

Answers to Questionnaire on Preliminary References

These answers are drafted by reference to England and Wales.

1.1 We have no such national arrangements.

1.2 This country is not bound by any other international agreement outside the EU involving the possibility of referring questions for a preliminary ruling to an international court of law.

1.3 The Civil Procedure Rules, which govern procedure in the civil courts (but excluding the House of Lords), outline the procedure to be followed by the courts when making a preliminary reference.¹ The rules provide that an order to refer a matter for a preliminary ruling may be made by a court on its own initiative at any stage of the proceedings or on application by a party before or at the trial. The order must set out in a schedule the request for the preliminary ruling and the court may also give directions in relation to the manner in which the schedule should be prepared and the form it should take. Where an order to refer is made, unless the court directs otherwise, the proceedings must be stayed until the European Court has given its ruling on the question referred to it. The rules also provide for a copy of the order to be sent to the Registrar of the European Court, unless a party exercises its right of appeal against the order. In such cases the order will only be sent to the Registrar once the time for an appeal has lapsed or the appeal has been determined. In practice, however, the court will order the reference to be sent notwithstanding that the time for appealing against the order has not expired. Further guidance in relation to making a reference is provided in the Practice Direction issued by the High Court and the Court of Appeal. In particular, it outlines what information should be included in the schedule to the order.

These rules only deal with the practicalities of making a reference. They are not concerned with the detailed questions of when a reference should be made which is a matter for the courts.

1.4 At the top of our legal pyramid is the House of Lords. Beneath that is the Court of Appeal. Beneath that there are many different courts. There is, for all presently relevant purposes, no automatic right of appeal either to the Court of Appeal or the House of Lords - permission to appeal is required in each case. That permission can be given either by the lower court or, if the lower court has refused permission, by the higher court. If the Court of Appeal refuses permission to appeal to it then that is the end of the matter: there is no further right to apply to the House of Lords for leave. In such cases the Court of Appeal is regarded as the final court. Where, however, the permission to appeal to the Court of Appeal has been given the position is different. In such circumstances the Court of Appeal in practice regards itself as the final court and will refer unless it regards the answer to the point of Community Law as either unnecessary to its decision or as *acte clair*. The party who loses in the Court of Appeal can apply for permission to appeal to the House of Lords. If either the Court of Appeal or the House of Lords grant permission then the House of Lords will become the final court.

¹CPR, Sch 1, RSC Order 114

However, in the case of *Chiron v. Murex (3)* [1995] ALL ER (EC) 88 the Court of Appeal decided that where the opportunity exists to petition the House of Lords, it is the House of Lords, and not any lower court, which is under the obligation to refer. The Court of Appeal held that where permission to appeal to the House of Lords is refused by the Court of Appeal, the Lords is the court of last resort. Before it refuses permission, the House of Lords will consider whether an issue of Community law arises which is necessary for its decision whether to grant or to refuse leave and is not *acte clair*.

Courts below the Court of Appeal, while free to refer if they regard it as desirable, are not encouraged to do so unless they are convinced that, in the event of an appeal, the higher court would order a reference.

1.5 We have no constitutional court.

11.6 In principle, it is possible to appeal both against a decision of a lower court to refer a question for a preliminary ruling and against a decision not to refer. It is, however, rare for such appeals to succeed. In one such successful appeal against the decision of a lower court to refer, the Court of Appeal overturned the decision to refer on the basis of its "complete confidence" in its ability to answer the questions being referred.²

Appeals against decisions not to refer will normally only be allowed where the judge in the lower court is held to have exercised his discretion wrongly as to whether or not to refer.³ Where the facts of the case have been established by the lower court and there is an arguable point of Community Law and the matter is not *acte clair* the higher court will be more inclined to allow an appeal against a refusal to refer.⁴

It would be unusual for an appeal against a decision not to refer to be lodged on a specific ground such as a violation of the Constitution. The principal ground of appeal against the decision of a lower court not to refer is on the basis that its decision was wrong in law.

1.7 We have no constitutional court.

1.8 The House of Lords handles some 70 cases a year. Community Law is directly involved in 8%. The Court of Appeal handles some 6924 cases a year. Community Law is involved in approximately 5%.

1.9 In general the quality of the help given to the Court by the advocates in cases involving Community Law is very good. It is seldom that the Court raises a point which has not been raised by the advocates. It happens, however, both in relation to Community Law and in relation to other parts of our law.

1.10 There are no special measures provided for the preparation and hearing of cases dealing with the application of Community Law. Indeed, in general in the Court of Appeal we

²*R v. International Stock Exchange, ex. p. Else* (1982) Ltd, [1993] 2 CMLR 677

³*HP Bulmer Ltd v. J Bollinger SA* [1974] 2 CMLR 91

⁴*BLP Group v. Customs and Excise Commissioners* [1994] STC 41, CA; *Conoco Ltd v. Customs and Excise Commissioners* [1995] STC 1022 (QBD)

do not see cases more than a few days before the hearing and will seldom spend more than a few hours preparing ourselves for hearing the case: we expect the advocates to do so and to furnish us with their submissions and all the case law upon which they rely. However, the judge giving leave to appeal is expected to record that a point of Community Law may be involved and can initiate research. In practice in the Court of Appeal this very seldom happens. Neither the Court of Appeal nor the House of Lords has access to a research and documentation department. We rely heavily on the advocates. However, each judge has access to the Court of Justice material through the Court's web site and the reports of cases and we use such material regularly. We occasionally, informally via our national judge or advocate general in Luxembourg and their referendaires, ask for clarification as to whether a similar point is pending or as to the progress made by a particular case.

We tend not to contact the Commission although the parties quite often do and furnish us with the result of such inquiries. A major reason for the Court not requesting the help of the Commission is that the Court itself does not prepare for the hearing more than a few days in advance. If, at that stage a request for help were to be sent out further delay would be inevitable. Another reason is a general feeling that, since the Commission cannot give a binding decision and its comments tend to be cautious and carefully nuanced, the amount of help it could give, apart from furnishing a few statistics, is likely to be limited.

In general the Court would not attempt itself to ascertain the contents of the legislation and case law of other Member States. Occasionally however it will do so. The reason for the general reluctance is a feeling that, while the result of such researches would occasionally improve the quality of the judgement of our Court, in general the expense in money and time in doing the research would be disproportionately high in the vast majority of cases. We attach a high priority to a swift decision - at times at the expense of the quality of the decision.

1.11 There have been no cases where the Court has decided to prohibit the enforcement of a national administrative decision based on a contested Community act following *Zuckerfabrik* or where it has applied positive interim measures following the *Atlanta* case. However, in a recent case involving an attempt to restrain the UK Government from implementing an EC Directive banning tobacco advertising, the Court of Appeal applied the factors in *Zuckerfabrik*. The Court refused to grant an injunction against the Government and concluded that although there was a strong indication that the Directive was invalid (which the Court of Justice subsequently confirmed to be the case) the applicants had not shown that they would suffer irreparable damage if the Directive had been implemented and was then found to be invalid. The House of Lords held in the same case that the conditions established in *Zuckerfabrik* and *Atlanta Fruchthandelsgesellschaft* as opposed to domestic law, should be applied when deciding whether or not to grant an injunction in relation to a contested Community act.⁵ However, in the earlier case of *R v. Secretary of State for Transport, ex. p. Factortame Ltd (No. 1)*⁶ interim relief was granted to the applicants, Spanish owners and operators of fishing vessels, whose loss of livelihood was threatened by the provisions of the Merchant Shipping

⁵*R v. (1) Secretary of State for Health (2) Secretary of State for Trade & Industry (3) HM Attorney-General, ex. p. (1) Imperial Tobacco Ltd (2) Gallagher Ltd (3) Rothmans (UK) Ltd (4) British American Tobacco Investments Ltd* (2001) 1 WLR 127

⁶Case C-213/89; [1990] I ECR 2433

Act 1988 which restricted the ownership of such vessels to UK nationals. Following a reference to the Court of Justice the Act was set aside.

1.12 Following *Hasselblad v. Orbinson* [1985] ALL ER 173 it would appear that it is permissible for the Commission to be heard in the national courts as an intervener. In that case, following the decision of Mr Justice Comyn and the institution of the appeal, the Commission successfully applied for a direction under RSC Ord 59, r 8(1) that the notice of appeal be served on them and counsel was invited to appear on behalf of the Commission to assist the Court on the workings of the Commission and its view of the construction of the regulations. Sir John Donaldson MR commented "This is apparently the first occasion on which the Commission has felt impelled to seek rights of audience in national proceedings and I am most grateful to them for an intervention which I have found most helpful".

1.13 The total number of annual references for a preliminary ruling made by the House of Lords and the Court of Appeal since 1995 is as follows: 1995:5; 1996:3; 1997:3; 1998:7; 1999:3; 2000:3; 2001:10.

The questions referred by the Court of Appeal for a preliminary ruling cover a wide range of issues and include employment matters relating to equal pay and sex discrimination; immigration; patents and trade marks; V.A.T. and tax levies; commercial contracts and commercial agency; agriculture and the environment.

In recent years, the whole process, from the time proceedings are initiated to when the case is finally disposed of, has on average taken approximately 2 years and 9 months. The approximate handling time at each stage is as follows: 5 months from the time the proceedings are commenced until the reference is sent; 2 years and 2 months handling time at the Court of Justice; and 2 months from the time the ruling is received in the national court to when the case is finally disposed of.

Our Court hears many cases apart from judicial review cases. The average handling time applies to all cases irrespective of whether they have an administrative law content.

2.1 The answer to 1.13 above reflects, in general terms, the frequency with which parties request a reference. The court has been asked to make references in relation to patents and copyright law, employment, general commercial and tax issues.

In principle if a request for a reference is turned down the reasons, containing where necessary a reference to the case law of the Court of Justice, are given. In the House of Lords this is done in the final decision. The same most usually applies in the Court of Appeal but if the parties request an interim ruling perhaps with a view to a possible appeal - the Court can accede to this request.

It is rare for a preliminary ruling to be requested by the Court without a demand from the parties although it could, in principle, occur. Certainly the formulation of the request will often differ from that suggested by the parties.

2.2 In the past year there has been only one case where a request for a preliminary ruling was seriously considered although the request was finally never sent. In the event, the parties

were keen to settle the dispute and decided not to proceed with a reference for a preliminary ruling. It is not clear, however, to what extent this case is in any way representative.

2.3 The Court of Appeal has established guidelines in relation to whether there is an obligation to request a preliminary reference under Article 234(3). The most important factor for a court deciding whether to make a preliminary reference will be the difficulty and importance of the Community Law point.⁷ More recently, the Court has suggested that there should be a willingness to refer unless the courts can resolve the issue itself with "complete confidence".⁸ The Court will also consider whether a reference is necessary in order to enable the Court to give judgment. In addition, the courts may take into account the possible effects on the parties of a delay upon making a reference, the existence of a similar case before the Court of Justice including whether the question has already been decided, and the wishes of the p

2.4 If a similar matter is pending before the Court of Justice then, save in the highly exceptional case where we regard the matter as *acte clair*, we would await the decision of the Court of Justice before giving final judgment. We would not usually regard such a reference as inhibiting us from giving *interim* relief. We would not usually make a reference ourselves prior to

2.5 We would not regard such paralysing effect as a factor which should inhibit us from making a reference. We would however draw the attention of the Court of Justice to this effect and ask for as speedy a decision as possible.

In principle the lower courts should await the result of the reference although they may make *interim* rulings before the Court of Justice gives its decision.

2.6 In the House of Lords case of *Factortame*⁹ a preliminary reference was made in connection with the granting of interim relief from the application of an Act of Parliament pending the outcome of an earlier reference in respect of the lawfulness of the Act. In subsequent cases¹⁰, the court has applied the guidance of *Factortame*, but has been reluctant to suspend national provisions in the absence of exceptional circumstances. There is usually a presumption in favour of the national law being applicable pending the decision of the Court of Justice and therefore a preliminary ruling in relation to precautionary measures will often not be considered necessary.

2.7 The Court has not referred for a preliminary ruling on the grounds of the cases *Leur-Bloem* and *Giloy*, namely regarding the interpretation of a Community Law concept which has been transposed into national law where the situation is not governed directly by Community Law.

However, in *Kleinwort Benson Ltd v. Glasgow District Council* [1995] ECR I-615 the matter at issue concerned Schedule 4 and Articles S(1) and 5 (3) of the Civil Jurisdiction and Judgments Act 1982, which were modelled on equivalent provisions in the Convention on

⁷ *HP Bullmer v. J Bollinger SA* [1974]

⁸ *R v. International Stock Exchange, ex. p. Else Ltd* [1982] QB 534

⁹ *R v. Secretary of State for Transport, ex. p. Factortame Ltd* [1991] 1 ECR 3905

¹⁰ *R v. Secretary of State for the National Heritage, ex. p. Continental Television BVIO* [1993] EMLR 389; *R v. Secretary, of State for Trade and Industry, ex. p. Trades Union Congress* [2001] 1 CMLR 8

Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. Despite the 1968 Convention. The reference was rejected as the case concerned national law not community law: Case C-346/93. This is the only case, so far as is known, in which the ECJ has rejected a reference from the UK and could well be decided differently now in the light of subsequent case law.

2.8 The parties will always be heard before a request for a preliminary ruling is made. Sometimes they are agreed on the necessity for a reference and on the terms of a draft reference. In such cases, the Court will still hear them but will usually make a reference without profound argument.

Where there is no agreement on the need for, or terms of, a request for a preliminary reference, the Court will hear submissions both on whether the dispute can be resolved without reference to Community Law and, if not, what points of Community law arise and whether their solution requires a reference.

If the Court decides that a reference should be made, it will indicate what, in its judgement, in broad terms it considers the terms of the reference should be. The parties then usually produce a draft and the Court will make a reference in terms of the draft, amended by the Court if it regards that as appropriate.

2.9 We usually give an interim judgment indicating what we see as the problem, how we would answer it, and why we do not regard the Court of Justice case law as having settled the point.

A normally constituted court will deal with such matters.

2.10 We have an established practice following the guidelines set out by the Court of Justice. This practice is outlined in the Practice Directions issued by the High Court and the Court of Appeal.

We give our opinion as to what answer should be given.

We try to keep our reference documents short bearing in mind the translation needs. [See attached reference in *Courage Ltd v. Crehan.*]

2.11 The situation has not arisen where a request for a preliminary ruling has involved taking into account documents containing information which is confidential under national law. If such a situation were to arise the Court of Justice would be informed of the confidentiality insofar as it is relevant to the case. It is not unusual, however, for the statement of case to contain information which is of a commercially sensitive nature.

2.12 Although it is rare, there has been an occasion when the Court has requested the Court of Justice to proceed urgently. On that occasion the solicitors for the Appellant asked for the proceedings to be expedited on account of the Appellant's age. The Senior Master of the Queen's Bench Division of the High Court sent a request to the Court of Justice asking for the proceedings to be expedited. There is no evidence to suggest that the proceedings were speeded up as a result. In most cases a request for expedition can in fact lead to a delay in

proceedings whilst the request is considered. Nonetheless, in *Factortame* (No. 1) the House of Lords asked the Court of Justice for the proceedings to be expedited and judgment was handed down by the Court of Justice within one year of the case being received by the Registry.

There have not been any cases where a request for a preliminary ruling has come up which, according to a provision of national law, has had to be treated urgently or within a determined time limit.

Where there is an obligation to refer, the length of time required to handle the reference is irrelevant to the decision to refer. It would however be relevant to a decision whether or not to grant *interim* relief and the terms of such relief.

2.13 Nothing will be stayed automatically. The Court has a full discretion as to how it handles matters pending the answer to a reference. In *MTV Europe v. BMG Records* [1995] 1 CMLR 437 a temporary stay of proceedings was granted in order to enable the parties to prepare for an oral hearing before the Commission but the court allowed the process of discovery to go ahead in the normal manner. The judge held that a full stay would be granted only if the Commission had not reached a final decision at the setting down of the case for trial. The Court of Appeal approved the result in *MTV Europe v. BMG Records* [1997] 1 EuLR 100.

2.14 When a case is referred to the Court of Justice the Court follows a standard procedure in relation to the submission of documents. Usually, the court will submit the original sealed order, the reference and the parties' statement of reasons. The pleadings before the referring court are also sent. It is not normal practice for additional material to be sent since the information required by the Court of Justice will usually be contained in these documents.

3.1 Although very few cases are withdrawn after a reference has been made to the Court of Justice, it has occurred. On one such occasion the Court withdrew a request for a preliminary ruling in a case because another case dealing with a similar issue had been decided in the interim.

3.2 There have been cases where a request for a preliminary ruling already referred has had to be corrected or amended. On one occasion a party's details on a reference did not correspond with the details on the Order and the reference had to be corrected. On other occasions similar cases have been consolidated in order to avoid duplication.

However, no case from the UK has ever been rejected for defect of form or inappropriateness of the questions or lack of factual information.

3.3 Any such intervention would be a matter for the parties to the reference. The Court of Appeal does not see any documents relating to the reference until the judgment is returned to it.

3.4 There would usually be a decision to stay. The parties would be asked whether they wished to be heard. If they did so wish then they would be heard.

3.5 There has not been any need to modify the national procedure rules in order to be able to answer a request for clarification by the Court of Justice. The obvious task is to try and reassemble the constitution which made the reference.

4.1 Whether the parties are heard on the preliminary ruling will depend on the terms of the ruling and the case in question. Sometimes the parties agree that, in the light of the ruling, the case can only be decided in one way. Often they will want to address the Court as to the implications of the ruling for the facts of the case. The Court has full discretion as to the procedure to be adopted.

4.2 There have not been any situations where it has been impossible to make use of the preliminary ruling because of its formulation, misinterpretation of the question or lack of precision.

4.3 In view of the Court's general reluctance to request a second preliminary ruling in the same case except in exceptional circumstances¹¹, it is unusual to make a further reference in the same case. In one case¹² the Court of Appeal refused a second reference because it felt that the July 2000. The matter is now awaiting a further ruling from the House of Lords on a yet further issue. It is also possible for second preliminary rulings to be requested in the same case w

4.4 The Court would in general summarise the judgment, cite from it and quite possibly from the Advocate General, give the questions contained in the reference and the answers to them and give the case reference of the decision.

4.5 The Court of Justice is not informed of the final decision by the national court having made the reference. Nor is there any method of forwarding information to the Court of Justice.

¹¹ *An Bord Baine Co-operative Ltd v. Milk Marketing Board* [1985] 1 CMLR 1

¹² *R v. Minister of Agriculture, Fisheries and Food, ex. p. SP Anastasiou (Pissouri) Ltd* [1994] I ECR 3087

¹³ *R v. Secretary of State for Transport, ex. p. Factortame Ltd* [1991]