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**THE TOULMIN MODEL OF LEGAL ARGUMENTATION
IN THE CASE C-388/01
OF THE EUROPEAN COURT OF JUSTICE**

Abstrakt

Aby sa zachoval koncept spravodlivosti, sudy sa spoliehajú na precedensy. Rovnaké prípady sú rozhodnuté podobne ako prípady pred nimi. Argumentácia v prípade je používanie faktov, pravidiel a precedensov. Jeden zo systémov právnej argumentácie bol vytvorený Stephenom Toulminom. Na prípade Európskeho súdneho dvora sa pokúsim nájsť vzor Toulminovho modelu v právnej argumentácii strán v tomto prípade.

Kľúčové slová

Právna argumentácia - Toulmanov model - nesplnenie povinnosti - voľný pohyb služieb - zákaz diskriminácie

Abstract

In order to preserve that concept of fairness, courts rely on precedent, similar cases that have been decided before. Arguing a case is a system of using combination of facts, rules and precedents. One of those systems of legal argumentation was developed by Stephen Toulmin. Using the case of European court of Justice I will try to find how the pattern of Toulmin model is to be found in legal argumentation of the parties in this case.

Key words

Legal argumentation - Toulman model - Failure to fulfill obligations - Free movement of services - Non-discrimination



1. INTRODUCTION

One of the principles of our system of justice and fairness is that the law is not fickle, but applies to everyone equally. In order to preserve that concept of fairness, courts rely on precedent, similar cases that have been decided before. To this end, when lawyers argue cases, they argue not only the statutes and constitutional law, but also the holdings of previous cases with similar facts.

If the earlier case came out with the result your client wants, then you compare the facts of your case to that earlier case, showing how similar they are. If the earlier case came out with a result your client wouldn't be happy with, then you distinguish the cases. That is you show how the fact pattern in your case is not similar to that of the earlier case. Now this distinguishing and showing of similarity are what you pay the lawyer for, for the skill to argue well enough to convince the court that your case is different from the ones with results you don't like, and similar to ones with results you do like.¹

In doing this you are using different models of legal argumentation. In my case I am going to use the famous Toulmin model of argumentation.² Toulmin's starting point involves the irrelevance of theoretical argument to the assessment of practical argument. During much of the history of the Western world, particularly the Modern Period (approximately 1650-1950), philosophers presupposed the existence of prior and immutable standards to judge the adequacy of concepts, especially scientific ones. According to Toulmin, these presuppositions "imposed on philosophy a certain epistemic picture of Man the Rational Knower facing Nature the Unchanging Object of Knowledge."¹⁶ At various times throughout history, philosophers have rebelled against this notion of immutable standards but have been unable to provide standards that are not completely relativistic. Responses to this problem have been either to develop standards that can distinguish "correct" arguments from "incorrect" ones or to admit

¹ Legal Argumentation Jeanne Curran and Susan R. Takata and Individual Authors, June 2004, <http://www.csudh.edu/dearhabermas/factslaw01.htm> as consulted on 15.10.2008

²Toulmin Argument, Writing center, University of Colorado, Colorado Springs, <http://web.uccs.edu/wrtgcntr/services/archive/handouts/Toulmin%20Argument.doc> as consulted on 15.10.2008

that such standards are relative to the people, times, and places in which the arguments are developed.³

Stephan Toulmin developed a method of argumentation that requires the writer to use logical structure, not in an attempt to prove any point, but in the hopes of convincing one's readers of the validity of the points used in the argument. Using claim, because clause, grounds, warrant, backing, rebuttal, and qualifiers, the writer hopes to convince the reader to accept the claim of the argument.

2. DESCRIPTION OF THE CASE C-388/01⁴

Now knowing the theory of the model I will try to apply it to the chosen case of The European Court of Justice. It is a case of The Commission of European Communities versus The Italian Republic. The Commission brought an action under Article 226 EC for a declaration that, by allowing discriminatory, advantageous rates for admission to museums, monuments, galleries, archaeological digs, parks and gardens classified as public monuments, granted by local or decentralized State authorities only in favour of Italian nationals and persons resident within the territory of those authorities running the cultural sites in question, who are aged over 60 or 65 years, and by excluding from such advantages tourists who are nationals of other Member States and non-residents who fulfill the same objective age requirements, the Italian Republic has failed to fulfill its obligations under Articles 12 EC and 49 EC.

2.1 ITALIAN LEGISLATION⁵

According to Toulmin's model of argumentation we can say that the law is used as a „*because clause*“ which is added to a claim as a reason that supports the claim⁶. The clause is to strengthen ones arguments and is defined as Qualifier. In this case it is the Italian legislation

³ Keser E., Toulmin A Critical Account of Theoretical and Practical Argument, Cyberargumentation, 2001, Excerpts from Traditional and Contemporary Logic, <http://www.nyu.edu/classes/keefe/brain/argue2.html> as consulted on 15.10.2008

⁴ As in Case C-388/01 The Commission of European Communities versus The Italian Republic

⁵ In Case C-388/01 The Commission of European Communities versus The Italian Republic

⁶ Toulmin Argument, Writing center, University of Colorado, Colorado Springs, <http://web.uccs.edu/wrtgcntr/services/archive/handouts/Toulmin%20Argument.doc> as consulted on 15.10.2008

which is holding the function of qualifiers on the Italian side. For example it is the Article 1(1) of Decree No 507 of the Ministry of Cultural Assets and Natural Sites of 11 December 1997, which states, that admission to monuments, museums, galleries, archaeological digs, parks and gardens classified as national monuments shall be authorised in exchange for payment for a ticket whose validity may be independent of the date of issue. Article 4(3) of that decree provides that free admission shall be granted to Italian citizens aged fewer than 18 years or over 60 years. Coming back to the case, the Court has already held that national legislation on admission to the museums of one Member State which entails discrimination affecting only foreign tourists is, for nationals of other Member States, prohibited by Articles 7 and 59 of the EEC Treaty. Regarding the articles we can again be talking about qualifiers but seeing it from the contents when talking about discrimination we are moving to the level of Warrant, which are represented by values or principles. It depends on each of the arguing parties in which way this argument will be used. It is also clear from the Court's case-law⁷ that the principle of equal treatment, of which Article 49 EC embodies a specific instance, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

That is true, in particular, of a measure under which a distinction is drawn on the basis of residence, in that that requirement is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners.⁸ In that context, it is immaterial whether the contested measure affects, in some circumstances, nationals of the State in question resident in other parts of the national territory as well as nationals of other Member States. In order for a measure to be treated as being discriminatory, it is not necessary for it to have the effect of putting at an advantage all the nationals of the State in question or of putting at a disadvantage only nationals of other Member States, but not nationals of the State in question.⁹

⁷ see, inter alia, Case C-3/88 Commission v Italy [1989] ECR 4035, paragraph 8

⁸ see, inter alia, Case C-224/97 Ciola [1999] ECR I-2517, paragraph 14

⁹ Case C-281/98 Angonese [2000] ECR I-4139, paragraph 41

3. THE TOULMIN MODEL OF ARGUMENTATION

3.1 THE CLAIM OF THE CASE

Within Toulmin's schema, the writer must first choose a topic and then form an opinion about the topic. This information is written in one sentence, which is called the claim.¹⁰ The Commission is stating the claim in expressing its view that the provision for advantageous admission charges infringes Articles 12 EC and 49 EC. Granting advantageous admission charges only to Italian nationals constituted a restriction on the right to have access to services to which were entitled tourists visiting Italian archaeological and cultural sites.

3.2 SUPPORTING OF THE CLAIM

In the present case, it is common ground that the free admission to museums, monuments, galleries, archaeological digs, parks and gardens classified as public monuments, granted by local or decentralized authorities, is only in favour of Italian nationals and persons resident within the territory of the authorities running the museum or public monument in question, in particular where they are aged over 60 or 65 years, so that the benefit of free admission is denied to tourists who are nationals of other Member States and non-residents who fulfill the same objective age requirements.

The Italian Government does not deny that the amendments made to Article 4 of Decree No 507 by Decree No 375, in order to extend to the nationals of all Member States the benefit of the advantageous rates at issue, do not apply to the museums or other monuments run by local or decentralized State authorities.¹¹

In further arguing from both parties of the case we can mostly see the use of facts and actual situation defined by Toulmin as grounds which are giving the strength to different arguments and in further way supporting the claim.¹²

¹⁰ Toulmin Argument, Writing center, University of Colorado, Colorado Springs,
<http://web.uccs.edu/wrtgcntr/services/archive/handouts/Toulmin%20Argument.doc> as consulted on 15.10.2008

¹¹ Case C-388/01 The Commission of European Communities versus The Italian Republic

¹² Toulmin Argument, Writing center, University of Colorado, Colorado Springs,
<http://web.uccs.edu/wrtgcntr/services/archive/handouts/Toulmin%20Argument.doc> as consulted on 15.10.2008

As regards, first, the economic grounds put forward by the Italian Government. According to the Italian Government, cultural sites cannot be operated without financial resources. The fact that Italian nationals contributed to such public expenditure through the taxes they paid had to be taken into account. A tariff which depended on characteristics of visitors to cultural sites was the expression of a particular social policy. The Italian Government also pointed out that the Commission's allegations related to local sites, for example the Doge's Palace in Venice, for which the central Government was not responsible. That followed from Article 47 of the Decree of the President of the Republic No 416 of 24 July 1977.

The Commission on the other hand submitted that purely economic considerations could not provide grounds of general interest justifying the measure. The Court recognized the need to safeguard the cohesion of the tax system only where there was a direct link between the advantageous admission charges for Italian nationals and the taxes they paid. The Italian Republic had proved neither necessity nor proportionality. Nor had it submitted that granting advantageous admission charges to all citizens of the European Union would impair the cohesion of the tax system. Moreover, the only taxpayers who benefited were those who actually claimed the advantageous admission charges. Finally, it was inconsistent to rely on the argument as to the cohesion of the tax system while enacting Decree No 375/99 extending the advantage to all citizens of the Union for national sites.

In further steps Italian Government pointed out that cultural sites belonged to the State or to local authorities and that it were for their owners to determine conditions of admission, in particular the tariff structure. As regards the reduction available to residents, a distinction had to be drawn between State and local museums, namely that the latter were likewise not the responsibility of the Government.

In order to make that assessment, the first thing to be considered is whether the measures concerning sites owned by local authorities are to be attributed to the Member State (the Italian Republic). Then, the question as to whether those national provisions constitute a restriction within the meaning of Article 49 EC is to be considered. If they do, then the question arises as to whether there is any justification for the measures.

As the Court has consistently held, Member States are accountable not only for measures of the central State and the bodies it governs, but also for measures of local or regional authorities (including bodies legally separate from but none the less governed by such authorities). In the present case, this means that the Italian Government is responsible also for measures laid down by local authorities or by separate bodies to be attributed to those authorities.

3.3 RESTRICTION ON THE FREEDOM TO PROVIDE SERVICES

Claim is usually supported by instated value or a principle which is defined as the warrant in Toulmin's model of legal argumentation.¹³ In This case it is the principle of freedom to provide services included freedom of tourists to go to a foreign country and to enjoy services under the same conditions as residents.

The explanation "Why did you use this argument as having greater value which is beyond the case?" is the matter of supporting the warrant In Toulmin model of legal argumentation this would be described as backing.¹⁴ As he asks the question , "Why do you believe that?" This question could be perhaps answered In this connection, there must be borne in mind the case-law of the Court and the related academic literature regarding the scope of this fundamental freedom in the context of tourism. The Court has held that the freedom to provide services includes the freedom for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, and that tourists, among others, must be regarded as recipients of services.

As regards the meaning for tourists of the freedom to provide services, the Court has held that the freedom to provide services includes the freedom for the recipients of services, including tourists, to go to another Member State in order to enjoy those services under the same conditions as nationals ... That right relates not only to access to services envisaged in the EEC Treaty but also to all the ancillary advantages which affect the conditions under which those services are provided or received.

¹³Toulmin Argument, Writting center, University of Colorado, Colorado Springs,
<http://web.uccs.edu/wrtgcntr/services/archive/handouts/Toulmin%20Argument.doc> as consulted on 15.10.2008

¹⁴ Ib Id.

And of course the museum sector, which the present case also concerns, the Court has held that, visiting museums is one of the determining reasons for which tourists, as recipients of services, decide to go to another Member State and that there is therefore a close link between the freedom of movement which they enjoy under the Treaty and museum admission conditions.

Moreover, a second warrant which I found in the case is that the Court itself concluded that, discrimination with regard to admission to museums may have an effect on the conditions under which services are provided, including the price thereof, and may therefore influence the decision of some persons to visit a country.

In some instances, for example in Venice and Treviso, the Italian tariffs refer to nationality and thus appear to constitute direct discrimination, whereas in others, for example in Florence and Padua, the tariffs refer to residence and the discrimination therefore appears to be indirect. As the Court has consistently held, Community law prohibits indirect discrimination as well. The Court's reason for this is that, national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreigners.

3.4 POSSIBLE JUSTIFICATION FOR THE DISCRIMINATION

Seeing the case from a different point of view it is first to be observed that discriminatory national provisions cannot be justified on the ground of so-called general interest, that is to say for reasons not provided for expressly in primary law such as Article 30 EC: only provisions which apply without distinction may be justified in this way. This principle applies also to the freedom to provide services, which is what the present case concerns.

However, even if the Court were to accept in a case such as the present that in principle the measures could be justified by reasons in the general interest, aims of a purely economic nature cannot constitute such reasons.

As regards the Italian Government's argument concerning the cohesion of the tax system this argument could be regarded as the „rebuttal“ used in Toulmin's model of argumentation. A rebuttal acknowledges the limitations of the claim. Under some circumstances, the claim may not be true. In this case it is to be observed that the link the Court's case-law requires between

the particular persons on whom the advantage is conferred and their contribution to the tax take is absent.

4. CONCLUSION

It is of no surprise that the Court of European communities declares in its judgement: *"By allowing discriminatory, advantageous rates for admission to museums, monuments, galleries, archaeological digs, parks and gardens classified as public monuments, granted by local or decentralised State authorities only in favour of Italian nationals and persons resident within the territory of those authorities running the cultural sites in question, who are aged over 60 or 65 years, and by excluding from such advantages tourists who are nationals of other Member States and non-residents who fulfil the same objective age requirements, the Italian Republic has failed to fulfill its obligations under Articles 12 EC and 49 EC.*¹⁵

After discussing the theory, and analyzing the case from both sides of possible argumentation. We can say that there being thus no justification for the discriminatory price reductions, and that's why it is clear, that the Italian Republic has infringed rules laid down in the EC treaty.

¹⁵ art.28, Case C-388/01 The Commission of European Communities versus The Italian Republic

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