Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 1 February 2017 [1]

Case C-670/15

Jan Šalplachta

(Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Reference for a preliminary ruling – Area of freedom, security and justice – Access to justice in cross-border disputes – Directive 2003/8/EC – Scope – Legal aid application submitted to the competent authority of the Member State in which the court is sitting – Reimbursement of costs incurred for the translation of documents annexed to the legal aid application)

Introduction

1. The present request for a preliminary ruling offers the Court an opportunity to clarify the scope of Council Directive 2003/8/EC,[2] which aims at establishing minimum common rules relating to legal aid for cross-border disputes.

2. The Bundesarbeitsgericht (Federal Labour Court, Germany) is seised of a dispute concerning the reimbursement of costs incurred in relation to a legal aid application, namely the costs of translation of documents annexed to such an application. The German law transposing Directive 2003/8 does not provide for the grant of legal aid for the legal aid procedure itself, when such an application is lodged before the German court which is also a competent authority. By means of the present request, the highest German labour court indirectly seeks to verify the compatibility of the national rules with Directive 2003/8 ('the Directive').

1 Original language: English.

2 Directive of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ 2003 L 26, p. 41).

Legal framework

EU law

3. Directive 2003/8 provides:

‘Article 3

Right to legal aid

1. Natural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive.

2. Legal aid is considered to be appropriate when it guarantees:

(a) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings;

(b) legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient, including the costs referred to in Article 7 and the fees to persons mandated by the court to perform acts during the proceedings.

…

Article 7

Costs related to the cross-border nature of the dispute

Legal aid granted in the Member State in which the court is sitting shall cover the following costs directly related to the cross-border nature of the dispute:

…

(b) translation of the documents required by the court or by the competent authority and presented by the recipient which are necessary for the resolution of the case; and

…

Article 8

Costs covered by the Member State of the domicile or habitual residence

The Member State in which the legal aid applicant is domiciled or habitually resident shall provide legal aid, as referred to in Article 3(2), necessary to cover:

(a) costs relating to the assistance of a local lawyer or any other person entitled by the law to give legal advice, incurred in that Member State until the application for legal aid has been received, in accordance with this Directive, in the Member State where the court is sitting;

(b) the translation of the application and of the necessary supporting documents when the application is submitted to the authorities in that Member State.

…

Article 13

Introduction and transmission of legal aid applications

1. Legal aid applications may be submitted to either:

(a) the competent authority of the Member State in which the applicant is domiciled or habitually resident (transmitting authority); or

(b) the competent authority of the Member State in which the court is sitting or where the decision is to be enforced (receiving authority).

2. Legal aid applications shall be completed in, and supporting documents translated into:

(a) the official language or one of the languages of the Member State of the competent receiving authority which corresponds to one of the languages of the Community institutions; or

(b) another language which that Member State has indicated it can accept in accordance with Article 14(3).

…

4. The competent transmitting authority shall assist the applicant in ensuring that the application is accompanied by all the supporting documents known by it to be required to enable the application to be determined. It shall also assist the applicant in providing any necessary translation of the supporting documents, in accordance with Article 8(b).

The competent transmitting authority shall transmit the application to the competent receiving authority in the other Member State within 15 days of the receipt of the application duly completed in one of the languages referred to in paragraph 2, and the supporting documents, translated, where necessary, into one of those languages.

…

6. The Member States may not charge for services rendered in accordance with paragraph 4. …'

German law

4. Directive 2003/8 was transposed into German law in Paragraphs 114 to 127a as well as Paragraphs 1076 to 1078 of the Zivilprozessordnung (Code of Civil Procedure; the 'ZPO').

5. Under Paragraph 114(1) of the ZPO:

'A party who because of his personal and economic circumstances cannot pay the costs of the proceedings, or can pay them only in part or only in instalments, shall receive legal aid, on application, if his intended action or defence has sufficient prospects of success and does not appear to be frivolous. For cross-border legal aid within the European Union, Paragraphs 1076 to 1078 apply in addition.'

6. Under Paragraph 117(1) and (2) of the ZPO:

'(1) The application for the grant of legal aid must be made to the court hearing the case; …

(2) A declaration by the party concerning his personal and economic circumstances (family circumstances, occupation, capital, income and obligations) and corresponding supporting documents are to be annexed to the application. …'

7. Under Paragraph 1076 of the ZPO:

'For cross-border legal aid within the European Union in accordance with [Directive 2003/8], Paragraphs 114 to 127a shall apply unless provided otherwise below.'

8. Under Paragraph 1078(1) of the ZPO:

'The court hearing the case or the court enforcing the decision shall be competent for incoming requests for cross-border legal aid. Applications must be completed in German and supporting documents accompanied by a translation into German. …'

9. According to German case-law, as explained by the referring court, those provisions do not provide for the grant of legal aid for the legal aid procedure itself, since that procedure does not constitute 'proceedings' within the meaning of Paragraph 114 of the ZPO. The grant of legal aid for the costs incurred for the translation of the declaration and supporting documents to be annexed to the application for legal aid into the language of the court is therefore ruled out. Thus, with respect to an applicant resident in another Member State, who brings an action directly before a German court and at the same time makes an application to that court for the grant of legal aid, the same provisions apply as for German residents.

Facts, procedure and question referred

10. Mr Šalplachta is a resident of the Czech Republic. On 24 September 2013, acting through his German lawyer, he brought an action before the Arbeitsgericht Zwickau (Labour Court, Zwickau, Germany) for the payment of arrears of wages against Elektroanlagen & Computerbau GmbH, a firm resident in Germany, and at the same time made an application for the grant of legal aid. On 27 November 2013 he applied for legal aid to be extended to cover the costs of translation of the documents showing his income and capital.

11. On 8 April 2014 the declaration of the applicant's economic and personal circumstances, completed in German and signed by the applicant on 23 September 2013, reached the registry of the Arbeitsgericht Zwickau (Labour Court, Zwickau). The declaration form, including the explanations and supporting documents, had been translated into German by a commercial translation agency based in Dresden (Germany). The applicant caused two invoices from the translation agency addressed to him to be added to the case file.

12. The Arbeitsgericht Zwickau (Labour Court, Zwickau) granted the applicant legal aid for the proceedings at first instance, but refused reimbursement of the translation costs. The applicant's appeal was dismissed by the Landesarbeitsgericht (Higher Labour Court). The applicant introduced a further appeal on a point of law before the referring court.

13. The referring court observes that the appeal would fall to be allowed only if Paragraph 114 et seq. of the ZPO were to be interpreted, in conformity with EU law, as meaning that the costs incurred by the applicant for the translation of the declaration and supporting documents annexed to the application for legal aid are covered by the legal aid granted in the Federal Republic of Germany. The appeal would otherwise have to be dismissed.

14. In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the right of a natural person to effective access to justice in a cross-border dispute within the meaning of Articles 1 and 2 of [Directive 2003/8] require that legal aid granted by the Federal Republic of Germany must extend to the costs incurred by the applicant for the translation of the declaration and supporting documents annexed to the legal aid application, where the applicant, at the same time as bringing the action, applies for legal aid to the court hearing the case, which is also the competent receiving authority within the meaning of Article 13(1)(b) of the Directive, and he has himself arranged for the translation to be made?'

15. The order for reference was received by the Court on 15 December 2015. Written observations were submitted by Mr Šalplachta, the German and Czech Governments, as well as the European Commission. Mr Šalplachta, the German and Spanish Governments, as well as the Commission, presented oral argument at the hearing of 9 November 2016.

Analysis

Introduction

16. Article 13(1)(a) and (b) of Directive 2003/8 gives a legal aid applicant a procedural option of submitting his application either to the competent authority of the Member State in which he is domiciled or habitually resident (point (a)) or to the authority of the Member State in which the court is sitting or where the decision is to be enforced (point (b)).

17. When the legal aid application is submitted in the Member State of the applicant's domicile or habitual residence, that Member State's competent authority serves as 'transmitting authority', and the competent authority of the Member State in which the court is sitting or where the decision is to be enforced serves as 'receiving authority'.

18. Under Article 13(4) of Directive 2003/8, the transmitting authority in the Member State of the applicant's domicile or habitual residence, before transferring the application to the receiving authority, is to assist the applicant in providing a translation of the supporting documents.

19. That provision mirrors Article 8(b) of Directive 2003/8 which requires that the Member State in which the legal aid applicant is domiciled or habitually resident must provide legal aid necessary to cover the translation of the application and of the necessary supporting documents when the application is submitted to the competent authority in that Member State.

20. However, Directive 2003/8 does not explicitly deal with the reimbursement of translation costs, when the legal aid application is submitted to the authorities in the Member State in which the court is sitting (the Member State of the forum).

21. By the present request, the referring court seeks to clarify whether Directive 2003/8 requires coverage of those costs also in the latter situation.

22. The referring court is essentially seeking to ascertain whether Directive 2003/8 requires that legal aid granted in the Member State in which the court is sitting must cover the costs incurred by the applicant for the translation of the declaration and supporting documents annexed to the legal aid application, where that application is submitted to the competent authority of that Member State, rather than to the authorities in the Member State in which the applicant is domiciled or habitually resident.

Wording of relevant provisions

23. Although the referring court refers to Articles 1, 2 and 13(1)(b) of the Directive, I consider that in order to provide a useful answer the Court should interpret Articles 3 and 7 of the Directive.

24. According to Article 3(1) of the Directive, natural persons involved in a dispute covered by the Directive are entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in the Directive. Legal aid is considered appropriate when it guarantees, in particular, legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient, including the costs referred to in Article 7 and the fees to persons mandated by the court to perform acts during the proceedings (Article 3(2)(b)).

25. The conditions and extent of legal aid are further set out in Articles 5 to 11 of the Directive.

26. Those provisions govern the right to legal aid both in the Member State of the forum (Articles 5 to 7) and in the Member State of the applicant's domicile or habitual residence (Article 8).

27. In particular, with regard to the costs related to the cross-border nature of the dispute, Article 7(b) of the Directive provides that legal aid must extend to the costs directly related to the cross-border nature of the dispute, including those incurred for translation of the documents required by the court or by the competent authority and presented by the recipient of legal aid which are necessary for the resolution of the case.

28. According to Article 8(b) of the Directive, the Member State in which the legal aid applicant is domiciled or habitually resident is to provide legal aid for the translation of the application and of the necessary supporting documents when the application is submitted to the authorities in that Member State.

29. The wording of these provisions does not explicitly refer to the translation costs incurred for the legal aid application when the application is submitted in the Member State of the forum. On the one hand, Article 7 of the Directive, which deals with the costs in the Member State of the forum refers to the translation of the documents which are 'necessary for the resolution of the case' and does not explicitly mention the costs incurred in relation to a legal aid application. On the other hand, Article 8 of the Directive, which refers to such costs expressly, only concerns the costs covered by the Member State where the applicant is domiciled or habitually resident.

30. The resulting ambiguity is reflected in the opposing positions expressed in the present proceedings.

31. The referring court – albeit noting that that interpretation cannot clearly be deduced from the Directive – takes the view that Article 8 of Directive 2003/8 gives expression to the idea that the costs incurred by a legal aid applicant for translating the declaration and supporting documents annexed to the legal aid application are exclusively borne by the Member State of the applicant's domicile or habitual residence, in this case, by the Czech Republic. That court further observes that, even though that interpretation implies that translation costs are not at all covered when the application is submitted directly in the Member State of the forum, this consequence results from the procedural choice made by the applicant. The applicant had the possibility of applying for legal aid in the Czech Republic, and would not have suffered any legal disadvantage if he had done so.

32. The three Member States intervening in the present case agree with this point of view.

33. The German, the Czech and the Spanish Governments observe that Article 7 of Directive 2003/8 refers to the costs incurred for translation of documents which are 'necessary for the resolution of the case' and does not explicitly refer to the costs for translating the documents linked to the legal aid application. They observe that the costs incurred in relation to a legal aid application are not strictly speaking the costs of the judicial proceedings. In fact, the Spanish Government underlines that in some legal systems a legal aid application is not made to a court but instead to a competent administrative authority and is dealt with under an administrative procedure that is independent of the court proceedings related to the substantive dispute. Even in those legal systems where the legal aid application must be lodged with the court competent to hear the substantive dispute, such an application is still considered under a procedure separate from the judicial proceedings related to that dispute.

34. The applicant in the main proceedings and the Commission take an opposing view.

35. The applicant contends that the exclusion, from the benefit of legal aid, of the costs incurred in relation to a legal aid application would create an obstacle to access to justice in cross-border disputes. If such costs were reimbursed only in the Member State of the applicant's domicile or habitual residence, this would penalise the applicant for submitting his legal aid application directly in the Member State of the forum, thus limiting his procedural options provided for by the Directive and also potentially exposing him to uncertainty as to the observance of time limits.

36. The Commission maintains that the extent of legal aid under the Directive must be determined in the light of the objectives pursued by the Directive and, moreover, should not depend on the procedural mechanism chosen by the legal aid applicant. It would not be coherent to extend legal aid to the translation costs related to the legal aid application only where such application is submitted in the Member State of the applicant's domicile or habitual residence, but not when it is directly submitted in the Member State of the forum. According to the Commission, translation costs should be reimbursed in both situations.

37. Since the wording of the relevant provisions of the Directive is open to conflicting interpretations, I will further refer to teleological and systemic interpretation and, as a subsidiary consideration, to the legislative history of the Directive.

Scheme and objective of Directive 2003/8

38. As apparent from its Article 1(1) and recitals 5 and 6, Directive 2003/8 aims to ensure effective access to justice in cross-border disputes for persons who lack sufficient resources.

39. The objective of the Directive therefore consists in the implementation of the right to effective judicial protection for the categories of litigation falling within the scope of that Directive, in conformity with Article 47(3) of the Charter of Fundamental Rights of the European Union, which guarantees the right to legal aid in so far as such aid is necessary to ensure effective access to justice. [3]

40. In order to achieve this objective, the Directive sets out certain minimum common rules related, in particular, to the right to appropriate legal aid (Article 3) and to the extent of legal aid in cross-border contexts (Article 7). The Directive thereby seeks to overcome the obstacles to access to justice resulting from the additional costs related to the cross-border nature of the dispute.

3 Of course, at the time of the adoption of the Directive, the Charter was not yet legally binding with regard to the Member States. See, in the Polish legal literature, Kowalik-Bańczyk, K., *Pojęcie sporu transgranicznego w dyrektywie Rady Nr 2003/8 [in] Współpraca sądowa*, Czapliński, W., Wróbel, A. (eds.), Warsaw 2007, p. 39, at p. 42.

41. In my view, in order to ensure the attainment of the objectives of the Directive, the 'appropriate legal aid' as envisaged in Articles 3 and 7 of the Directive must be interpreted as also covering the costs which are incurred because of the cross-border nature of the legal aid application itself, such as the costs of translating the application and the supporting documents.

42. In the situations envisaged by the Directive, introducing a legal aid application is a pre-condition for ensuring access to justice. Persons, who due to their economic situation are unable to meet the costs of litigation, could find it difficult to meet the costs of translating the documents necessary for introducing a cross-border legal aid application. Access to justice in cross-border disputes would therefore be imperilled if the applicant could not obtain support for translation costs related to his or her legal aid application.

43. This consideration is confirmed by the system of the Directive, the provisions of which are not restricted to the reimbursement of the costs of litigation, but also deal with the costs of legal advice before submitting the application for legal aid and also the costs incurred in relation to the legal aid application (Article 8).

44. Moreover, since the Directive contains provisions governing the reimbursement of the costs of legal aid applications, such costs should be reimbursed irrespective of the procedural option exercised by the applicant in accordance with Article 13(1) of the Directive.

45. The extent of legal aid should not vary depending on the type of procedural mechanism used for submitting the legal aid application.

46. First, the exclusion of such costs in a situation where the application is submitted directly in the Member State of the forum would, in practice, restrict the applicant's choice between the two procedural alternatives explicitly provided for in Article 13(1) of the Directive. Secondly, such restriction would potentially force the applicant to choose a more onerous procedural solution. Instead of submitting the legal aid application directly to the court competent to hear the substantive dispute, the applicant would be obliged to institute two separate proceedings, the first before the competent court, in order to secure the observance of time limits, and the second before the authorities in the Member State of his or her domicile or habitual residence, in order to obtain the reimbursement of costs incurred in relation to the legal aid application.

47. I consider that it would not be appropriate to read such an intention into the provisions contained in Articles 3, 7 and 8 of the Directive. It does not seem consistent to provide the applicant with two alternative options and then penalise him for pursuing one of the explicitly envisaged procedural alternatives. Such a restriction of procedural options available to the legal aid applicant would create an additional obstacle to access to justice, contrary to the objectives pursued by the Directive.

48. In my opinion, bearing in mind the system and the objective of the Directive, Article 7 thereof, which provides that legal aid in the Member State of the forum must extend to the costs directly related to the cross-border nature of the dispute, cannot be construed as excluding the costs of translation of documents required for deciding on the legal aid application in the context of such a dispute.

49. I therefore consider that both the system and the objective of Directive 2003/8 support the interpretation according to which the extent of legal aid under Articles 3 and 7 of that directive covers the translation costs incurred in relation to a cross-border legal aid application, including the situation where such an application is directly submitted in the Member State of the forum.

Legislative history of Directive 2003/8

50. In my opinion, such a reading of Articles 3, 7 and 8 of the Directive is supported by its legislative history.

51. In the Commission proposal,[4] a single article (Article 5) dealt with costs related to the cross-border nature of the dispute. Its first two paragraphs concerned such costs incurred in the Member State of the forum, while the third paragraph governed the costs incurred in the Member State of the applicant's residence.[5] Thus, under the system as designed by the Commission in its proposal the cross-border costs would in general be covered by the Member State of the forum, save for – as an exception – certain costs incurred in the Member State of the applicant's residence. The structure of that provision remained unchanged after the reading in the European Parliament, except for the amendment to Article 5(3) introduced in order to ensure consistency with a proposed amendment to Article 2(1).[6]

52. In the text of the Directive as finally adopted by the Council[7] the provisions on the costs related to the cross-border nature of the dispute were modified and split between two different articles – Article 7, entitled 'Costs related to the cross-border nature of the dispute', and Article 8, entitled 'Costs covered by the Member State of the domicile or habitual residence'. It does not however appear from those modifications that the Council intended to depart from the concept inherent in the system as proposed by the Commission, according to which the costs related to the cross-border nature of the dispute had to be as a general rule covered by the Member State of the forum, with the exception of certain specific costs incurred in the Member State of the applicant's domicile or habitual residence. Indeed, a reflection of that principle can still be found in the recitals of the Directive.[8]

53. Legislative history therefore appears to support the Commission's assertion in the present case that Article 8 was drafted as an exception to the general rule requiring the Member State of the forum to cover the costs. In any case, I do not find any support for the view expressed by the Spanish Government at the hearing, stating that Articles 7 and 8 contain a rule of apportionment of the costs, by setting out in detail which costs are covered by which of the two Member States concerned. In particular, as I have stated above,[9] I do not see how Article 7 might be interpreted as excluding the costs of translation of documents required for deciding on a legal aid application, when such an application is submitted in the Member State of the forum. Such a restrictive interpretation would, in my opinion, stand in conflict with the objective of the Directive which aims at ensuring the right to receive appropriate legal aid in order to guarantee effective access to justice in cross-border disputes.

4 Proposal for a Council directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings (COM(2002) 13 of 18 January 2002).

5 Article 5 in the Commission proposal was drafted as follows:

'Costs related to the cross-border nature of the dispute.
Legal aid granted in the Member State in which the court is sitting shall cover the costs directly related to the cross-border nature of the dispute.
Such costs shall include interpretation and translation and travel costs where the physical presence of the persons concerned in court is mandatory.
The Member State in which the legal aid applicant resides shall grant legal aid to cover costs incurred by the recipient in that State and, in particular, the cost of consulting a local lawyer.'

6 European Parliament legislative resolution P5_TA(2002)0441 of 25 September 2002. Amendment 17: 'Article 5(3) The Member State in which the legal aid applicant resides or habitually resides shall grant compensation in respect of the cost of legal aid.'

7 Council document No 13385/02 of 18 November 2002.

8 See recital 23, which implies that legal aid is given by the Member State in which the court is sitting or where enforcement is sought, except for pre-litigation assistance.

9 See point 48 of this Opinion.

54. Finally, I observe that the German Government at the hearing referred to the fact that the Directive replaced the system of cooperation in the field of legal aid which existed under the Strasbourg Agreement of 1977 of the Council of Europe. [10]

55. The Strasbourg Agreement provided for a system of cross-border transmission of legal aid applications which enabled applicants to apply for legal aid in the State of their residence. The Agreement also provided that the transmitting authority was to assist the applicant in ensuring that the application was accompanied by all the necessary documents and also assist the applicant in providing any necessary translation of the documents (Article 3).

56. The notification and transmission mechanisms provided for by Article 13 of the Directive are directly inspired by those of the Strasbourg Agreement. [11]

57. However, I do not think that this historical argument can be invoked to show, as the German Government intended, that – since the Directive takes the place of the Strasbourg Agreement – translation costs incurred in relation to legal aid applications are covered only in such situations as were formerly envisaged by the Strasbourg Agreement, that is, only where the applicant makes use of the system of international transmission of legal aid applications by introducing such an application in the Member State of residence.

58. The Strasbourg Agreement introduced the system of cross-border transmission of legal aid applications, but did not cover the issue of the extent of legal aid in the State where the court is sitting. The legislative history of the Directive shows that the Union legislature's intention was to build upon the Strasbourg Agreement, which was little used in practice. [12]

59. If the interpretation advocated by the German Government were accepted, this would mean that the Directive does not go significantly further than the system which existed under the Strasbourg Agreement.

60. Such a conclusion would appear to me to be contrary to the intention of the Union legislature. The main objective of the Directive was not to establish another mechanism for transmitting legal aid applications across borders, since such a mechanism already existed under the Strasbourg Agreement. The Directive seeks to ensure the effective right to legal aid in another Member State, including a situation where the applicant chooses to submit a legal aid application directly in the Member State of the forum. In order for that option to be effective, legal aid should also cover the costs related to the cross-border nature of the legal aid application.

61. In view of all those reasons, I consider that both systemic and teleological considerations support an interpretation of Articles 3 and 7 of the Directive as meaning that legal aid must include the costs incurred by the applicant for the translation of the declaration and supporting documents annexed to the legal aid application, and that this interpretation is also corroborated by the legislative history of the Directive.

10 The European Agreement on the Transmission of Applications for Legal Aid, signed in Strasbourg in 1977 (available at http://www.coe.int/en/web/conventions/). At the time of the adoption of the Directive, the agreement was ratified by all the Member States of the Union, with the exception of Germany. A similar mechanism for transmitting legal aid applications is also provided for by the Hague Convention of 25 October 1980 on International Access to Justice, which was at the time ratified only by six Member States.

11 See recital 26 of the Directive.

12 See Green paper from the Commission 'Legal aid in civil matters: The problems confronting the cross-border litigant' (COM(2000) 51 of 9 February 2000, p. 15).

Conclusion

62. In the light of all the foregoing considerations, I propose that the Court give the following answer to the question referred for a preliminary ruling by the Bundesarbeitsgericht (Federal Labour Court, Germany):

Articles 3(1) and 7 of Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes must be interpreted as meaning that legal aid granted in the Member State in which the court is sitting must cover the costs incurred by the applicant for the translation of the declaration and supporting documents annexed to the legal aid application, where that application is submitted to the competent authority of that Member State.