Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 10 November 2011 [1]

Case C-419/10

Wolfgang Hofmann
v
Freistaat Bayern

(Reference for a preliminary ruling from the Bayerischer Verwaltungsgerichtshof (Germany))

(Directive 2006/126/EC — Mutual recognition of driving licences — Refusal by a Member State to recognise, in favour of a person whose driving licence was withdrawn in its territory, the validity of a driving licence issued by another Member State)

1. By the present question referred for a preliminary ruling, the Court is asked to interpret, for the first time, the provisions of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences, [2] which recasts Council Directive 91/439/EEC of 29 July 1991 on driving licences. [3]

2. Article 2(1) of Directive 2006/126 provides that driving licences issued by the Member States are to be mutually recognised.

3. That principle is qualified, however. The second subparagraph of Article 11(4) of that directive provides that a Member State *shall refuse* [4] to recognise the validity of any driving licence issued by another Member State to a person whose driving licence is restricted, suspended or withdrawn in the former State's territory. That provision replaces the first subparagraph of Article 8(4) of Directive 91/439, which states that a Member State *may refuse* [5] to recognise a driving licence issued under those circumstances.

4. In view of the different wording used in each of these two articles, the Bayerischer Verwaltungsgerichtshof (Bavarian Higher Administrative Court, Germany) questions whether the case-law of the Court developed under Directive 91/439 is also applicable to situations governed by Directive 2006/126.

5. The Court has held that, by virtue of Article 8(4) of Directive 91/439, a Member State may not refuse to recognise the validity of a driving licence issued by another Member State on the ground that its holder has, in the first Member State, been subject to a measure withdrawing or cancelling the driving licence issued by that Member State, where a temporary ban on obtaining a new licence, with which that measure is coupled, has expired before the date of issue of the licence issued by the other Member State. [6]

1 — Original language: French.

2 — OJ 2006 L 403, p. 18

3 — OJ 1991 L 237, p. 1

4 — Emphasis added.

5 — Idem.

6 — See Case C-476/01 *Kapper* [2004] ECR I-5205, paragraph 78, and orders of 6 April 2006 in Case C-227/05 *Halbritter* and of 28 September 2006 in Case C-340/05 *Kremer*.

6. The referring court is therefore seeking to establish, essentially, whether the amended drafting means Member States are from now on required to refuse to recognise the validity of a driving licence granted in those same circumstances.

7. In this Opinion, I will set out the reasons why I consider that, on a proper interpretation of Article 2(1) and the second subparagraph of Article 11(4) of Directive 2006/126, a Member State is required to refuse to recognise the validity of a driving licence issued by another Member State if its holder has had his driving licence withdrawn in the first Member State, on the ground that he had been driving under the influence of alcohol, and the requisite checks concerning his aptitude for driving, as provided for in point 14.1 of Annex III to that directive, have not been carried out.

I – Legal context

A – *European Union law*

1. Directive 91/439

8. With the aim of facilitating the movement of persons within the European Community or their establishment in a Member State other than that in which they obtained their driving licence, Directive 91/439 established the principle of mutual recognition of driving licences.[7]

9. However, that principle is qualified. The first subparagraph of Article 8(4) of that directive provides that a Member State may refuse to recognise the validity of any driving licence issued by another Member State if the holder is, in the first Member State's territory, subject to a measure which restricts, suspends, withdraws or cancels the driving licence.

2. Directive 2006/126

10. In Article 2(1), Directive 2006/126 reiterates that driving licences issued by Member States are to be mutually recognised.

11. According to Article 7(1)(e) of that directive, driving licences are to be issued only to applicants who have their normal residence in the territory of the Member State issuing the licence.

12. The second subparagraph of Article 11(4) of the directive provides that a Member State is to refuse to recognise the validity of any driving licence issued by another Member State to a person whose driving licence is restricted, suspended or withdrawn in the former State's territory.

13. Under Article 13(2) of Directive 2006/126, any entitlement to drive granted before 19 January 2013 is not to be removed or in any way qualified by the provisions of that directive.

14. Point 14.1 of Annex III to Directive 2006/126 states that driving licences are not to be issued to, or renewed for, applicants or drivers who are dependent on alcohol or unable to refrain from drinking and driving. After a proven period of abstinence and subject to authorised medical opinion and regular medical check-ups, driving licences may be issued to, or renewed for, applicants or drivers who have in the past been dependent on alcohol.

7 — See Article 1(2) of that directive.

15. Article 16(1) of Directive 2006/126 provides that Member States are to adopt and publish, not later than 19 January 2011, the laws, regulations and administrative provisions necessary to comply with that directive. Those provisions are to apply as from 19 January 2013 [8] and Directive 91/439 is to be repealed with effect from the same date. [9]

16. However, some provisions of Directive 2006/126 are to apply before that date. According to the second subparagraph of Article 18 of that directive, Articles 2(1), 5, 6(2)(b), 7(1)(a), 9, 11(1) and (3) to (6), Article 12 and Annexes I, II and III are to apply from 19 January 2009.

B – *National law*

17. The regulation on the authorisation of persons to drive on highways (Verordnung über die Zulassung von Personen zum Straßenverkehr), in the version in force on 19 January 2009 ('the FeV'), provides in Paragraph 28(1) that holders of a valid European Union or European Economic Area (EEA) driving licence having their normal residence, within the meaning of Paragraph 7(1) or (2) of the FeV, in Germany shall be authorised — subject to the restrictions laid down in subparagraphs (2) to (4) of Paragraph 28 — to drive motor vehicles in Germany within the limits authorised by their driving licence.

18. Point 3 of the first sentence of Paragraph 28(4) of the FeV states that the right to drive does not apply to holders of a European Union or EEA driving licence whose driving licence has, in Germany, been provisionally or definitively withdrawn by a court, or has been withdrawn by an immediately enforceable or definitive decision of an administrative authority, who have been definitively refused a driving licence, or whose driving licence has not been withdrawn solely because the licence has been surrendered in the meantime.

II – The facts and the dispute in the main proceedings

19. Mr Hofmann, a German national, obtained a German driving licence on 13 October 1960. By decision of 21 November 1996, the Amtsgericht (Local Court) Memmingen withdrew that licence. It was restored to him on 31 August 1998.

20. Having committed the offence of driving under the influence of alcohol, Mr Hofmann was fined by the Amtsgericht Memmingen and had his licence withdrawn again. The summary sentence of the Amtsgericht Memmingen became final on 8 May 2007. That sentence also comprised a ban on applying for a new licence until 7 August 2008.

21. On 19 January 2009, the responsible Czech authorities issued a driving licence to Mr Hofmann. On that licence, his place of residence is stated to be Lazany (Czech Republic).

22. On the occasion of a roadside check carried out on 17 March 2009, the German authorities noted that Mr Hofmann was in possession of a Czech driving licence. During another roadside check, carried out on 25 March 2009, that licence was seized by the German police, which then sent it to the authorities responsible for issuing driving licences.

23. By letter of 20 April 2009, those authorities told Mr Hofmann that his Czech driving licence did not entitle him to drive on German territory and that he would be committing the offence of driving without a licence if he drove a vehicle there. They notified him, further, that if he did not agree to that licence being endorsed with a notice stating the existence of the ban on driving on German territory, a declaratory administrative decision would be issued.

8 — Article 16(2) of the directive.

9 — First paragraph of Article 17 of Directive 2006/126.

24. Mr Hofmann having refused the endorsement of his licence, the Landratsamt Unterallgaü determined, by decision of 15 July 2009, that Mr Hofmann's driving licence issued by the responsible Czech authorities did not entitle him to drive vehicles on German territory.

25. On 13 August 2009, Mr Hoffman brought an action seeking the annulment of that decision before the Verwaltungsgericht (Administrative Court) Augsburg. That court dismissed the action by judgment of 11 December 2009, on the ground that the conditions laid down by points 2 and 3 of the first sentence of Paragraph 28(4) of the FeV were met, since Mr Hofmann had had his German driving licence withdrawn. He could not, therefore, use a driving licence issued by another Member State in German territory.

26. Mr Hofmann appealed against that judgment to the referring court. He seeks, essentially, the annulment of the judgment and the annulment of the decision issued by the Landratsamt Unterallgäu on 15 July 2009.

III – The question referred for a preliminary ruling

27. The Bayerischer Verwaltungsgerichtshof, being in doubt as to the correct interpretation of the provisions of Directive 2006/126, decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Are Article 2(1) and Article 11(4), second [subparagraph], of Directive 2006/126 … to be interpreted as meaning that a Member State must refuse to recognise in its territory the validity of a driving licence issued by another Member State to a person outside a period during which that person was prohibited from applying for a new licence, in the case where that person's driving licence had been withdrawn in the national territory of the first Member State and that person's normal place of residence at the time of the issue of the driving licence was in the national territory of the issuing Member State?'

IV – My assessment

A – *Preliminary observations*

28. Since the issue of whether Article 2(1) and the second subparagraph of Article 11(4) of Directive 2006/126 apply has been raised by the referring court, in its reference for a preliminary ruling, and by the parties, in their written submissions, I should explain, as a preliminary matter, why I believe those provisions do indeed apply to the present case.

29. By virtue of Article 17 of that directive, Directive 91/439 is repealed with effect from 19 January 2013. Member States are to apply the provisions of Directive 2006/126 as from the same date.[10] However, as we have seen, according to the terms of the second paragraph of Article 18 of that directive, certain articles apply from 19 January 2009. That includes, in particular, Articles 2(1) and 11(4) of that directive.

30. Mr Hofmann obtained his Czech driving licence on 19 January 2009. In my view, there is accordingly no doubt that the provisions relevant to the present case are those of the new directive on driving licences, that is, Articles 2(1) and 11(4) of Directive 2006/126, which apply from that same date.

31. Furthermore, the referring court questions whether Article 13(2) of that directive does not prevent the application of the second subparagraph of Article 11(4) of the directive. I recall that, by virtue of the first of those provisions, any entitlement to drive granted before 19 January 2013 is not to be removed or in any way qualified by the provisions of Directive 2006/126.

10 — Article 16(2) of the directive.

32. Mr Hofmann therefore contends that the second subparagraph of Article 11(4) of that directive applies only from 19 January 2013 and that driving licences delivered before that date cannot be restricted, suspended or withdrawn.

33. It should be recalled that, by virtue of Article 16(1) and (2) of Directive 2006/126, its provisions, and in particular Article 13, are applicable only from 19 January 2013.

34. In any event, as the German Government observes, the place of Article 13 in the body of Directive 2006/126 shows that it refers only to acquired rights to drive particular categories of vehicles and not to the restriction, suspension or withdrawal of a driving licence.

35. The directive lays down a single Community model driving licence designed to replace the various driving licences in existence in the Member States.[11] In that regard, it prescribes and defines the different categories of driving licence.[12] The Member States having each defined, before the entry into force of the Community provisions, their own categories of driving licences, they must now establish equivalences between these and those defined by the European Union legislature.

36. Article 13 of Directive 2006/126, entitled 'Equivalences between non-Community model licences', seeks only to regulate that question of equivalences between the various categories of driving licences.

37. That is, moreover, apparent from the *travaux préparatoires*. Article 13 of the directive was added on the initiative of the European Parliament.[13] The Parliament justified the addition stating that the replacement of old driving licences was not, under any circumstances, to result in the loss or restriction of acquired rights with regard to the authorisation to drive different categories of vehicles.[14]

38. An analysis of the kind contended for by Mr Hofmann would, what is more, have the effect that a Member State would be unable to apply national provisions concerning the restriction, suspension or withdrawal of the entitlement to drive of drivers who obtained their driving licence before 19 January 2013. That would be totally contrary to the objective of the improvement of road safety pursued by Directive 2006/126.

39. For all those reasons, I take the view that Article 13(2) of that directive does not prevent the application of the second subparagraph of Article 11(4) of the directive.

B – *The question referred*

40. By its question, the referring court asks, essentially, whether Article 2(1) and the second subparagraph of Article 11(4) of Directive 2006/126 must be interpreted as meaning that a Member State is required to refuse to recognise the validity of a driving licence issued by another Member State where its holder has had a previous driving licence withdrawn in the territory of the first Member State, even where the effects of that measure are exhausted and the residence condition is satisfied.

41. In reality, the referring court wishes to know whether the case-law developed until now by the Court under Directive 91/439[15] applies also to situations such as that of Mr Hofmann, which are governed by Directive 2006/126.

42. I do not believe so, for the following reasons.

11 — See Article 1(1) of the directive.

12 — See Article 4 of Directive 2006/126.

13 — See amendment 13 of the report of 3 February 2005 on the proposal for a directive of the European Parliament and of the Council on driving licences (A6-0016/2005; 'the report').

14 — Idem.

15 — See point 5 of this Opinion.

43. It is apparent from the *travaux préparatoires* which led to Directive 2006/126 that the European Union legislature sought to reinforce the combating of driving licence tourism and, thereby, threats to road safety.

44. The change to the wording of the second subparagraph of Article 11(4) of that directive is the Parliament's doing. During the recast of Directive 91/439, the Parliament proposed establishing the mutual recognition of sanctions imposed on dangerous drivers. To that end, it stated that, in order to guarantee that a driving ban in one Member State be valid in all, the Member States should be obliged to recognise any restrictions, suspension or withdrawal imposed by another Member State and to refuse to recognise the validity of driving licences that are subject to such measures. [16]

45. The Parliament had in mind that driving licence tourism should be neutralised, as far as possible. [17] According to that institution's Committee on Transport and Tourism, driving licence tourism can be defined as the act whereby a citizen whose licence has been withdrawn in his home Member State as a result of a serious offence obtains a new licence in another Member State. [18]

46. Furthermore, the Parliament specifically condemned the fact that persons whose driving licences have been withdrawn in a Member State, in particular for drink driving or driving under the influence of drugs, can already easily procure a false residence in a Member State and obtain a driving licence there, thus circumventing the conditions for the issue of a new driving licence. [19]

47. Accordingly, to my mind, it is very clear that the change of drafting in the terms used in Article 11(4) of Directive 2006/126 is the expression of that desire to support the combating of threats to road safety by going beyond what was thus far provided by Directive 91/439. The second subparagraph of Article 11(4) of Directive 2006/126 therefore leaves the Member States no discretion and now requires them to refuse to recognise the validity of any driving licence issued by another Member State where its holder has been subject to a measure restricting, suspending or withdrawing a previous driving licence in the territory of the first Member State.

48. In my opinion, this must mean that, in Mr Hofmann's situation, the responsible German authorities are entitled not to recognise the driving licence issued by the responsible Czech authorities.

49. The withdrawal of a previous driving licence by the responsible German authorities has the effect that, as from the end of the ban on applying for a new driving licence, the issue of such a licence would have been subject to the production of a medical-psychological expert's report regarding Mr Hofmann's fitness to drive.

50. There seems to me to be no doubt that, for certain offences which, statistically, underlie a great number of serious road traffic accidents, such as driving while drunk, [20] making the renewal of the entitlement to drive subject to such recourse to expert opinion is an effective preventive method which enhances road safety. In that light, the national measure seems to me to be in line with one of the objectives of Directive 2006/126, namely the improvement of road safety. [21]

51. The Commission has pointed out, in that regard, quite how important it is to educate, train, monitor and, where appropriate, penalise road users, since they are the first link in the road safety chain. [22]

16 — See amendment 57 of the report and the explanatory statement, p. 58.

17 — See the justification for that amendment.

18 — See the draft recommendation for second reading of 21 September 2006 on the Council common position for adopting a directive of the European Parliament and Council on driving licences (2003/0252(COD)), paragraph 2.1.

19 — See the justification adjoining amendment 57 of the report.

20 — In 2009, over 35 000 persons were killed on the roads of the European Union, in other words, the equivalent of the population of an average town; no less than 1 500 000 were injured (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled 'Towards a European road safety area: policy orientations on road safety 2011-2020' (COM(2010) 389 final, p. 2)). It is thought that one accident in three is directly linked to alcohol.

21 — See recital 2 in the preamble to that directive.

22 — See page 5 of the Commission communication cited in footnote 20.

52. Therefore, to conclude that the responsible German authorities were entitled to refuse to recognise the validity of the driving licence issued by the responsible Czech authorities seems to me to be consistent not only with the spirit, but also with the letter of the directive as concerns the provisions applicable from 19 January 2009.

53. It is appropriate, in my view, to take into account the fact that the second paragraph of Article 18 of Directive 2006/126 provides, inter alia, that Annex III to that directive is also applicable from 19 January 2009. Point 14 of that annex states that alcohol consumption constitutes a major danger to road safety and that, in view of the scale of the problem, the medical profession must be very vigilant. Point 14.1 of the annex therefore provides that driving licences are not to be issued to persons dependent on alcohol, and are to be issued to persons who have in the past been in that state of dependence only subject to certain conditions, such as a medical opinion.

54. The ground for the decision of 15 July 2009 affecting Mr Hofmann justifies, in my opinion, the application of the checks under point 14.1 of Annex III to Directive 2006/126. Had such checks been carried out and had all the tests to verify whether Mr Hofmann was once again fit to drive been carried out, then the Czech driving licence would have fallen to be recognised as valid by the responsible German authorities, as it would have satisfied the conditions prescribed at European Union level to address a common concern with safety.

55. The fact that the responsible Czech authorities were unaware of the withdrawal decision issued by the Amtsgericht Memmingen does not, I believe, have any bearing on the solution I propose. That lack of awareness results either from Mr Hofmann's hiding the existence of that conviction, or from the responsible Czech authorities' failure to consult the responsible German authorities. In the former case, it is clear that the concealment employed by Mr Hofmann cannot operate to his benefit. In the latter case, an error on the part of an administration cannot create rights either, in particular with regard to the law of another Member State, and especially not when a directive requires that State to apply its national law in the context of an exception recognised by that directive as a part of the broad balance it establishes.

56. During the hearing, the Commission conceded that, in the present case, the system which would have implied the issuing Member State's consulting the responsible German authorities and, having learned of Mr Hofmann's alcohol problems, applying the measures provided for in point 14.1 of Annex III to Directive 2006/126, could be considered consistent with the spirit of that directive and would accordingly have the effect that the Federal Republic of Germany would have been bound to recognise the driving licence issued by the Czech Republic.

57. I believe, for my part, that such a system allows, in line with its preventive purpose, the combination of the new provisions of Article 11(4) of Directive 2006/126 with the principle of mutual recognition based on unquestionable mutual confidence, provided the measures provided for in point 14.1 of Annex III to the directive, which are applicable in all 27 Member States, have been carried out.

58. Admittedly, the Commission also stated that such a system, which would thus require consultation between the competent authorities of the various Member States, appeared complex and was not expressly provided. I recall, however, that not only did Article 12(3) of Directive 91/439 already provide that Member States are to assist one another mutually in the implementation of that directive and, if need be, exchange information on licences they have registered, but, in addition, Article 15 of Directive 2006/126 reaffirms this requirement for mutual assistance, with reference to the envisaged setting-up of a driving licence network. Cooperation and mutual assistance between Member States seem to me to be, precisely, the instrument which, by strengthening mutual trust, enables the achievement of the objectives the European Union has set itself in the area of road safety. What is more, the establishment of a driving licence network does not appear any more complicated than the establishment of a criminal records network, already in place as between certain Member States.

59. In consequence, the solution I propose seems to me to be that which most aptly meets the European Union legislature's intention to support the combating of threats to road safety and ensures the effectiveness of the second subparagraph of Article 11(4) of Directive 2006/126, the wording of which was expressly amended for that reason.

60. In that regard, Mr Hofmann's conduct provides the proof. Mr Hofmann has not, it seems, resolved his problems with alcohol, since, on 16 April 2009, about three months after the issuance of his Czech driving licence, he was stopped and checked by German police, who measured a very high blood alcohol level. The consequence of this conduct, which is dangerous for all road users, was the withdrawal, by a decision which became final on 5 April 2011, of his Czech driving licence for a period of 18 months. I believe that, had the responsible Czech authorities been aware of his alcohol problems, they would probably not have issued a driving licence to Mr Hofmann.

61. Thus, as the German Government pointed out, the second subparagraph of Article 11(4) of Directive 2006/126 functions as a safety valve allowing dangerous individuals to be prevented from driving in the territory of the Member States.

62. It could be objected that such reasoning cannot be applied to the final subparagraph of Article 11(4) of that directive, that is to say, when the measure taken is the cancellation of the driving licence. According to that provision, a Member State *may refuse*[23] to issue a driving licence to an applicant whose licence is cancelled in another Member State. However, like the German Government and the Commission, I believe that cancellation, which is thus distinguished from suspension, restriction or withdrawal measures, concerns the procedural steps leading to the issuance of the driving licence, and not the fitness to drive of its holder.

63. The objective of Directive 2006/126 is not to offer European Union nationals the option of driving licence forum shopping where issuance conditions are less demanding in a neighbouring Member State;[24] it is, on the one hand, to allow a person who possesses a driving licence to establish himself in the territory of a Member State other than the Member State issuing the licence without having to pass any other driving test or having to exchange the licence, and, on the other, to ensure the safety of road users in the territory of the European Union.[25]

64. Accordingly, in view of all the foregoing considerations, I believe that Article 2(1) and the second subparagraph of Article 11(4) of Directive 2006/126 must be interpreted as meaning that a Member State is required to refuse to recognise the validity of a driving licence issued by another Member State where its holder has had a driving licence withdrawn in the territory of the first Member State, on the ground that he was driving under the influence of alcohol, and the necessary checks regarding his fitness to drive, as provided for in point 14.1 of Annex III to the directive, have not been carried out in the issuing Member State.

V – Conclusion

65. In the light of the foregoing, I propose that the question referred for a preliminary ruling by the Bayerischer Verwaltungsgerichtshof be answered as follows:

Article 2(1) and the second subparagraph of Article 11(4) of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences must be interpreted as meaning that a Member State is required to refuse to recognise the validity of a driving licence issued by another Member State where its holder has had a driving licence withdrawn in the territory of the first Member State, on the ground that he was driving under the influence of alcohol, and the necessary checks regarding his fitness to drive, as provided for in point 14.1 of Annex III to Directive 2006/126, have not been carried out in the issuing Member State.

23 — Emphasis added.

24 — Admittedly, Mr Hofmann's Czech driving licence features a place of residence in the Czech Republic. However, it is well known that certain less than scrupulous driving schools have specialised in the provision of residence to German nationals, with the sole aim of satisfying one of the conditions for issuance of the driving licence (see, in that regard, point 46 of this Opinion).

25 — See recital 2 in the preamble to that directive.