Law is irrelevant as regardless as to what the

answer may be, this cannot affect the outcome of the case which deals with the nullity or otherwise of the Maltese legislation itself which created a dual tariff system based on residence.

Decree

For the reasons above, this Court rejects claimants` application for a reference to the European Court of Justice.

**The Hon. Mr Justice
Joseph Zammit McKeon**

**Amanda Cassar
Deputy Registrar**