JUDGMENT OF THE COURT (Sixth Chamber)

13 July 2000 *

In Case C-423/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by Corte d'Appello di Napoli, Italy, for a preliminary ruling in the proceedings pending before that court brought by

Alfredo Albore

on the interpretation of Articles 6, 52 and 56 of the EC Treaty (now, after amendment, Articles 12 EC, 43 EC and 46 EC) and Article 67 of the EC Treaty (repealed by the Treaty of Amsterdam),

THE COURT (Sixth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, C. Gulmann, J.-P. Puissochet (Rapporteur), V. Skouris and F. Macken, Judges,

Advocate General: G. Cosmas,
Registrar: D. Louterman-Hubeau, Principal Administrator,

* Language of the case: Italian.

after considering the written observations submitted on behalf of:

— Mr Albore, by himself,

— the Italian Government, by Professor U. Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by P.G. Ferri, Avvocato dello Stato,

— the Greek Government, by K. Paraskevopoulou-Gregoriou, Legal Representative in the State Legal Service, and S. Vodina, Assistant Lawyer in the Department for European Affairs of the Ministry of Foreign Affairs, acting as Agents,

— the Commission of the European Communities, by A. Aresu and M. Patakia, both of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Italian government, represented by P.G. Ferri, of the Greek Government, represented by K. Paraskevopoulou-Gregoriou, and of the Commission, represented by E. Traversa, Legal Adviser, acting as Agent, at the hearing on 26 January 2000,

after hearing the Opinion of the Advocate General at the sitting on 23 March 2000,

gives the following

Judgment

1 By order of 29 October 1998, received at the Court on 25 November 1998, the Corte d'Appello di Napoli (Court of Appeal, Naples) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now article 234 EC) a question on the interpretation of Articles 6, 52 and 56 of the EC Treaty (now, after amendment, Articles 12 EC, 43 EC and 46 EC) and Article 67 of the EC Treaty (repealed by the Treaty of Amsterdam).

2 That question was raised in an appeal brought by Mr Albore, a notary, against a decision of the Tribunale Civile e Penale di Napoli (Civil and Criminal District Court, Naples) dismissing his action against the refusal by the Naples Registrar of Property to register the sale of two immovable properties to German nationals on the ground that they had not applied for the prefectural authorisation prescribed by Italian law where property is situated in areas of the territory designated as being of military importance.

The national legislation

3 Article 1 of Italian Law No 1095 of 3 June 1935 laying down specific rules on the transfer of immovable property situated in the provinces adjoining land

frontiers (GURI No 154 of 4 July 1935), as amended by Law No 2207 of 22 December 1939 (GURI No 53 of 2 March 1939), provides:

'All instruments transferring wholly or in part ownership of immovable property situated in areas of provinces adjacent to land frontiers shall be subject to approval by the Prefect of the province.'

4 Under Article 2 of that Law, instruments of transfer may not be entered in the public registers by the competent officials 'unless evidence is produced that the Prefect has given his approval'.

5 Under Article 18 of Law No 898 of 24 December 1976 laying down new rules on military easements (GURI No 8 of 11 January 1977), as amended by Law No 104 of 2 May 1990 (GURI No 105 of 8 May 1990, hereinafter 'Law No 898/76'):

'The provisions laid down in Articles 1 and 2 of Law No 1095 of 3 June 1935, as amended by Law No 2207 of 22 December 1939, shall also apply in the areas of the national territory designated as being of military importance by decree of the Minister for Defence, jointly with the Minister for the Interior, and published in the Gazzetta Ufficiale.

Neither the Prefect's authorisation nor the opinion of the military authorities provided for by Law No 1095 of 3 June 1935, as amended by Law No 2207 of

22 December 1939, in respect of the disposal in whole or in part of immovable property shall be required where such disposal in whole or in part is to Italian nationals or to the authorities of the State, including autonomous agencies, to municipalities, provinces or other public economic bodies, or to any other legal person, whether governed by public or private law, of Italian nationality.'

The main proceedings

6 Two properties at Barano d'Ischia, in an area of Italy designated as being of military importance, were purchased on 14 January 1998 by two German nationals, Uwe Rudolf Heller and Rolf Adolf Kraas, who did not apply for prefectural authorisation. In the absence of such authorisation, the Naples Registrar of Property refused to register the sale of the properties.

7 Mr Albore, the notary before whom the transaction was concluded, appealed against that refusal to the Tribunale Civile e Penale di Napoli, claiming that the sale at issue, concluded for the benefit of nationals of a Member State of the Community, should not be subject to the national legislation which required only foreigners to obtain prefectural authorisation.

8 Following the dismissal of his action by the Tribunale on 20 May 1998, Mr Albore appealed to the Corte d'Appello, Naples.

9 The Corte d'Appello, having observed that it was inappropriate to apply domestic provisions that were contrary to Community law, stated that the national legislation at issue, applied to nationals of Member States of the Community, appeared to be contrary to the provisions of the EC Treaty on the prohibition of all discrimination on grounds of nationality, on freedom of establishment and on free movement of capital and did not appear, in view of its general nature and scope, to relate to matters of public policy, public security or public health such as to justify, under the Treaty, such discrimination.

10 In view of the differences of opinion between the various judicial authorities in Italy with jurisdiction in that sphere, the Corte d'Appello considered it necessary to seek a preliminary ruling from the Court of Justice.

11 It therefore stayed proceedings pending a preliminary ruling from the Court as to whether Articles 6, 52, 56 and 67 of the Treaty precluded provisions such as Article 18 of Law No 898/76 which require prefectural authorisation to be obtained for the purchase of property situated in an area of the national territory designated as being of military importance unless the purchaser is a public or private person of Italian nationality.

The question referred to the Court

12 The national court seeks essentially to ascertain whether the provisions of the Treaty concerning prohibition of discrimination on grounds on nationality,

freedom of establishment and free movement of capital preclude national legislation of a Member State which releases the nationals of that Member State, and only them, from the obligation to seek an administrative authorisation for any purchase of real property in an area of the country designated as being of military importance.

13 The Italian Government contends that that question is inadmissible because the German nationality of the purchasers of the property is not sufficient to establish that the transaction at issue was entered into in the exercise of a freedom guaranteed by Community law and that none of the facts of the case indicates that it might fall within the scope of Community law.

14 The Italian Government's submission as to the admissibility of the question is unfounded. Whatever the reasons for it, the purchase of immovable property in a Member State by a non-resident constitutes an investment in real estate which falls within the category of capital movements between Member States. Freedom for such movements is guaranteed by Article 73b of the EC Treaty (now Article 56 EC) (see Case C-302/97 *Konle* v *Austria* [1999] ECR I-3099, paragraph 22).

15 An answer must therefore be given to the question submitted.

16 In so far as it exempts only Italian nationals from the requirement of obtaining an authorisation to buy a property in certain parts of the national territory, Article 18 of Law No 898/76 imposes on nationals of the other Member States a

discriminatory restriction on capital movements between Member States (to that effect, see *Konle,* paragraph 23).

17 Such discrimination is prohibited by Article 73b of the Treaty unless it is justified on grounds permitted by the Treaty.

18 Although no justification is mentioned in the order for reference and the Italian Government likewise has not mentioned any in its written observations, it is clear from the object of the legislation at issue that the contested measure may be regarded as having been adopted in relation to public security, a concept which, within the meaning of the Treaty, includes the external security of a Member State (see Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, paragraph 22).

19 However, the requirements of public security cannot justify derogations from the Treaty rules such as the freedom of capital movements unless the principle of proportionality is observed, which means that any derogation must remain within the limits of what is appropriate and necessary for achieving the aim in view (see Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 38).

20 Furthermore, under Article 73d(3) of the EC Treaty (now Article 58(3) EC), such requirements may not be relied on to justify measures constituting a means of arbitrary discrimination or a disguised restriction on the free movement of capital.

21 In that regard, a mere reference to the requirements of defence of the national territory, where the situation of the Member State concerned does not fall within

the scope of Article 224 of the EC Treaty (now Article 297 EC), cannot suffice to justify discrimination on grounds of nationality against nationals of other Member States regarding access to immovable property on all or part of the national territory of the first State.

22 The position would be different only if it were demonstrated, for each area to which the restriction applies, that non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.

23 In the absence of any evidence enabling the Court to examine whether the existence of such circumstances might be demonstrated in relation to the island of Ischia, it is for the national court to decide, in the case before it, whether or not there is sufficient justification within the meaning of the foregoing paragraph.

24 The answer to the question submitted must therefore be that Article 73b of the Treaty precludes national legislation of a Member State which, on grounds relating to the requirements of defence of the national territory, exempts the nationals of that Member State, and only them, from the obligation to apply for an administrative authorisation for any purchase of real estate situated within an area of the national territory designated as being of military importance. The position would be different only if it could be demonstrated to the competent national court that, in a particular area, non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.

25 In view of the foregoing, it is unnecessary to consider the questions relating to the interpretation of Articles 6 and 52 of the Treaty.

Costs

26 The costs incurred by the Italian and Greek Governments 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 (Sixth Chamber),

in answer to the question referred to it by the Corte d'Appello di Napoli by order of 29 October 1998, hereby rules:

Article 73b of the EC Treaty (now Article 56 EC) precludes national legislation of a Member State which, on grounds relating to the requirements of defence of

the national territory, exempts the nationals of that Member State, and only them, from the obligation to apply for an administrative authorisation for any purchase of real estate situated within an area of the national territory designated as being of military importance.

The position would be different only if it could be demonstrated to the competent national court that, in a particular area, non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.

Moitinho de Almeida Gulmann Puissochet

Skouris Macken

Delivered in open court in Luxembourg on 13 July 2000.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber