JUDGMENT OF THE COURT (Third Chamber)

9 October 2008 *

In Case C-404/07,

REFERENCE for a preliminary ruling under Article 35 EU from the Fővárosi Bíróság (Hungary), made by decision of 6 July 2007, received at the Court on 27 August 2007, in the criminal proceedings

György Katz

v

István Roland Sós,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues (Rapporteur), J. Klučka, P. Lindh and A. Arabadjiev, Judges,

* Language of the case: Hungarian.

Advocate General: J. Kokott,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 19 June 2008,

after considering the observations submitted on behalf of:

— Mr Katz, by L. Kiss, ügyvéd,

— Mr Sós, by L. Helmeczy, ügyvéd,

— the Hungarian Government, by J. Fazekas, R. Somssich and K. Szíjjártó, acting as Agents,

— the Austrian Government, by E. Riedl, acting as Agent,

— the Commission of the European Communities, by R. Troosters and B. Simon, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2008,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 2 and 3 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1; 'the Framework Decision').

2 The reference was made in criminal proceedings brought against Mr Sós, who is being prosecuted for fraud by Mr Katz, acting as substitute private prosecutor.

Legal framework

European Union law

3 According to recital 4 in the preamble to the Framework Decision:

'Member States should approximate their laws and regulations to the extent necessary to attain the objective of affording victims of crime a high level of protection, irrespective of the Member State in which they are present.'

4 Under Article 1 of the Framework Decision, for the purposes of the Framework Decision:

'(a) "victim" shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State;

…'

5 Article 2 of the Framework Decision states:

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

2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.’

6 Article 3 of the Framework Decision provides:

‘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.’

7 Under Article 5 of the Framework Decision:

'Each Member State shall, in respect of victims having the status of witnesses or parties to the proceedings, take the necessary measures to minimise as far as possible communication difficulties as regards their understanding of, or involvement in, the relevant steps of the criminal proceedings in question, to an extent comparable with the measures of this type which it takes in respect of defendants.'

8 Article 7 of the Framework Decision provides:

'Each Member State shall, according to the applicable national provisions, afford victims who have the status of parties or witnesses the possibility of reimbursement of expenses incurred as a result of their legitimate participation in criminal proceedings.'

9 According to the Information concerning the declarations by the French Republic and the Republic of Hungary on their acceptance of the jurisdiction of the Court of Justice to give preliminary rulings on the acts referred to in Article 35 of the Treaty on European Union, published in the *Official Journal of the European Union* on 14 December 2005 (OJ 2005 L 327, p. 19), the Republic of Hungary made a declaration under Article 35(2) EU accepting the jurisdiction of the Court of Justice of the European Communities to give rulings in accordance with the arrangements laid down in Article 35(3)(a) EU.

10 Nevertheless, according to the decision of the Hungarian Government (kormányhatározat) No 2088/2003 (V. 15.) of 15 May 2003, containing a declaration relating to references to the Court of Justice for a preliminary ruling, 'the Republic of Hungary [declared], under Article 35(2) EU, that it accepts the jurisdiction of the

Court of Justice of the European Communities in accordance with the provisions of Article 35(3)(b) EU'.

11 The Information concerning the declarations by the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania and the Republic of Slovenia on their acceptance of the jurisdiction of the Court of Justice to give preliminary rulings on the acts referred to in Article 35 of the Treaty on European Union, published in the *Official Journal of the European Union* on 14 March 2008 (OJ 2008 L 70, p. 23), states that the Republic of Hungary withdrew the declaration it made earlier and 'has declared that it accepts the jurisdiction of the Court of Justice of the European Communities in accordance with the arrangements laid down in Article 35(2) and (3)(b) of the Treaty on European Union'.

National legislation

12 Paragraph 28(7) of Law No XIX of 1998 on criminal procedure (Büntetőeljárásról szóló 1998 évi XIX. törvény) provides:

'Subject to the provisions of this Law, the public prosecutor shall institute criminal proceedings and, except in the case of private prosecution or substitute private prosecution, shall conduct those proceedings in court, or refer the case for mediation, stay the proceedings or partially discontinue them. The public prosecutor may decide to terminate the proceedings or to change the charges. He may examine the case file during the trial stage. He may make applications concerning all matters raised in the proceedings in respect of which the court must rule.'

13 Paragraph 31(1) of that Law provides:

‘The following may not act in the capacity of public prosecutor in criminal proceedings:

…

(b) anyone taking part or having taken part in the proceedings as … victim, private prosecutor, substitute private prosecutor, party bringing a civil claim or complainant, the representative of any of those persons or any person closely related to the foregoing;

(c) anyone taking part or having taken part in the proceedings as a witness or as an expert or specialist;

…’

14 Paragraph 51(1) of the Law defines the victim as the holder of rights or legitimate interests harmed or jeopardised by the offence. Under Paragraph 51(2), the victim is entitled:

‘(a) save where otherwise provided in this Law, to attend the proceedings and to examine the procedural documents concerning him;

(b) to make applications and submit observations at any stage in the proceedings;

(c) to obtain information from the court, the public prosecutor and the investigating authority on his rights and obligations in the criminal proceedings;

(d) to exercise all rights of appeal in the cases provided for in this Law.’

15 Under Paragraph 53(1) of Law No XIX of 1998:

‘The victim may act as substitute private prosecutor in the cases provided for in this Law where:

(a) the public prosecutor or investigating authority decides not to act on a complaint or not to proceed with a prosecution or investigation;

(b) the public prosecutor partially discontinues criminal proceedings;

(c) the public prosecutor terminates the proceedings;

(d) the public prosecutor finds, following the investigation, that there has not been an offence which warrants prosecution and for that reason has not instituted proceedings, or, following the investigation carried out in proceedings instituted by a private prosecution, has decided not to take over the proceedings himself;

(e) the public prosecutor has terminated the proceedings at trial stage on the ground that he considers that the offence does not warrant prosecution.'

16 Paragraph 236 of that Law states:

'Save where otherwise provided in this Law, the substitute private prosecutor shall exercise, in the judicial proceedings, the rights of the public prosecutor, including the right to apply for the imposition of coercive measures entailing the removal or restriction of liberty of the accused. The substitute private prosecutor may not apply for the accused to be deprived of parental authority.'

17 Paragraph 343(5) of the Law provides:

'The substitute private prosecutor may not extend the scope of the prosecution.'

Facts and question referred for a preliminary ruling

18 In the criminal proceedings instituted before the Fővárosi Bíróság (Budapest Metropolitan Court) by Mr Katz as substitute private prosecutor against Mr Sós, the latter is accused of having committed acts of fraud referred to in paragraph 318(1) of the Hungarian Criminal Code (Büntető törvénykönyv) and having caused Mr Katz serious harm within the meaning of Paragraph 318(6)(a). Those proceedings were instituted following a decision by the public prosecutor in the same case not to proceed with prosecution.

19 The Fővárosi Bíróság explains that criminal proceedings instituted by a substitute private prosecutor are a special means by which criminal proceedings can be instituted under Hungarian rules of criminal procedure. In addition to criminal proceedings instituted on the application of the public prosecutor, Hungarian law permits victims of certain minor offences to institute and conduct a prosecution; this is known as 'private prosecution' ('magánvád'). The 'substitute private prosecution' ('pótmagánvád'), which is at issue in the main proceedings, is a third means of instituting criminal proceedings, which permits victims of a crime to take action, inter alia where the public prosecutor terminates proceedings which he has instituted. Private prosecution and substitute private prosecution should not be confused with the bringing of civil claims for damages in criminal proceedings.

20 Mr Katz's application requesting that he, as a victim, be summoned and heard as a witness in the substitute criminal proceedings at issue was dismissed by the Fővárosi Bíróság, which ruled on that offer to supply evidence and terminated legal debate on that point.

21 In his oral submissions to the referring court, Mr Katz claimed that, by refusing to hear the victim, who is also prosecutor, as a witness, the referring court infringed the principles concerning the right to a fair trial and equality of arms enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 ('the ECHR'). He also maintained that he had already

suffered harm during the investigation by reason of the fact that the investigating authority did not comply with its obligation to establish the facts, whereas the legal mechanism of the substitute private prosecution precisely enables that situation to be remedied so that, thanks to the testimony of the victim appearing in person, the truth can be ascertained and the latter can obtain reparation for the harm suffered. According to Mr Katz, the victim would otherwise be placed at a disadvantage compared to the person being prosecuted.

22 At a subsequent hearing before that court, held on 6 July 2007, the court reopened the criminal investigation. It pointed out that, while Paragraph 236 of Law No XIX of 1998 derogates from the prohibition on a substitute private prosecutor acting in the capacity of the public prosecutor, there is no provision in that Law derogating from the prohibition contained in Paragraph 31(1), under which a witness may not act in the capacity of public prosecutor. The Fővárosi Bíróság inferred from this that a substitute private prosecutor may not be heard as a witness in such criminal proceedings. With regard to a private prosecution, the Law in question contains an express provision under which the private prosecutor may be heard as a witness. Even though private prosecutions and substitute private prosecutions are undoubtedly similar, the same rules cannot, in the absence of any cross-reference between them, be applied to those two distinct types of proceedings.

23 The Fővárosi Bíróság then states that the Hungarian legislature itself has recognised that the substitute private prosecution mechanism is an important instrument which can compensate for inaction of the legal authorities. There is also no doubt that that legal mechanism involves the victim being given the genuine possibility of obtaining a judicial decision in proceedings of a legally binding nature. It could be difficult or even impossible to achieve that result if the victim acting as substitute private prosecutor had no possibility of being heard as a witness and if that victim could not, thanks to his own testimony, supply evidence, when, more often than not, it is the victim who would know the facts which require to be established.

24 However, the Fővárosi Bíróság states, it should also be acknowledged that, by having at his disposal the powers granted to the public prosecutor, the substitute private

prosecutor's rights are rather considerable. Given his power to make applications, he has the possibility of supplying evidence. He also has the right to submit observations.

25 The Fővárosi Bíróság is unsure as to what is meant by the concepts of a 'real and appropriate' role for victims and the 'possibility' they have 'to be heard during proceedings and to supply evidence', provided for in Articles 2 and 3 of the Framework Decision respectively, and wonders whether they should include the possibility for a national court to hear the victim of a crime as a witness in the course of a substitute private prosecution.

26 It is in those circumstances that the Fővárosi Bíróság, acting as a court of first instance, decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 2 and 3 of … Framework Decision 2001/220 … 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?'

Admissibility

27 As is clear from paragraph 10 of the present judgment, by decision of the Hungarian Government No 2088/2003 of 15 May 2003 the Republic of Hungary declared that it accepts the jurisdiction of the Court to rule on the validity and interpretation of the acts referred to in Article 35 EU in accordance with the arrangements laid down in Article 35(3)(b) EU. It is not disputed that the present order for reference was submitted in accordance with that declaration, and therefore the Fővárosi Bíróság

falls within the courts which are entitled to refer questions to the Court under Article 35 EU.

28 The Hungarian Government considers that the reference for a preliminary ruling is nevertheless inadmissible, as it is hypothetical. In its view, the Fővárosi Bíróság wrongly asserts that Hungarian law does not permit a substitute private prosecutor to be heard as a witness in criminal proceedings. In support of its argument, the Hungarian Government relies in particular on Opinion No 4/2007 of the criminal division of the Legfelsőbb Bíróság (Hungarian Supreme Court) of 14 May 2007, which states that 'there is no legal obstacle precluding, in criminal proceedings, the questioning as a witness of the victim acting as substitute private prosecutor.' Mr Katz also takes the view that there is no doubt at all that Hungarian law authorises a substitute private prosecutor to be heard as a witness in criminal proceedings.

29 It should be noted, that, in accordance with Article 46(b) EU, the provisions of the EC Treaty concerning the powers of the Court of Justice and the exercise of those powers, including the provisions of Article 234 EC, apply to the provisions of Title VI of the EU Treaty under the conditions laid down by Article 35 EU. It follows that the system under Article 234 EC applies to the Court's jurisdiction to give preliminary rulings under Article 35 EU, subject to the conditions laid down by the latter article (see, inter alia, Case C-296/08 PPU *Santesteban Goicoechea*, [2008] ECR I-6307, paragraph 36, and the case-law cited).

30 Like Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court 'considers that a decision on the question is necessary to enable it to give judgment', meaning that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU (see, inter alia, Case C-467/05 *Dell'Orto* [2007] ECR I-5557, paragraph 39, and the case-law cited).

31 It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of European Union law referred to in the questions bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Save for such cases, the Court is, in principle, bound to give a preliminary ruling on questions concerning the interpretation of the acts referred to in Article 35(1) EU (*Dell'Orto*, paragraph 40, and the case-law cited).

32 As is evident from paragraphs 18 to 25 of this judgment, the order for reference sets out the principal facts of the main action and the provisions of applicable national law which are directly relevant, and it explains the reasons why the court making the reference is seeking an interpretation of the Framework Decision, and also the link between the latter and the national legislation applicable in the matter.

33 Contrary to what is argued by the Hungarian Government, it is not obvious that, in the main proceedings, the problem raised is of a hypothetical nature, if only because it is not in dispute that the referring court dismissed Mr Katz's application to be heard as a witness in the substitute private prosecution in those proceedings on the ground that Hungarian law does not expressly confer that right in such a situation.

34 Moreover, it is not for the Court, in the context of a reference for a preliminary ruling, to give a ruling on the interpretation of provisions of national law or to decide whether the interpretation given by the national court of those provisions is correct (see, inter alia, with regard to Article 234 EC, Case C-244/06 *Dynamic Medien* [2008] ECR I-505, paragraph 19).

35 Therefore, it is necessary to reply to the reference for a preliminary ruling.

36 On the other hand, it is not appropriate to accede to Mr Katz's request that the Court extend the question referred to include examination of the question whether the Framework Decision means that certain powers of investigation granted by Hungarian law to the public prosecutor are also to be available to a substitute private prosecutor.

37 Under Article 35 EU, it is for the national court, not the parties to the main proceedings, to bring a matter before the Court of Justice. The right to determine the questions to be put to the Court thus devolves on the national court alone and the parties may not change their tenor (see *Santesteban Goicoechea*, paragraph 46).

38 Furthermore, to answer the questions formulated by Mr Katz would be incompatible with the function given to the Court by Article 35 EU and with its duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice, bearing in mind that under the latter provision only the order of the national court is notified to the interested parties (see *Santesteban Goicoechea*, paragraph 47).

The question referred for a preliminary ruling

39 It is common ground that a person in the position of Mr Katz is a victim within the meaning of Article 1(a) of the Framework Decision, a provision according to which a victim is a natural person who has suffered harm directly caused by acts or omissions which infringe the criminal law of a Member State.

40 Articles 5 and 7 of the Framework Decision make clear that the latter covers the situation of the victim, whether acting as a witness or as a party to the proceedings.

41 There is no provision in the Framework Decision which aims to exclude from its scope the situation where, in criminal proceedings, the victim assumes, as in the present instance, the role of the prosecutor in place of the public authorities.

42 According to recital 4 in the preamble to the Framework Decision the victims of crime should be afforded a high level of protection.

43 Under Article 2(1) of the Framework Decision, Member States are to ensure that victims have a real and appropriate role in their criminal legal system, and are to recognise victims' rights and legitimate interests with particular reference to criminal proceedings.

44 The first paragraph of Article 3 of the Framework Decision provides, in general terms, that the Member States are to safeguard the possibility for victims to be heard during proceedings and to supply evidence.

45 Accordingly, while a victim who acts in the capacity of substitute private prosecutor may claim the rights attaching to the status of victim provided for under the Framework Decision, the fact remains that neither the first paragraph of Article 3 nor any other provision of the Framework Decision supplies further details concerning the rules of evidence applicable to victims in criminal proceedings.

46 It must therefore be concluded that the Framework Decision, while requiring Member States, first, to ensure that victims enjoy a high level of protection and have a real and appropriate role in their criminal legal system and, second, to recognise victims' rights and legitimate interests and ensure that they can be heard and supply evidence, leaves to the national authorities a large measure of discretion with regard to the specific means by which they implement those objectives.

47 However, in order not to deprive the first paragraph of Article 3 of the Framework Decision of much of its practical effect or to infringe the obligations stated in Article 2(1) of the Framework Decision, those provisions imply, in any event, that the victim is to be able to give testimony in the course of the criminal proceedings which can be taken into account as evidence.

48 It should be added that the Framework Decision must be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the ECHR, are respected (see, in particular, Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 59).

49 It is therefore for the referring court to ensure in particular that the way in which the evidence is taken in the criminal proceedings, viewed as whole, does not prejudice the fairness of the proceedings for the purposes of Article 6 of the ECHR, as interpreted by the European Court of Human Rights (see, inter alia, Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 76, and *Pupino*, paragraph 60).

50 In those circumstances, the answer to the question referred must be that Articles 2 and 3 of the Framework Decision are to be interpreted as not obliging a national court to permit the victim to be heard as a witness in criminal proceedings instituted by a substitute private prosecution such as that in issue in the main proceedings.

However, in the absence of such a possibility, it must be possible for the victim to be permitted to give testimony which can be taken into account as evidence.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Third Chamber) hereby rules:

Articles 2 and 3 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings are to be interpreted as not obliging a national court to permit the victim to be heard as a witness in criminal proceedings instituted by a substitute private prosecution such as that in issue in the main proceedings. However, in the absence of such a possibility, it must be possible for the victim to be permitted to give testimony which can be taken into account as evidence.

[Signatures]