



**Joined Cases M-180/18 & M-181/18**  
**Prosecutor's Office v. Gully**

1. Illiberania is a Member State of the EU since 2008. It is a former dictatorship that transitioned to democracy in 1996.
2. The Political Party “Only Us” is currently the leading party in Illiberania’s ruling coalition government. The discourse of Only Us, based on the fight against illegal immigration and a return to traditional values, has earned it a spectacular rise in the polls from 4% to 32% of votes cast in the last election.
3. During the election campaign, Only Us promised its voters several legislative reforms, as well as a constitutional amendment, to implement an “Illiberanians first” policy and to exclude foreign nationals from certain entitlements and rights. The Constitution now includes a new Article 2b, according to which

“Illiberania is committed to the rule of law and to the preservation of the values that ensure security and justice in the nation. To that end, no external or internal entity or subject shall interfere in the free realization of the will of the people of Illiberania. Parliament shall establish all the necessary measures to ensure the strict compliance with this provision.”

4. Based on Article 2b of the Constitution, Parliament has passed an Act amending the Illiberanian Criminal Code, establishing in the new Article 189ter, as a criminal offence, any “public declaration or other form of action with a significant public impact that directly or indirectly undermines the constitutional, territorial, cultural or ethical integrity of Illiberania and its people”.
5. Article 213(4) of Illiberania’s Criminal Code was also amended in order to specify that hate speech is limited to speech inciting violence against nationals of Illiberania only. After the European Commission addressed its concerns over the discriminatory character of the reform, the final version of the Act included a reference to violence against nationals of a EU Member State. The final wording of the provision reads as follows:

“A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an



offence, shall be sentenced to a penalty of a maximum of 2.000.000 szlots and/or sentenced to imprisonment for three to five years, if—

(a) he or she intends thereby to stir up racial hatred against nationals of Illiberania and/or of another Member State of the EU, or

(b) having regard to all the circumstances, racial hatred towards nationals of Illiberania and/or of another Member State of the EU likely to be stirred up thereby.”

6. In January 2016 the Parliament of Illiberania passed an Act lowering the forced retirement age of the justices of Illiberania’s Constitutional Court. After months of institutional tensions, the Constitutional Court was almost entirely reappointed on October of 2016, following the forced retirement of ten of its eleven justices.
7. That same year, Illiberania’s Parliament enacted the Judiciary Act, introducing the same measure applied to the Constitutional Court’s justices to the members of the Supreme Court and of the regional High Courts of the country. Shortly after the Act was passed, the European Commission initiated proceedings pursuant to Article 7 TEU questioning the Judiciary Act’s conformity with the values enshrined in Article 2 TEU. The Judiciary Act is intended to enter into force on 1<sup>st</sup> January 2018, but the European Commission and the Illiberanian government carried on with negotiations.
8. In light of the lack of developments in Illiberania and the Government’s unwillingness to amend the scope of the judicial reforms, the European Council decided to vote on a Decision pursuant to Article 7(2) TEU, to confirm the existence of “a serious and persistent breach by a Member State of the values referred to in Article 2 [TEU]”. On 20<sup>th</sup> January 2018 the European Council (with the absence of the Head of Government of Illiberania, as set in Article 354, first paragraph, TFEU), voted and confirmed a breach of Article 2 TEU as a result of the enactment and entry into force of the Illiberanian Judiciary Act, but immediately suspended the effects of the Decision, with the purpose of “contributing in a constructive way to the search of a solution to the situation in Illiberania”. The suspension was enacted *sine die*.

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9. Freedomia is a Member State of the EU since 2010. It was a military dictatorship until 1999 and it acceded to the EU after a peaceful transition towards democracy.



10. Igor Gully is the Chairman of the Sword and Nation Party. This party defends the supremacy of Western civilization and Christian values, as well as the rise of physical external borders, including borders with its EU neighbouring Member States. The party also supports the withdrawal of Freedonia from the EU.
11. In late 2016 Igor Gully ran for the office of President of the region of Tartasia, a northern and wealthy part of Freedonia that borders with Illiberania. Although Sword and Nation was far from winning a majority in the regional elections and reached only 16% of the vote, it made a coalition agreement with the conservative party and as of January 2017 Igor Gully is the President of the region of Tartasia.
12. On the 3<sup>rd</sup> of July of 2018, Igor Gully participated in a political rally of his party in Verenoya, capital of the region of Tartasia. In the course of his speech, he made the following statements:

“I believe in a pure and clean Freedonia. I believe in a free Freedonia because freedom is the very core of our identity as a people, a Christian and free people. I vomit when I see foreigners telling us what to do. I abhor it. And thus I ask you, my dear brothers and sisters, to help me in this sacred quest to save the soul of our beloved motherland, to please help me to put an end to this foreign covert invasion of sin and evil. Because the evil is in our homes. The evil is next door. It is obscure, it is heretical, it is coming to destroy us.

In fact, I will not *ask* you, I will not *beg* you, I am *ordering* you with all my patriotic love to begin this quest to annihilate the darkness and sinfulness that lives with us, an evil that awaits our moment of weakness to strike us and destroy us as a Christian people of faith and values.

Citizens, brothers of the nation: I order you to raise the sword and drench it in the unholy blood of the sinners. Free our country! Free Freedonia!”.

13. In the late hours of the same day, in Verenoya, and once the rally of Sword and Nation was over, a masked group of individuals entered the home of Nizar Yussen, a young Muslim engineer of Tunisian nationality, working as a project manager in a major international tech company with a production site in Verenoya. Neighbours heard shouting and screaming inside the home of Mr. Yussen and witnessed how the masked group fled the premises with swords in their hands, some of them stained in red, to the cry of “*Sword and Nation. Free our country!*”.



14. When the neighbours approached the home of Mr. Yussen, they could see him lying unconscious on the floor, surrounded by his wife and two children. By the time an ambulance arrived at the site, Mr. Yussen had passed away as a result of multiple wounds throughout his body. In the walls of the living room, written in blood, the words “*Free our country*” could be read.
15. That same night, at 04h30 a.m., four University students, wearing hoods and driving a van, were arrested in the outskirts of Verenoya carrying four swords with stains of blood. They were put under arrest awaiting the prosecutor’s instructions.
16. On the 4<sup>th</sup> of July of 2018, the Prosecutor of Verenoya filed charges against the four students for the offence of manslaughter, racially and religiously aggravated within the meaning of the Freedonian Crime and Disorder Act, and requested from the Verenoya district court that the suspects be remanded in custody without bail.
17. In the course of the interrogations, the four students claimed that their act was an uncontrollable and involuntary reaction after hearing the speech of Igor Gully in Sword and Nation’s rally of the 3<sup>rd</sup> of July. They argued to have suffered a transitory loss of free will, attributable to Mr. Gully’s inflammatory rhetoric against foreigners and Muslims.
18. On the 6<sup>th</sup> of July the Prosecutor of Verenoya summoned Mr. Gully to attend the Prosecutor’s office. In the afternoon of the same day, Mr. Gully, in the company of his chief of staff and his lawyer, drove across the border of Freedonia with Illiberania and checked himself in a hotel in the town of Cambrilda, a small capital of province of the same name in southern Illiberania.
19. On the 7<sup>th</sup> of July the Prosecutor of Verenoya requested the district court to issue a European arrest warrant against Mr. Gully, on the grounds of the charges filed against him that very day, for breach of Article 355 of the Freedonian Criminal Code, which precludes any speech based on racial hatred that incites violence. According to the Prosecutor, the transcript of Mr. Gully’s speech on the 3<sup>rd</sup> of July, in relation with the events that followed the rally, was sufficient evidence to support that the contents of the speech amounted to a breach of Article 355 of the Criminal Code.
20. After reviewing the Prosecutor’s request, the district court of Verenoya issued a European arrest warrant addressed to the competent judicial authority in Illiberania, as



determined in the Illiberanian Judicial International Cooperation Act: the High Court of the Region of Cambrilda.

21. On the 15<sup>th</sup> of July the High Court of Cambrilda received from the district court of Verenoya the full file of the case, including the arrest warrant, in which the issuing authority requested the surrender of Mr. Gully, for the purposes of conducting a criminal investigation in which Mr. Gully is a suspect of a presumed offence of incitement of violence by means of racial hatred. According to the Judicial Criminal Cooperation Act of Freedonia, Article 355 of the Criminal Code is to be considered an offence of “racism and xenophobia”, in the sense of Article 2(2) of the Framework Decision 2002/584/JHA, on the European arrest warrant and the surrender procedures between the Member States. In its request, the district court of Verenoya argued that this offence is not subject to a verification of the double criminality of the act and therefore the arrest warrant should be recognized and enforced by the competent judicial authority (the High Court of Cambrilda).
22. On the 25<sup>th</sup> of July, the High Court of Cambrilda rendered a decision ordering the surrender of Mr. Gully to the issuing authority for the conduct of criminal investigations. However, and although the High Court’s decision ordering surrender was final, the Prosecutor’s Office of Illiberania lodged an appeal in the interest of the Constitution before the Constitutional Court on the 26<sup>th</sup> of July, thus producing, according to the Constitutional Court Act, the stay of the procedures of surrender of Mr. Gully.
23. The appeal in the interest of the Constitution is a recent remedy introduced that same year in the context of the Constitutional Court’s reform Act. It grants jurisdiction to the Constitutional Court to review, on extraordinary grounds, final decisions of the ordinary courts that directly or indirectly undermine a provision of the Constitution. The only applicant with standing to appeal is the Prosecutor’s Office and/or the President of the Republic of Illiberania.
24. On the 1<sup>st</sup> of August the Constitutional Court ruled on the case and quashed the decision of the High Court of Cambrilda on the grounds of a breach of the constitutional fundamental rights of freedom of movement and criminal legality. According to the Constitutional Court, although Mr. Gully’s acts can be considered offences of racism and xenophobia under the laws of Freedonia, the enactment of the new Criminal Code of Illiberania limits the scope of these offences to attacks on nationals of Illiberania and/or nationals of another Member State of the EU. Although Mr. Gully’s inflammatory rhetoric can be interpreted as targeting any “foreigner”, including nationals of other



Member States of the EU, it can also be interpreted as targeting nationals of third countries only. The fact that the victim was a non-EU national is additional proof that Mr. Gully's remarks were targeting non-EU nationals. In the context of a criminal procedure, the most favourable interpretation must prevail in the enforcement of criminal rules, and this construction led the Constitutional Court to conclude that Mr. Gully's statements should have been considered to be addressed to nationals of third countries and therefore they did not amount to a criminal offence under the laws of Illiberania.

25. On the 14<sup>th</sup> of August, immediately after having been served the Constitutional Court's decision, the High Court of Cambrilda informed the parties of its intention to make a preliminary reference to the Court of Justice, on the grounds of Article 267 of the Treaty on the Functioning of the European Union. According to the High Court, the decision of the Constitutional Court raises several questions of interpretation of Framework Decision 2002/584 that require the interpretation of the Court of Justice. In particular, the High Court granted the Prosecutor's office and Mr. Gully's counsel five days to submit observations over the following point of law: is Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, to be interpreted in the sense that it is opposed to a provision like Article 213(4) of the Illiberanian Criminal Code, that limits offences inciting violence towards Illiberanian nationals and/or nationals of other Member States of the EU?
26. On the 18<sup>th</sup> of August, once the High Court of Cambrilda had summoned the Prosecutor and Mr. Gully's counsel, the Prosecutor's office filed an appeal in the interest of the Constitution, requesting the Constitutional Court to order the High Court to refrain from bringing a preliminary reference to the Court of Justice, and to make use of Article 56 of the Constitutional Court Act, which grants jurisdiction on the Constitutional Court to rule definitively on the substance of a case even if it concerns the interpretation and application of statutory law, if the ruling is necessary and in the interest of justice.
27. On the grounds of Article 56 of the Constitutional Court Act, the Constitutional Court ruled on the 21<sup>st</sup> of August granting the appeal, ordering the High Court of Cambrilda "to refrain from referring any preliminary reference of interpretation to any court other than the Constitutional Court" and ruling on the substance of the case. In its decision on the substance of the case and based on Article 56 of the Constitutional Court Act, the Constitutional Court reiterated its arguments of the decision of 1<sup>st</sup> August but went a step further and ruled on the request of the district court of Verenoya, refusing the



enforcement of the European arrest warrant on the grounds that under Illiberanian law offences of incitement to violence based on racial hatred are limited to violence addressed to nationals of Illiberania and/or nationals of other Member States of the EU.

28. The Constitutional Court referred its decision to the High Court of Cambrilda ordering the closure of the proceedings and the transmission of the decision of 21<sup>st</sup> August to the district court of Verenoya at the shortest notice.
29. On the August 31<sup>st</sup> of 2018 the High Court of Cambrilda, sitting in its criminal chamber, rendered an order for reference for a preliminary ruling to the Court of Justice on the grounds of Article 267 of the Treaty on the Functioning of the European Union, raising the following questions of interpretation:
  1. Is Article 267 TFEU to be interpreted in the sense that a Constitutional Court, in the course of an appeal in the interest of the Constitution, is entitled to order a lower court to refrain from referring a preliminary reference under Article 267 TFEU, when the Constitutional Court has the power, and uses its power, to rule on the substance of the case and to provide a definitive ruling that precludes further decisions by the lower court?
  2. Is Article 2(2) of Framework Decision 2002/584/JHA, on the European arrest warrant and the surrender procedures between the Member States, to be interpreted in the sense that the executing Member States cannot undergo a double incrimination test of the offences enumerated in the said provision, even if the offence in the executing state has been amended and at the relevant time of the facts it does not cover all offences based on xenophobia and racism and, in addition, it raises doubts as to its conformity with Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law?
30. Immediately after the preliminary reference was filed, the Prosecutor's Office lodged another appeal in the interest of the Constitution before the Constitutional Court, requesting the annulment of the order for reference.
31. On the same day, the Prosecutor's Office instituted a formal accusation against Piotr Hüberèn, President of the criminal chamber of the High Court of Cambrilda, Igor Spetzür and Korinne Galasch, sitting members of the chamber, before the Supreme Court of Illiberania. The Prosecutor argued that the president had committed a criminal



offence in breach of Article 189ter of the Illiberanian Criminal Code. According to the Prosecutor, the President of the criminal chamber and the two sitting members, by disregarding the Decision of the Constitutional Court of 21<sup>st</sup> August 2018, had “directly undermined the constitutional integrity of Illiberania”. By refusing to comply with the binding decisions of the Constitutional Court, they allegedly breached their duty to uphold the Constitution. According to the Prosecutor, Illiberania is a State governed by the rule of law, and any departure from the Constitution endangers the integrity of the State.

32. On September 1<sup>st</sup> 2018, in the context of the appeal in the interest of the Constitution lodged before it, the Constitutional Court of Illiberania rendered an order for a preliminary ruling to the Court of Justice. In its reasoning, the Constitutional Court endorsed all the arguments of the prosecution and raised the following question:

“Is a national court considered to be “independent” in the terms of the case-law of the Court of Justice pursuant to Article 267 TFEU, when the chamber making an order for a preliminary ruling openly disregards the decisions of a higher court, including an order not to refer a question for a preliminary ruling because the case has been effectively resolved by the higher court, thus breaching the Constitution of a Member State that proclaims the Rule of Law as an essential value of the State and, at the same time, Article 2 TEU?”

33. The orders for reference were received by the Registrar of the Court, who assigned to them respectively case numbers M-180/18 and M-181/18. In accordance with Article 23 of the Statute of the Court of Justice, the Registrar has notified the parties and has invited them to submit written observations to the Court by November, 25<sup>th</sup> 2018.
34. The President of the Court of Justice has ordered the joining of both procedures on the grounds of Article 54 of the Rules of Procedure of the Court of Justice.
35. Pursuant to Article 23, first paragraph, of the Statute of the Court of Justice, the Prosecutor’s Office, acting as party in both the proceedings before the High Court of Cambrilda and the Constitutional Court, has intervened in the proceedings. Pursuant to Article 23, second paragraph, of the Statute of the Court of Justice, the government of the Republic of Freedonia has intervened as well.
36. Mr. Gully’s legal counsel informed the Court of Justice of his client’s decision to refrain from submitting written observations and from participating in the oral hearing.