Access to the profession of lawyer and conditions of registration to the bar for civil servants of the European Union administration: conformity of the French regulation, following a preliminary ruling of the CJUE

28/10/2021

Ruling no 327 of 5 May 2021 (17-21.006) - *Cour de cassation* (Court of Cassation) - First Civil Chamber - ECLI:FR:CCAS:2021:C100327

Dismissal

Only the french version is authentic

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Appellant(s): Ms A... X...

Respondent(s): Conseil de l'ordre des avocats au barreau de Paris; and others

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Facts and procedure

1. According to the ruling under appeal (Paris, 11 May 2017), Ms X..., an official of the European Commission, applied for admission to the Paris Bar, with the benefit of the exemption from the training and degree requirement provided for in Article 98, 4° of Decree No 91-1197 of 27 November 1991 organising the legal profession, for civil servants and former civil servants in category A, or persons treated as such, who have carried out legal activities for at least eight years in a public administration or public service or in an international organisation.

2. By a ruling of 20 February 2019, the Cour de cassation (Court of Cassation) referred two questions to the Court of Justice of the European Union (the CJEU) for a preliminary ruling on the compatibility of Articles 11, 2° and 3° of Act No 71-1130 of 31 December 1971 reforming certain judicial and legal professions and Article 98, 4° of the above-mentioned decree with Articles 45 and 49 of the Treaty on the Functioning of the European Union (TFEU).

Reviewing pleas

On the first, second, and third pleas, joined

Statement of pleas

3. By her first plea, Ms X... objects to the ruling for dismissing her request, whereas:

"1°/ Article 98, 4° of the Decree of 27 November 1991 provides that "the theoretical and practical training and the certificate of aptitude for the profession of lawyer are waived: (...) for civil servants and former civil servants in category A, or persons equivalent to civil servants in that category, who have been engaged in legal activities in that capacity for at least eight years in an administration or public service or in an international organisation". EU law is directly incorporated into national law. Even if the exercise of the legal activities referred to in the text is limited to French law, it does not require the applicant to have mastered all the branches of that law. Also the practice for at least eight years of any branch of French law, including European Union law, is sufficient for this

condition to be met. In this case, by deciding on the contrary that Ms X..., an officer in the highest category at the European Commission, did not meet the condition of having practised French law since she had only practised European Union law, to which national law was not limited, the cour d'appel (Court of Appeal) infringed Article 11, 3° of Act No 71-1130 of 31 December 1971 and 98, 4° of Decree No 91-1197 of 27 November 1991, together with the principle of the direct integration of European Union law into the domestic law of the Member States, together with Article 88-1 of the Constitution of 4 October 1958;

2°/ European Union law is directly integrated into national law. The practice of European Union law is therefore equivalent to the practice of any other branch of French law. In this case, by distinguishing, for the application of Article 98, 4° of the Decree of 27 November 1991, between civil servants who have practised certain branches of French law outside of European Union law and civil servants who have practised European Union law, in order to exclude the latter from the benefit of the exemption instituted by the text, the cour d'appel (Court of Appeal), which made a distinction where the law does not, infringed Articles 11, 3° of Act No 71-1130 of 31 December 1971 and 98, 4° of Decree No 91-1197 of 27 November 1991, together with the principle of the direct integration of European Union law into the domestic laws of the States and the principle of conforming interpretation, together with Article 88-1 of the Constitution of 4 October 1958."

4. By her second plea, Ms X... makes the same complaint against the ruling, whereas "European Union law prohibits not only direct discrimination based on nationality, but also indirect discrimination, which can only be justified on grounds of public order, public safety or public health. According to the case law of the CJEU, the concept of indirect discrimination is interpreted broadly and also includes barriers of secondary importance which concern equal access to employment without distinction on grounds of nationality. If the exemption provided for in Articles 11, 3° of the Act of 31 December 1971 and 98, 4° of the Decree of 27 November 1991 is to be understood as being limited to category A civil servants and persons of equivalent status who have carried out legal activities for eight years, either exclusively on French territory or by implementing rules of French law which do not originate in European Union law, then these texts necessarily have the effect of introducing indirect discrimination in favour of French civil servants - the vast majority of whom are French nationals - who are in practice the only ones who can meet these criteria, and against European citizens who are civil servants belonging to another civil service, which is not justified on grounds of public policy, public security or public health. By dismissing Ms X...'s request on this basis, the cour d'appel (Court of Appeal) infringed Articles 11, 3° of Act No 71-1130 of 31 December 1971 and 98, 4° of Decree No 91-1197 of 27 November 1991, together with Articles 18, 45 and 49 of the Treaty on the Functioning of the European Union as interpreted by the CJEU."

5. By her third plea, Ms X... makes the same complaint against the ruling, whereas:

"1°/ All the provisions of the Treaty on the Functioning of the European Union relating to the free movement of persons are intended to facilitate the exercise of professional activities of all kinds within the territory of the European Union and preclude measures which might place its nationals at a disadvantage when they wish to exercise an economic activity in the territory of another Member State. A measure which impedes the free movement of workers and the freedom of establishment may be admitted, assuming that it is non-discriminatory, only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons relating to the publicinterest, provided that the application of such a measure is suitable for securing the attainment of the objective in question and does not go beyond what is necessary in order to attain that objective. In this case, to consider that the exemption provided for in Article 98, 4° of the Decree of 27 November 1991 should be refused to European Union officials who have practised only European Union law, which is an integral part of French law, on the ground that this practice would not guarantee litigants a relevant and effective defence, or the protection of litigants against the prejudice they might suffer as a result of services provided by persons who do not have the necessary professional qualifications but the fact that it may be granted to officials who have practised only in certain branches of French law (other than European Union law), and therefore do not objectively offer more guarantees, constitutes a restrictive measure which, even if it pursues the legitimate aim of protecting the

individual, is nevertheless inadequate to guarantee the attainment of the objective in question and goes beyond what is necessary to attain it. By dismissing in these conditions Ms X...'s application for registration at the bar, the cour d'appel (Court of Appeal) infringed Articles 18, 45 and 49 of the Treaty on the Functioning of the European Union, as interpreted by the CJEU, together with Articles 11, 3° of Act No 71-1130 of 31 December 1971 and 98, 4° of Decree No 91-1197 of 27 November 1991, together with the principles of the direct integration of European Union law into the domestic law of the Member States and of conforming interpretation of national law;

2°/ A measure which hinders the free movement of workers and the freedom of establishment may be admitted, assuming that it is non-discriminatory, only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons in the public interest, provided that the application of such a measure is appropriate to guarantee the attainment of the objective in question and does not go beyond what is necessary to attain that objective. According to the case law of the CJEU, in order to exercise this control when access to a regulated profession is at issue, the national court must take into consideration the periods of comparable activity of the party concerned completed in another Member State, by means of an assessment of the qualifications and experience acquired, which must be made in concreto. In this case, the cour d'appel (Court of Appeal) was therefore required to compare the degrees, qualifications and professional experience of Ms X..., a European official who had admittedly practised European law for ten years, but who held a master I degree, a DEA (master II degree) and a doctorate in French law, with those required of a French official who held only a master's degree in law and who had only practised 'ordinary' French law for eight years, in order to assess the level of the applicant's knowledge of 'ordinary' French law. By limiting itself to a dismissal in abstracto based on the absence of practice of 'ordinary' French law without making an overall assessment that also included the knowledge of the party concerned, the cour d'appel (Court of Appeal) infringed Article 11, 3° of Act No 71-1130 of 31 December 1971 and 98, 4° of Decree No 91-1197 of 27 November 1991, together with Articles 18, 45 and 49 of the Treaty on the Functioning of the European Union as interpreted by the CJEU;

3°/ A measure which hinders the free movement of workers and the freedom of establishment may be admitted, assuming that it is non-discriminatory, only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons in the public interest, provided that the application of such a measure is suitable for guaranteeing the attainment of the objective in question and does not go beyond what is necessary in order to attain that objective. By requiring an in concreto assessment by the judge of the knowledge of the person concerned, European Union law imposes an obligation of result to take account of equivalent knowledge and experience, an obligation which, if not respected, gives rise to indirect discrimination. In order to satisfy this obligation, the national court cannot simply refer to existing categories of access under national law if these do not make it possible to achieve this obligation of result. In this case, by referring the appellant to the ordinary law access regime open to lawyers without professional experience, whereas her knowledge and professional experience corresponded at least in part to those opening up derogatory access to civil servants in the French civil service, that this regime did not allow her professional experience to be effectively taken into account and that a less strict means of achieving the desired objective would have consisted in requiring proof of the missing knowledge alone, the cour d'appel (Court of Appeal) infringed Article 11, 3° of Act No 71-1130 of 31 December 1971 and Article 98, 4° of Decree No 91-1197 of 27 November 1991, together with Articles 18, 45 and 49 of the Treaty on the Functioning of the European Union as interpreted by the CJEU, and the obligation of conforming interpretation of European Union law."

Court's response

6. Access to the profession of lawyer is regulated by the Act of 31 December 1971, in particular by Article 11, 3°, according to which no one may have access to this profession unless he or she holds a certificate of aptitude for the profession of lawyer, subject to the regulatory provisions mentioned in 2° of the same article. These provisions include Article 98, 4° of Decree No 91-1197 of 27 November 1991, as amended, according to which civil servants and former civil servants in category A, or persons holding a status equivalent to civil servants in that category,

who have carried out legal activities in that capacity for at least eight years in a public administration or public service or in an international organisation, are exempted from the theoretical and practical training and from the certificate of aptitude for the legal profession.

7. Responding to the above-mentioned questions for a preliminary ruling, the CJEU, in a ruling of 17 December 2020 (C-218/19), ruled that Articles 45 and 49 TFEU must be interpreted as meaning "precluding national legislation which restricts an exemption from the requirements of professional training and holding a certificate of competence to exercise the profession of lawyer laid down, in principle, for entry to the profession of lawyer, to certain members of the civil service of a Member State who have performed legal work in that capacity in that Member State, in an administration or a public service or an international organisation, and which excludes from the scope of that exemption officials, members or former members of the EU civil service who have performed legal work in that capacity in an EU institution and outside French territory" but " not precluding national legislation which makes such an exemption contingent on the person concerned having performed legal work in the field of national law, and excluding from the scope of that exemption officials, members or former members of the EU civil service who have performed legal work in that capacity, in one or more fields of EU law, provided that that national legislation does not exclude account from being taken of legal work involving the practice of national law."

8. In its ruling, the CJEU states, on the one hand, that the protection of "recipients of legal services provided by persons involved in the administration of justice, and, second, the proper administration of justice are objectives which feature among those which may be regarded as overriding reasons in the public interest capable of justifying restrictions both on the freedom to provide services [...] as well as [...] on the free movement of workers and the freedom of establishment" (point 34).

9. It adds that "it cannot, a priori, be ruled out that a candidate who is a member of a civil service other than the French civil service, inter alia, the EU civil service, [...] has practised French law outside French territory in such a way as to have acquired satisfactory knowledge of it", but that it was "therefore open to the French legislature to define autonomously its quality standards [...] and, therefore, to consider that satisfactory knowledge of French law [...] could be acquired by practising that law for a minimum of eight years" (points 36 and 38).

10. It follows that civil servants, officials, and former officials of the European Union civil service, who have worked in that capacity within a European institution, cannot be deprived of the benefit of Article 98, 4° on the ground that they have carried out their activities outside French territory, but that in accordance with the national rules requiring the exercise of legal activities in the field of national law, in order to ensure the protection of individuals and the proper administration of justice, it must be determined whether their legal activities involve the satisfactory practice of national law and that, in those circumstances, the national rules do not infringe on Articles 45 and 49 of the Treaty.

11. The ruling rightly states, first of all, without focusing on the place where the legal activities are carried out, that the requirements laid down by Article 98, 4° do not create discriminatory conditions for access to the profession of lawyer, that they are justified in order to protect the individual and to guarantee, by means of a satisfactory knowledge of national law, the exercise of the rights of the defence and that they are limited and proportionate to the objective pursued. It then found that Ms X... fulfilled the required degree condition and had worked for at least eight years in various European Union departments as a temporary agent, a probationary civil servant, and then a permanent civil servant.

12. However, examining in concreto the work and missions that had been entrusted to her, the cour d'appel (Court of Appeal) considered that Ms X... did not justify any practice of national law, which, even if it integrates a number of European rules, retains a specificity and is not limited to them, and rightly deduced that she did not fulfil the derogatory condition relating to the exercise of legal activities in the domain of national law.

13. The pleas are therefore unfounded.

On the fourth plea

Statement of plea

14. Ms X... makes the same complaint against the ruling that "the Revised European Social Charter (version of 3 May 1996) provides in Part I, Point 18, that the "nationals of any one of the Parties have the right to engage in any gainful occupation in the territory of any one of the others on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons." and, in Part II, Article 18, that "With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake: 1. To apply existing regulations in a spirit of liberality". The "right to engage in a gainful occupation" thus referred to covers in a general way the possibility of such exercise, without it being necessary to distinguish "access" to the activity concerned. In this case, by dismissing the application of the Charter as a matter of principle, on the grounds that it concerns only the "exercise" of a profession and not "access" to a profession, and by refusing therefore to interpret Article 98, 4° of the Decree of 27 November 1991 in accordance with the directive contained in Article 18 of Part II, the cour d'appel (Court of Appeal) infringed the Revised European Social Charter (version of 3 May 1996), together with Article 55 of the Constitution of 4 October 1958."

Court's response

15. Whatever the scope of the provisions of Article 18 of Part II of the European Social Charter in the domestic order, they are not disregarded by Article 98, 4° of the Decree of 27 November 1991, which opens up the practice of the profession of lawyer to nationals of Member States, by merely subjecting them, like nationals, to certain conditions justified by overriding reasons of public interest proportionate to the objective of protecting litigants.

16. Consequently, the plea is irrelevant.

ON THESE GROUNDS, the Court:

DISMISSES the appeal;

President: Ms Batut
Reporting Judge: Ms Teiller
Advocate-General: Mr Chaumont
Lawyers: SCP Krivine et Viaud - SCP Waquet, Farge et Hazan

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