

JUDGMENT OF THE COURT (First Chamber)

10 March 2021 (*)

(Reference for a preliminary ruling – Lawyers’ freedom to provide services – Directive 77/249/EEC – Article 5 – Obligation for a visiting lawyer representing a client in domestic legal proceedings to work in conjunction with a lawyer who practises before the judicial authority in question – Limits)

In Case C-739/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 4 October 2019, received at the Court on 7 October 2019, in the proceedings

VK

v

An Bord Pleanála,

intervening parties:

The General Council of the Bar of Ireland,

The Law Society of Ireland and the Attorney General,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen (Rapporteur), C. Toader, M. Safjan and N. Jääskinen, Judges,

Advocate General: P. Pikamäe,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 23 September 2020,

after considering the observations submitted on behalf of:

- VK, by B. Ohlig, Rechtsanwältin,
- The General Council of the Bar of Ireland, by E. Gilson and D. Spring, Solicitors, and by W. Abrahamson, Barrister-at-Law, and P. Leonard, Senior Counsel,
- The Law Society of Ireland and the Attorney General, by C. Callanan and S. McLoughlin, Solicitors, and by M. Collins, Senior Counsel,
- Ireland, by M. Browne, G. Hodge, J. Quaney and A. Joyce, acting as Agents, and by M. Gray and R. Mulcahy, Senior Counsel,
- the Spanish Government, by J. Rodríguez de la Rúa Puig, acting as Agent,
- the European Commission, by H. Støvlbæk, L. Malferrari and L. Armati, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 December 2020,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5 of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17).

2 The request has been made in proceedings between VK and An Bord Pleanála (the Planning Appeals Board) concerning the obligation imposed on the applicant’s visiting lawyer to work in conjunction with a local lawyer for the purposes of representing that applicant before the referring court.

Legal context

European Union law

3 Article 1 of Directive 77/249 provides:

‘1. This Directive shall apply, within the limits and under the conditions laid down herein, to the activities of lawyers pursued by way of provision of services.

...

2. “Lawyer” means any person entitled to pursue his professional activities under one of the following designations:

...

Germany: Rechtsanwalt

...’

4 Article 5 of that directive provides:

‘For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to whom Article 1 applies:

- to be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State;
- to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an “avoué” or “procuratore” practising before it.’

Irish law

5 Regulation 2(1) of the European Communities (Freedom to Provide Services) (Lawyers) Regulations, 1979 (‘the 1979 Regulations’), which transpose the provisions of Directive 77/249 into Irish law, defines ‘visiting lawyer’ by reference to the list contained in Article 1(2) of Directive 77/249.

6 Regulation 6 of the 1979 Regulations provides:

‘Where a visiting lawyer is pursuing activities in the State relating to the representation of a client in legal proceedings, he shall work in conjunction with a lawyer who is entitled to practise before the judicial authority in question and who would, where necessary, be answerable to that authority.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 7 VK is a party in appeal proceedings before the Supreme Court (Ireland) concerning determination of liability for the costs of judicial proceedings relating to the planning permission granted for the construction of a fallen-animal inspection unit close to his farm.
- 8 The background to this reference for a preliminary ruling is a dispute in which the Supreme Court made an earlier reference for a preliminary ruling which gave rise to the judgment of 17 October 2018, *Klohn* (C-167/17, EU:C:2018:833).
- 9 Before the Supreme Court, VK had decided to conduct his own defence.
- 10 Before the Court of Justice, he was represented by Ms O, *Rechtsanwältin* (lawyer), who is established in Germany.
- 11 Following the delivery of the judgment of 17 October 2018, *Klohn* (C-167/17, EU:C:2018:833), the case returned to the Supreme Court in order for it to rule on the appeal brought by VK in the light of the interpretation of the relevant EU law provisions resulting from that judgment.
- 12 It is in that context that VK wished to engage Ms O, who is not established in Ireland, with a view to representing him in those proceedings before the Supreme Court.
- 13 The referring court is uncertain whether Regulation 6 of the 1979 Regulations is compatible with EU law in so far as it requires a visiting lawyer to use the services of a lawyer who practises before the judicial authority in question, including in proceedings in which a party is entitled to conduct his or her own defence.
- 14 Specifically, the referring court questions how it should interpret the judgment of 25 February 1988, *Commission v Germany* (427/85, EU:C:1988:98), in which the right of a Member State to require that a visiting lawyer work in conjunction with a lawyer who practises before the judicial authority in question was examined. That court asks, in essence, whether the interpretation adopted in that judgment precludes obliging a visiting lawyer to work in conjunction with a lawyer who practises before the judicial authority in question in all circumstances where his or her client would, in accordance with national law, be entitled to conduct his or her own defence.
- 15 In that regard, the referring court states that the obligation to work ‘in conjunction with’ is limited. The lawyer who practises before the judicial authority in question therefore does not need to be the lawyer on record or the lawyer who presents the case in court. It is appropriate to leave to the two lawyers concerned, namely the visiting lawyer and the lawyer entitled to practise before the judicial authority in question, the task of defining the precise role each of them is to play. The role of the lawyer entitled to practise before the judicial authority in question consists, in general, in assisting the visiting lawyer in the event that adequate representation of the client and the proper fulfilment of obligations towards the judicial authority in question require knowledge or advice on national law, practice and procedure or ethics. Accordingly, the extent of that cooperation will depend heavily on the circumstances of each individual case, given that there is a real risk that a visiting lawyer might, inadvertently, fail in his or her duties to his or her client or to the judicial authority in question in the absence of assistance, in those areas, from a lawyer who practises before the judicial authority in question.
- 16 Finally, the referring court notes that one of the ethical obligations that has to be complied with by any lawyer representing a party before the Irish courts lies in the obligation to research all relevant areas of the

law and to bring to the attention of the judicial authority in question any legal element, whether legislative or case-law-based, liable to have a bearing on the proper course of the procedure. That obligation applies even if those elements are unfavourable to the cause defended by the lawyer in question. That is a feature of proceedings in common-law countries, where the bulk of the research necessary for a judicial authority to rule on the questions of law before it is carried out by the parties rather than by the judicial authority itself. The matter would be different only if they were conducting their own defence. In that situation, the judicial authorities themselves would have to assume responsibility in dealing with the legal issues.

17 In those circumstances, the Supreme Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Is a member state precluded from exercising the option to be found in Article 5 of Directive [77/249] which permits a member state to impose a requirement on a lawyer who is engaged in the activity of representing a client in legal proceedings “to work in conjunction with a lawyer who practises before the judicial authority in question”, in all circumstances where the party whom the visiting lawyer wishes to represent in such proceedings would be entitled to self-represent?
- (2) If the answer to question 1 is no, by reference to what factors should a national court assess whether it is permissible to impose a requirement to “[work] in conjunction with”?
- (3) In particular, would the imposition of a limited obligation to [work] “in conjunction with”, in the manner described earlier in this order for reference, amount to a proportionate interference in the freedom of lawyers to provide services so as to be justified, having regard to the public interest involved being both the need to protect consumers of legal services and the need to secure the proper administration of justice?
- (4) If the answer to question 3 is yes, does that position pertain in all circumstances and, if not, what factors should a national court take into account in determining whether such a requirement can be imposed in a particular case?’

Consideration of the questions referred

18 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 5 of Directive 77/249 must, in the light of the objective of the sound administration of justice, be interpreted as precluding a lawyer, provider of representation services in respect of his or her client, from being required to work in conjunction with a lawyer who practises before the judicial authority in question and who would be responsible, if necessary, towards that judicial authority, under a system placing lawyers under ethical and procedural obligations such as that of submitting to the judicial authority in question any legal element, whether legislative or case-law-based, for the purposes of the proper course of the procedure, from which the litigant is exempt if he or she decides to conduct his or her own defence.

19 It is important to recall that Directive 77/249, which contains measures intended to facilitate the effective pursuit of the activities of lawyers by way of provision of services, must be interpreted, in particular, in the light of Article 56 TFEU, which prohibits any restriction on the freedom to provide services and which logically requires the abolition of all discrimination against the person providing the service by reason of his or her nationality or the fact that he or she is established in a Member State other than that in which the service is to be provided (see, to that effect, judgment of 25 February 1988, *Commission v Germany*, 427/85, EU:C:1988:98, paragraphs 11 and 13).

20 It should be noted that the obligation, imposed by national legislation, to work in conjunction with a domestic lawyer constitutes a restriction on the freedom of lawyers from other Member States to provide services in so far as it means that the litigant who wishes to use a lawyer established in another Member State will bear additional costs compared to the individual who decides to retain the services of a lawyer established in the Member State of the proceedings concerned.

- 21 Directive 77/249 must also be interpreted in the light of the third paragraph of Article 57 TFEU, from which the Court has inferred that, regard being had to the particular nature of certain services, specific requirements imposed on the provider of the services cannot be considered incompatible with the FEU Treaty where they have as their purpose the application of rules governing such activities, but that the freedom to provide services is one of the fundamental principles of the FEU Treaty and may be restricted only by rules which are justified by the general good and are imposed on all persons pursuing activities in the host Member State, in so far as that interest is not safeguarded by the rules to which the provider of the service is subject in the Member State in which he or she is established (see, to that effect, judgment of 25 February 1988, *Commission v Germany*, 427/85, EU:C:1988:98, paragraph 12).
- 22 In that regard, it must be noted that, first, the protection of consumers, in particular recipients of legal services provided by persons involved in the administration of justice and, second, the proper administration of justice are objectives which feature among those which may be regarded as overriding requirements in the public interest capable of justifying a restriction on the freedom to provide services (judgment of 18 May 2017, *Lahorgue*, C-99/16, EU:C:2017:391, paragraph 34 and the case-law cited).
- 23 In the case at hand, it is apparent from the order for reference that the Irish legislation in question seeks to protect the proper administration of justice and the protection of the litigant as a consumer.
- 24 It is also necessary that the measures which restrict the freedom to provide services be appropriate for attaining their objective and do not go beyond what is necessary in order to attain that objective (see, to that effect, judgment of 18 May 2017, *Lahorgue*, C-99/16, EU:C:2017:391, paragraph 31).
- 25 In the judgment of 25 February 1988, *Commission v Germany* (427/85, EU:C:1988:98), the Court, in the first place, noted, in paragraph 13 thereof, that, in proceedings for which German law did not make representation by a lawyer mandatory, the parties could conduct their cases themselves and that, in such proceedings, German law also allowed representation to be entrusted to a person who was neither a lawyer nor a specialist, provided that that person was not acting in a professional capacity. In the second place, it found, in paragraphs 14 and 15 of that judgment, that, in those circumstances, it was apparent that there was no consideration relating to the general interest which, in court proceedings for which representation by a lawyer was not mandatory, could justify the obligation for a lawyer established in another Member State, who was providing his or her services in a professional capacity, to work in conjunction with a German lawyer. Consequently, in so far as the German legislation obliged, in such proceedings, a lawyer providing services to work in conjunction with a lawyer practising before the judicial authority in question, the Court held that it infringed Directive 77/249 and Articles 59 and 60 of the EEC Treaty, now Articles 56 and 57 of the FEU Treaty.
- 26 Similarly, in the judgment of 10 July 1991, *Commission v France* (C-294/89, EU:C:1991:302), the Court noted, in paragraph 18 of that judgment, that, in the case of certain proceedings before the courts, French legislation did not require the parties to be assisted by a lawyer but allowed the parties to conduct their own defence or, in proceedings before the commercial courts, to be assisted and represented by a person who was not a lawyer, but held a special authorisation. It then held, in paragraph 19 of that judgment, that, accordingly, a lawyer providing services could not be required to work in conjunction with a lawyer practising before the judicial authority in question, in judicial proceedings in respect of which the French legislation did not make the assistance of a lawyer compulsory.
- 27 It must be pointed out that, even though, in the cases which gave rise to the judgments of 25 February 1988, *Commission v Germany* (427/85, EU:C:1988:98), and of 10 July 1991, *Commission v France* (C-294/89, EU:C:1991:302), the national legislation authorised the parties, as in the case in the main proceedings, to conduct their own defence, the respective obligations on the parties and the courts as regards the identification of the relevant legal rules were, unlike those applicable in the case in the main proceedings, the same, whether the party conducted his or her own defence or was assisted by a lawyer.
- 28 It is therefore in the specific context of the cases which gave rise to the judgments cited in the preceding paragraph that paragraph 13 of the judgment of 25 February 1988, *Commission v Germany* (427/85,

EU:C:1988:98), and paragraph 17 of the judgment of 10 July 1991, *Commission v France* (C-294/89, EU:C:1991:302), according to which Article 5 of Directive 77/249 may not have the effect of imposing upon a lawyer providing services requirements for which there is no equivalent in the professional rules which would apply in the absence of any provision of services, within the meaning of the EEC Treaty, now the FEU Treaty.

- 29 After all, as is apparent inter alia from paragraph 16 of the present judgment, the respective obligations on the parties and the courts as regards the identification of the relevant legal rules in proceedings before the Irish courts are not the same depending on whether the party conducts his or her own defence or is represented by a lawyer. In the latter case, the onus is on the lawyer, before the Irish courts, to carry out the bulk of the legal research necessary for the proper course of the procedure, that task however falling to the judicial authority in question should the party choose to conduct his or her own defence.
- 30 Where those obligations are, as in the cases which gave rise to the judgments cited in paragraph 28 of the present judgment, the same, whether the party conducts his or her own defence or is assisted by a lawyer, it must be held that, given that the objective of the proper administration of justice can be attained in the first scenario, it can a fortiori be attained where the party is assisted by a visiting lawyer, within the meaning of Directive 77/249.
- 31 However, the same does not apply where, as in the case in the main proceedings, those obligations differ depending on whether the party conducts his or her own defence or is assisted by a lawyer. In that regard, the circumstance that the objective of the proper administration of justice can be attained where the party conducts his or her own defence in the context of a given set of rules governing the proceedings cannot permit the inference that that objective is attained where the party is assisted by a visiting lawyer, within the meaning of Directive 77/249, and where the rules governing the proceedings are different and more restrictive than those applying to the party who conducts his or her own defence.
- 32 In such a case, a reason of general interest based on the proper administration of justice constitutes an overriding reason in the public interest capable of justifying the obligation imposed on a visiting lawyer to work in conjunction with a lawyer who practises before the judicial authority in question. After all, as the Court held in its judgment of 25 February 1988, *Commission v Germany* (427/85, EU:C:1988:98, paragraph 23), Directive 77/249 allows Member States to require a lawyer providing services to work in conjunction with a lawyer who practises before the judicial authority in question in order to enable him or her to carry out the tasks entrusted to him or her by his or her client, in keeping with the proper functioning of justice. Viewed from that perspective, the purpose of that obligation is to provide the lawyer providing services with the support necessary to work within a judicial system different from that in which he or she usually practises, and to provide the judicial authority in question with an assurance that that lawyer does indeed have that support and that he or she is therefore in a position fully to observe the applicable procedural and ethical rules.
- 33 As regards the question of the proportionality of that obligation, it should be recalled that, according to the information provided by the referring court, a lawyer providing services is required to communicate to the national courts the name of an Irish-qualified lawyer to assist him or her in the event that the proper representation of his or her client and the proper fulfilment of his or her duties to the judicial authority in question requires knowledge or advice which might be needed precisely because the visiting lawyer might have limited knowledge of what might turn out to be relevant aspects of national law, practice and procedure or ethics. However, according to that information, it is not necessary that the lawyer who practises before the judicial authority in question be the lawyer on record or the lawyer who presents the case in court. After all, it is for the visiting lawyer and for the lawyer authorised to practise before the Irish court in question to define the precise role each of them is to play, the role of the latter consisting rather in being designated as the lawyer assisting the visiting lawyer.
- 34 In that regard, it must be pointed out that the flexibility which characterises the cooperation between the visiting lawyer and the lawyer who practises before the judicial authority in question – as is described by the referring court – corresponds to the view of that cooperation which the Court has developed

interpreting and applying Article 5 of Directive 77/249. According to that view, those two lawyers must be regarded as being capable, in compliance with the ethical rules applicable in the host Member State and in the exercise of their professional independence, of agreeing upon a form of cooperation appropriate to their client's instructions (see, to that effect, judgment of 25 February 1988, *Commission v Germany*, 427/85, EU:C:1988:98, paragraph 24, and of 10 July 1991, *Commission v France*, C-294/89, EU:C:1991:302, paragraph 31).

35 In that context, as the Advocate General indicated, in essence, in point 76 of his Opinion, it does not appear that freedom to provide services is harmed more than is necessary to attain the objective of the proper administration of justice.

36 That said, it should also be noted that, as the Advocate General observed in point 75 of his Opinion, the Irish legislation at issue in the main proceedings appears to be characterised by the fact that it is not subject to any exceptions to the obligation to work in conjunction with a lawyer who practises before the judicial authority in question.

37 As the Advocate General indicated in points 80 and 81 of his Opinion, it is clear that such an obligation may become redundant in certain circumstances and, therefore, go beyond what is necessary in order to attain the objective of the proper administration of justice.

38 That would be the case, in particular, if the visiting lawyer, by dint of professional experience, were capable of representing the litigant in the same way as a lawyer who practises habitually before the national court concerned. It is for the latter to assess, in the circumstances of the case, whether professional experience in the host Member State is sufficient in order to establish that point.

39 In the present case, it is apparent from the file before the Court that Ms O claims to have practised in Ireland for several years under the conditions laid down in Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36), which may suggest that that lawyer is capable of representing the litigant in the same way as a lawyer authorised to practise before the judicial authority in question. It is, according to settled case-law, for the referring court to determine whether that is the case (see, to that effect, judgment of 2 April 2020, *Comune di Gesturi*, C-670/18, EU:C:2020:272, paragraph 50 and the case-law cited).

40 In the light of all the foregoing considerations, the answer to the questions referred is that Article 5 of Directive 77/249 must be interpreted as meaning that:

- it does not preclude, as such, in the light of the objective of the proper administration of justice, a lawyer, provider of representation services in respect of his or her client, from being required to work in conjunction with a lawyer who practises before the judicial authority in question and who would be responsible, if necessary, towards that judicial authority, under a system placing lawyers under ethical and procedural obligations such as that of submitting to the judicial authority in question any legal element, whether legislative or case-law-based, for the purposes of the proper course of the procedure, from which the litigant is exempt if he or she decides to conduct his or her own defence;
- the obligation for a visiting lawyer to work in conjunction with a lawyer who practises before the judicial authority in question, in a system in which the latter have the possibility of defining their respective roles, the sole purpose of the lawyer who practises before the judicial authority in question being, as a general rule, to assist the visiting lawyer to ensure the proper representation of their client and the proper fulfilment of his or her duties to that judicial authority is not disproportionate, in the light of the objective of the proper administration of justice;
- a general obligation to work in conjunction with a lawyer who practises before the judicial authority in question which does not allow account to be taken of the experience of the visiting lawyer would go beyond what is necessary in order to attain the objective of the proper administration of justice.

Costs

- 41 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 5 of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services must be interpreted as meaning that:

- **it does not preclude, as such, in the light of the objective of the proper administration of justice, a lawyer, provider of representation services in respect of his or her client, from being required to work in conjunction with a lawyer who practises before the judicial authority in question and who would be responsible, if necessary, towards that judicial authority, under a system placing lawyers under ethical and procedural obligations such as that of submitting to the judicial authority in question any legal element, whether legislative or case-law-based, for the purposes of the proper course of the procedure, from which the litigant is exempt if he or she decides to conduct his or her own defence;**
- **the obligation for a visiting lawyer to work in conjunction with a lawyer who practises before the judicial authority in question, in a system in which the latter have the possibility of defining their respective roles, the sole purpose of the lawyer who practises before the judicial authority in question being, as a general rule, to assist the visiting lawyer to ensure the proper representation of their client and the proper fulfilment of his or her duties to that judicial authority is not disproportionate, in the light of the objective of the proper administration of justice;**
- **a general obligation to work in conjunction with a lawyer who practises before the judicial authority in question not allowing account to be taken of the experience of the visiting lawyer would go beyond what is necessary in order to attain the objective of the proper administration of justice.**

Bonichot

Bay Larsen

Toader

Safjan

Jääskinen

Delivered in open court in Luxembourg on 10 March 2021.

A. Calot Escobar

J.-C. Bonichot

Registrar

President of the First
Chamber

* Language of the case: English.