

JULY 12, 2023

Analysis: “National court must have regard to the proper function of the Court under the procedure laid down in Article 267 TFEU (Joined Cases C-711/21 and C-712/21)” by Silvia Rizzuto

Silvia Rizzuto

Introduction

In [Joined Cases C-711/21 and C-712/2](#) the Court of Justice not only recalls its case law on the function of the procedure laid down in Article 267 TFEU but also takes the opportunity to clarify the core of the ‘test’ of relevance as well as to emphasise the need for each national court to respect the system of judicial dialogue between the Court and the courts and tribunals of the Member States and the principle of sincere cooperation.

Dispute

In the case delivered on 22 June 2022, the questions referred for a preliminary ruling concerned the interpretation of Articles 4, 7 and 47 of the Charter of Fundamental Rights and Articles 5, 6(6) and 13 of Directive 2008/115/EC, concerning two return decisions that the Belgian authorities adopted in respect of the appellants, both third-country nationals.

Following the rejection of their request for international protection and the order to leave the territory, the applicants lodged an appeal with the Belgian Council for asylum and immigration proceedings, attaching documents attesting a change of circumstances relating to their family life and health conditions. Nevertheless, the Belgian authority held that applicants could no longer contest the decision ordering them to leave the Country, since the judgment dismissing their appeal against the refusal to grant them international protection had settled the matter definitively (para 34). That judgment was thus appealed again by the applicants before the Belgian *Conseil d'État*.

Therefore, the *Conseil d'État* raised a preliminary question asking for clarification of the time limit for considering any developments that occurred after the validity of the decisions to reject a request had been upheld. It considered that case *Gnandi* ([C-181/16](#)) did not clearly identify the extent to which a court entrusted with examining the lawfulness of a return decision could take into consideration a change of circumstances after the closure of the international protection procedure.

In the proceedings before the Court of Justice, the Belgian Government submitted written observations noting that both references were inadmissible since the interpretation of EU law requested by the referring court was no longer necessary for the purposes of delivery of the judgment, because the competent authority issued both applicants with a residence permit in Belgium. Furthermore, it underlined that according to the *Conseil d'État's* own case-law, a return decision is automatically revoked when a residence permit is issued, without the need for the competent authority to issue a new return decision.

As a result of the Governments reply, the Court of Justice asked the *Conseil d'État* whether it intended to maintain its references for a preliminary ruling and, if so, to state its reasons. The *Conseil d'État* maintained its questions and justified that decision by first recalling the position taken by the applicants' lawyer who was concerned that, as soon as that right of residence ceased to exist, the competent Belgian authority might proceed with a return procedure against the applicants. And this despite the fact that the Belgian Government had stated the contrary. Moreover, the *Conseil d'État* also pointed out that, 'since the proceedings pending before it had been stayed pending the answer of the Court of Justice, it could not rule that the return decisions have disappeared from the legal order and that those applicants no longer have an interest in bringing proceedings, without a without new adversarial debates between the parties and without a new judgment' (para 42).

The Court of Justice started its reasoning by recalling that, in the context of cooperation between the Court and national courts and in accordance with settled case-law, questions concerning the interpretation of EU law under Article 267 TFEU enjoy a presumption of relevance. It took the opportunity to reiterate the *rationale* of the preliminary reference procedure, which does not lie in the expression of advisory opinions on generic or hypothetical questions, but in the need to concretely settle a dispute. As is clear from the very wording of Article 267 TFEU, the requested preliminary ruling must be ‘necessary’ to enable the referring court to ‘deliver its judgment’ in the case before it (para 30).

Consequently, where it appears that the question referred is manifestly irrelevant to the resolution of that dispute, the Court must declare that there is no need to adjudicate. Moreover, as the Advocate General also pointed out, in the context of the division of judicial functions between the national courts and the Court of Justice, the latter gives preliminary rulings without, as a matter of principle, having to ask what are the circumstances in which the national courts have submitted questions and propose to apply the provision or provisions of EU law in question (AG Opinion point 19).

The Court of Justice agreed with Belgian Government and the [Advocate General](#), that, in the case at hand, a ruling by the Court was not necessary for the effective resolution of the appeals pending before the *Conseil d’État*. In spite of the insistence of the Conseil d’État, who had replied to requests from the Court reinstating its wish to maintain its questions, the Court observed that the *Conseil d’État* had not placed the Court in a position to satisfy itself

that, in view of the emergence of factors subsequent to the references for a preliminary ruling, the questions it had submitted remained relevant to the outcome of the actions brought by the appellants in the main proceeding, and thus justified by a need inherent in the effective resolution of the disputes before it (para 43).

It was precisely for those reasons that the Court also recalled that the present case was distinct from the judgment 15 April 2021, *État belge (Elements subsequent to the transfer decision)* (C – 194/19) in which the Court was similarly asked whether an *ex nunc* examination of the asylum seeker's situation under the Dublin procedure presupposes that the competent court takes into account the circumstances subsequent to the issuance of the transfer decision. However, in that case, the *Conseil d'État* answered the Court's question by affirming that the pending dispute continued to have a subject-matter. Moreover, it had not been brought to the Court's attention that that *Conseil d'État* had developed case-law to the effect that, in similar cases, the plaintiffs should be regarded as having forfeited their interest in bringing proceedings (para 49).

Against this background, the Court concluded that the references for a preliminary ruling were inadmissible. The Court observed, that even taking into account the appearance of elements subsequent to the references for a preliminary ruling, it is necessary that the questions submitted remain relevant to the outcome of the actions brought by the applicants in the main proceedings.

In its judgement, the Court clarifies its approach and

the need for a ‘test’ of relevance by making it clear the context of the procedure of cooperation provided for in Article 267 TFEU. It recalls that is indispensable for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions from the Court of Justice is necessary to enable them to give judgment. National courts are also required to disapply any national provision which does not enable to provide a useful answer to the questions asked by the Court of Justice, in accordance with the procedure laid down in Article 267 TFEU.

Silvia Rizzuto is a PhD Researcher in EU Law at the University of Luxembourg, Faculty of Law Economics and Finance, and at Alma Mater Studiorum University of Bologna (cotutelle de thèse), silvia.rizzutoferruzza@uni.lu



[NEWS](#)

[BOOKSTORE](#)

[PUBLISH
WITH US](#)

[IN-DEPTH](#)

[EVENTS](#)

[OUR
CONTENTS
EXPLAINED](#)

[WEEKEND EDITION](#)

[ABOUT US](#)

[PODCASTS](#)

[OUR
PRINCIPLES](#)

[GET IN
TOUCH](#)

[SUBSCRIBE](#)

EU LAW LIVE. ALL RIGHTS
RESERVED



[PRIVACY POLICY](#)
[TERMS OF USE](#)
ISSN: 2695-9585

[COOKIE POLICY](#)