JUDGMENT OF THE COURT (Second Chamber)

21 December 2011 *

In Case C-507/10,

REFERENCE for a preliminary ruling under Article 267 TFEU, from the judge in charge of preliminary investigations at the Tribunale di Firenze (Italy), made by decision of 8 October 2010, received at the Court on 25 October 2010, in the criminal proceedings against

X

intervening party:

Y,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, U. Lõhmus, A. Rosas, A. Ó Caoimh and A. Arabadjiev, Judges,

* Language of the case: Italian.

Advocate General: P. Cruz Villalón,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— X, by F. Bagattini, avvocato,

— Y, by G. Vitiello and G. Paloscia, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by F. Arena, avvocato dello Stato,

— the German Government, by T. Henze, acting as Agent,

— Ireland, by D. O'Hagan, acting as Agent,

— the Netherlands Government, by C. Wissels and M. de Ree, acting as Agents,

— the European Commission, by D. Recchia and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 October 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2, 3 and 8 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 X, suspected of having committed acts of a sexual nature on his daughter, Y, who is a minor.

Legal context

The Framework Decision

3 Under Article 1(a) of the Framework Decision, a 'victim' is to 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.'

4 Under Article 2 of the Framework Decision, headed 'Respect and recognition':

'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.'

5 Article 3 of the Framework Decision, headed 'Hearings, and provision of evidence' 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 insofar as necessary for the purpose of criminal proceedings.'

6 Article 8 of the Framework Decision, headed 'Right to protection', provides:

'1. Each Member State shall ensure a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.

2. To that end, and without prejudice to paragraph 4, each Member State shall guarantee that it is possible to adopt, if necessary, as part of the court proceedings, appropriate measures to protect the privacy and photographic image of victims and their families or persons in a similar position.

3. Each Member State shall further ensure that contact between victims and offenders within court premises may be avoided, unless criminal proceedings require such contact. Where appropriate for that purpose, each Member State shall progressively provide that court premises have special waiting areas for victims.

4. Each Member State shall ensure that, where there is a need to protect victims - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles.'

National legislation

7 Article 392(1a) of the Italian Code of Criminal Procedure ('the CPP'), which appears in Book V of that code, headed 'Preliminary investigations and preliminary hearing', provides:

'In proceedings relating to offences under Articles …609c … of the Criminal Code, the Public Prosecutor, [on his own initiative] or at the request of the victim or the person under investigation, may request that evidence be taken from a person who is a minor or from a victim who is of age, by means of the *incidente probatorio* [special measures procedure], even outside the cases provided for in paragraph 1.'

8 Article 394 CPP provides:

'1. A victim may ask the Public Prosecutor to initiate an *incidente probatorio*.

2. If the Public Prosecutor refuses that request, he must issue a statement of reasons for his decision which he must notify to the victim.'

9 Under Article 398(5a) of the CPP:

'In investigations concerning offences under Articles … 609c … of the Criminal Code, where the persons from whom evidence is to be obtained include minors, the judge shall determine, by the order referred to in paragraph (2), the place, time and particular arrangements for hearing evidence by means of the *incidente probatorio*, where the need to protect such persons makes it appropriate and necessary. In such cases, the hearing can be held in a place other than the court, in any special support facilities or, failing that, at the home of the person from whom evidence is to be obtained. Witness statements must be fully documented by the use of sound or audiovisual recording equipment. Where recording equipment or technical personnel are not available, the judge shall have recourse to experts or technical advice. The interview shall also be minuted. The recordings shall be transcribed only at the request of the parties.'

The main proceedings and the questions referred for a preliminary ruling

10 The order for reference states that Ms Z brought a complaint that, during 2007, Mr X had repeatedly engaged in sexual acts which are prohibited by Article 609c of the Criminal Code, read together with Article 81 et seq. thereof, the victim being their daughter, Y, who was then five years old.

11 On the basis of that complaint a preliminary investigation was begun, in the course of which the child Y was heard on several occasions by various expert psychologists and paediatricians. On 8 May 2008, following those measures, the Public Prosecutor requested that the case be closed and no further action taken.

12 Since that request was opposed by the child Y, the judge in charge of preliminary investigations, in accordance with the applicable rules of procedure, ordered a hearing in chambers to enable the parties to state their views on the merits of that request and to apply, if appropriate, for further enquiry or referral to a court. In the course of that hearing, the child Y, pursuant to Article 394 of the CPP, requested that the Public Prosecutor hear her as a witness by means of the special measures procedure for the early taking of evidence, the *incidente probatorio*.

13 The referring court, after obtaining the agreement of the Public Prosecutor in relation to the request to open an *incidente probatorio*, ordered that the child be heard according to the special arrangements provided for in Article 398(5a) of the CPP. At that hearing, the child Y confirmed that her father had subjected her to acts of a sexual nature.

14 On 27 May 2010 the Corte suprema di cassazione set aside the decision of the referring court to have recourse to the *incidente probatorio*.

15 On 14 July 2010 the Public Prosecutor again requested that the case be closed, a request which the victim opposed.

16 The referring court ordered a further hearing in chambers, at which the child Y requested that the Public Prosecutor renew the request for a hearing within the *incidente probatorio*. The Public Prosecutor expressed no view on that request and repeated his request that the case be closed and no further action taken.

17 Since the judge in charge of preliminary investigations at the Tribunale di Firenze doubted the compatibility of the procedural rules applicable to minor victims, under the provisions of Articles 392(1a), 394 and 398 of the CPP, with Articles 2, 3, and 8 of the Framework Decision, because, first, those rules impose no obligation on the Public Prosecutor to take any action on a request by a victim that use be made of the *incidente probatorio* and, second, they do not allow the victim to bring an appeal

before a court against a refusal by the Public Prosecutor to comply with that request, the judge decided to stay the proceedings and to ask the Court to rule on the scope of those articles of the Framework Decision.

The jurisdiction of the Court of Justice

18 In accordance with Article 9 of Protocol No 36 on transitional provisions, annexed to the FEU Treaty, the legal effects of the Framework Decision, which was adopted on the basis of Title VI of the EU Treaty before the entry into force of the Treaty of Lisbon, are to be preserved until the Framework Decision has been repealed, annulled or amended in implementation of the Treaties.

19 Further, Article 10(1) of that protocol provides that the powers of the Court of Justice with respect of acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon under Title VI of the EU treaty, are to remain the same, including where they have been accepted under Article 35(2) EU. Pursuant to Article 10(3) of that protocol, the transitional measure mentioned in Article 10(1) is to cease to have effect five years after 1 December 2009, the date of the entry into force of the Treaty of Lisbon.

20 It is apparent from the information concerning the date of entry into force of the Treaty of Amsterdam, published in the *Official Journal of the European Communities* of 1 May 1999 (OJ 1999 L 114, p. 56) that the Italian Republic made a declaration on the basis of Article 35(2) EU by which it accepted the jurisdiction of the Court to rule on the validity and interpretation of acts referred to in Article 35 EU in accordance with the arrangements laid down in Article 35(3)(b) EU.

21 It is also undisputed that the Framework Decision, based on Articles 31 EU and 34 EU, is one of the acts referred to in Article 35(1) EU on which the Court may rule in a reference for a preliminary ruling and it is accepted that the judge in charge of preliminary investigations, acting in proceedings such as those in the main action, must be regarded as a court or tribunal of a Member State for the purposes of Article 35 EU (see, inter alia, Case C-467/05 *Dell'Orto* [2007] ECR I-5557, paragraph 35).

22 In those circumstances, the questions referred must be answered.

Consideration of the questions referred

23 By its questions, the referring court seeks, in essence, to ascertain whether Articles 2, 3 and 8(4) of the Framework Decision must be interpreted as precluding provisions of national law, such as those of Articles 392(1a), 398(5a) and 394 of the CPP, which, first, do not impose any obligation on the Public Prosecutor to make a request to the competent court that it allow a particularly vulnerable victim to be heard and to give evidence under the arrangements of the *incidente probatorio* during the investigation phase of criminal proceedings, and, second, do not give authority to that victim to bring an appeal before a court against the decision of the Public Prosecutor rejecting her request to be heard and to give evidence under those arrangements.

24 In accordance with Article 3 of the Framework Decision, each Member State must safeguard the possibility for victims to be heard during proceedings and to supply evidence and must take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.

25 Articles 2 and 8(4) of the Framework Decision require each Member State to make every effort to ensure that all victims are treated with due respect for their individual dignity during proceedings, to ensure that particularly vulnerable victims benefit from specific treatment best suited to their circumstances, and to ensure that where there is a need to protect victims, particularly those most vulnerable, from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner enabling that objective to be achieved, by any appropriate means compatible with its basic legal principles.

26 While the Framework Decision does not define the concept of a victim's vulnerability, within the meaning of Articles 2(2) and 8(4) thereof, it cannot be disputed that where, as in the main proceedings, a young child claims to have been the victim, repeatedly, of acts of a sexual nature committed by her father, that child is manifestly capable of being so classified, having regard in particular to her age and to the nature, seriousness and consequences of the offences of which she considers herself to have been the victim, with a view to her benefiting from the specific protection required by the provisions of the Framework Decision referred to above (see, to that effect, Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 53).

27 None of the three provisions of the Framework Decision referred to by the referring court lays down specific means for implementing the stated objectives, which consist, in particular, of ensuring that all victims are treated 'with due respect for the dignity of the individual'; that victims can 'be heard' during proceedings and 'supply evidence', and that victims are 'questioned … only insofar as necessary for the purpose of criminal proceedings', while also ensuring that 'victims who are particularly vulnerable' can benefit from 'specific treatment best suited to their circumstances' and that those victims are, when necessary, protected 'from the effects of giving evidence in open court' by being entitled, 'by decision taken by the court', to 'testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles' (see, to that effect, *Pupino*, paragraph 54).

28 In the absence of fuller clarification in the actual provisions of the Framework Decision in the light of Article 34 EU, which grants to national authorities the choice of form and methods necessary to achieve the desired result of Framework Decisions, it must be recognised that the Framework Decision leaves to the national authorities a large measure of discretion with regard to the specific means by which they implement the objectives to be attained (see, to that effect, Case C-404/07 *Katz* [2008] ECR I-7607, paragraph 46; Case C-205/09 *Eredics and Sápi* [2010] ECR I-10231, paragraphs 37 and 38, and Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* [2011] ECR I-8263, paragraphs 57, 72 and 74).

29 Under the legislation at issue in the main proceedings, testimony given during the preliminary enquiries must generally be repeated in open court in order to acquire full evidential value. It is, however, permissible in certain cases to give that testimony only once, during the preliminary investigation, with the same probative value, but under different arrangements from those which apply in open court (*Pupino*, paragraph 55).

30 As regards that legislation, the Court has previously ruled that achievement of the aims pursued by the abovementioned provisions of the Framework Decision require that a national court should be able, in respect of particularly vulnerable victims, to use a special procedure, such as the *incidente probatorio* for early gathering of evidence, provided for under Italian law, and the special arrangements for hearing testimony – for which provision is also made – if that procedure is best suited to the circumstances of those victims and is necessary in order to prevent the loss of evidence, to reduce the repetition of questioning to a minimum, and to prevent the damaging effects, for those victims, of their giving evidence in open court (*Pupino*, paragraph 56).

31 In contrast to the case which led to the *Pupino* judgment, the offence at issue in the main proceedings is one of the offences for which recourse to that procedure is, as a general rule, possible.

32 The referring court considers however that the fact that the Public Prosecutor is not obliged to agree to the request, made by a victim who is particularly vulnerable during the investigation phase, to apply to the competent judge to use that procedure and to conduct a hearing under the particular arrangements for which provision is also made, is contrary to the abovementioned provisions of the Framework Decision. The judge in charge of preliminary investigations is, in a case of refusal by the Public Prosecutor and where there is no request for such a measure by the person under investigation, barred from using that procedure even though, on the other hand, that same judge could compel the Public Prosecutor to draw up charges with a view to the case against the person being prosecuted being brought for trial.

33 As observed in paragraphs 27 and 28 of this judgment, none of the three provisions of the Framework Decision referred to by the referring court lays down specific means for implementing their stated objectives. In the light of the wording of those provisions, and taking into account Article 34 EU, it must be recognised that the national authorities have a large measure of discretion with regard to those means.

34 While, as stated above, provision must be made by Member States for specific measures to benefit victims who are particularly vulnerable, it does not necessarily follow that those victims have a right to the *incidente probatorio* during the investigation phase, in order to achieve the objectives pursued by the Framework Decision.

35 The obligation imposed in particular by Article 8(4) of the Framework Decision on Member States is to ensure that, where there is a need to protect victims, particularly those most vulnerable, 'from the effects of giving evidence in open court', victims may, 'by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved' and 'by any appropriate means compatible with its basic legal principles'.

36 However, as observed by the Advocate General in points 53 to 58 of his Opinion, the discretion which is enjoyed by Member States in implementing that objective is not exceeded by national legislation which, in a legal system such as that in the main proceedings, provides for procedural arrangements whereby the Public Prosecutor is to decide whether it is appropriate to agree to a victim's request to use a procedure such as the *incidente probatorio*.

37 In addition to the fact that, as stated in recital 9 in the preamble thereto, the Framework Decision does not impose an obligation on Member States to ensure that victims will be treated in a manner equivalent to that of a party to proceedings (see, in particular, *Gueye and Salmerón Sánchez*, paragraph 53), the fact that, in the Italian criminal justice system, it is for the Public Prosecutor to decide whether to submit to the competent court the victim's request for use, in the investigation phase, of the *incidente probatorio*, which is an exception to the general rule that evidence is obtained by adversarial proceedings, can be regarded as part of the logic of a system in which the Public Prosecutor is a judicial body with responsibility for bringing prosecutions.

38 It follows from the foregoing that, first, the provisions of national law at issue in the main proceedings stem from fundamental principles of the criminal justice system of the Member State concerned which, in accordance with Article 8(4) of the Framework Decision, must be respected. Second, an assessment of a victim's request to use the *incidente probatorio* must take into account the need to interpret the Framework Decision in such a way that fundamental rights are respected. In the light of that requirement, the national authorities must ensure, in every case, that the effect of application of such a procedure is not such that the criminal proceedings, considered as a whole, are unfair in terms of the abovementioned provisions.

39 While, in the Italian legal system, the judge in charge of preliminary investigations may oblige the Public Prosecutor to draw up the charges in a case, notwithstanding the fact that the latter wanted to close the case and take no further action, it seems established that, in such circumstances, the Public Prosecutor may still submit, where

appropriate, even to the judge with responsibility for deciding subsequent procedure, a request for the use of a procedure such as the *incidente probatorio*.

40 Further, as the Italian Government explained, as regards *inter partes* proceedings before the competent court in the event that the person accused is brought to trial, the protection of the victim is ensured by various provisions of the CPP, which make provisions for, inter alia, *in camera* hearings and the possibility of using the arrangements provided for in Article 398(5a) of the CPP, namely precisely those arrangements which the referring court would like to be used in the investigation phase.

41 Nor is the conclusion reached in paragraph 36 of this judgment called into question by the fact that the Public Prosecutor's refusal decision, which must be supported by a statement of reasons, cannot be reviewed by a court, since that fact is the consequence of a system in which responsibility for drawing up the charges is, as general rule, reserved to the Public Prosecutor.

42 Admittedly, as the Court has held (see, inter alia, *Gueye and Salmerón Sánchez*, paragraphs 58 and 59), the first paragraph of Article 3 and Article 2(1) of the Framework Decision imply in particular that the victim is to be able to give testimony in the course of the criminal proceedings and that that testimony is to be capable of being taken into account as evidence. To guarantee that the victim can effectively and adequately take part in the criminal proceedings, his or her right to be heard must permit not only the possibility of objectively describing what happened, but also the opportunity to express his or her opinion.

43 However, neither the provisions of the Framework Decision nor Article 47 of the Charter of Fundamental Rights of the European Union (see, in relation to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, in particular, the judgment of the ECHR of 29 March 2001 *Asociación de Víctimas del Terrorismo v Spain* (No 54102/00))

guarantee to the victim of a criminal offence a right to require criminal proceedings to be brought against a third party in order to secure his conviction.

44 In the light of all the foregoing, the answer to the questions referred is that Articles 2, 3 and 8(4) of the Framework Decision must be interpreted as not precluding provisions of national law, such as Articles 392(1a), 398(5a) and 394 of the CPP, which, first, do not impose on the Public Prosecutor any obligation to apply to the competent court so that a victim who is particularly vulnerable may be heard and give evidence under the arrangements of the *incidente probatorio* during the investigation phase of criminal proceedings and, second, do not give to that victim the right to bring an appeal before a court against that decision of the Public Prosecutor rejecting his or her request to be heard and to give evidence under those arrangements.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Articles 2, 3 and 8(4) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, must be interpreted as not precluding provisions of national law, such as Articles 392(1a), 398(5a)

and 394 of the Italian Code of Criminal Procedure, which, first, do not impose on the Public Prosecutor any obligation to apply to the competent court so that a victim who is particularly vulnerable may be heard and give evidence under the arrangements of the incidente probatorio during the investigation phase of criminal proceedings and, second, do not give to that victim the right to bring an appeal before a court against that decision of the Public Prosecutor rejecting his or her request to be heard and to give evidence under those arrangements.

[Signatures]